Time to Abolish Parent-Child Tort Immunity: A Call to Repudiate Mississippi’s Gift to the American Family

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Abstract

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Your children are not your children.
They are the sons and daughters of Life's longing for itself.
They come through you but not from you,
And though they are with you yet they belong not to you.
You may give them your love but not your thoughts,
For they have their own thoughts.
You may house their bodies but not their souls,
For their souls dwell in the house of tomorrow, which you cannot visit, not even in your dreams.
You may strive to be like them, but seek not to make them like you.
For life goes not backward nor tarries with yesterday.


1. INTRODUCTION

The law, like life, must not go backward nor tarry with yesterday. Like children, the law must grow and learn and, hopefully, become wiser as it matures to reflect the ever-changing environment of our society. One of the most important justifications for such change is the proper use by thoughtful, progressive courts of the Latin maxim cessante ratione

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The idea of immunity in tort actions between parents and children is such a rule. According to the view that the reasons for such immunity never existed at all, or alternately that they have ceased to exist, the time has come for abolishing the rule in Florida.

The parental immunity rule bars the right of an unemancipated minor child to bring an action for a tort against a parent; the rule similarly prevents a parent from bringing a tort action against an unemancipated minor child. Under this doctrine of parent-child tort immunity, like that of any status-based legal immunity, the opportunity of the injured party for justice does not depend on the nature of his injury or on the type of act which caused the wrong, but solely on the status or relationship of the wrongdoer vis-a-vis the victim. Thus, pursuant to the general rule, a tortfeasor, by virtue merely of his status as a parent or an unemancipated minor, will be immune from liability for personal injuries suffered by his child or his parent. The legal confusion caused by a multitude of objections to, and limitations on, such an unqualified bar to suit between family members was mentioned in a 1972 annotation of this subject:

A major cause of the confusion that has developed is due to changing economic realities, "particularly the advent of the automobile and the prevalence of liability insurance." (Emphasis Added)

This article will review the background, origin, and development of parent-child tort immunity and will analyze the basic premises and
rationales invoked and used by various courts to either justify, limit, or abrogate the rule. The application of the immunity doctrine by Florida courts will also be discussed, along with the conflict between such immunity and tort goals and policies enunciated by the Florida courts and legislature in the 1970's. The inconsistencies in the immunity doctrine, and present public policy which is in conflict with such immunity rule, give rise to the author's opinion that Florida should abrogate the parental immunity rule and join the growing number of jurisdictions which now allow tort actions between parents and children. Whatever justification may have once existed for the immunity rule, if indeed any true justification ever existed, no longer exists, and the doctrine's day has long since passed.

2. HISTORY AND DEVELOPMENT OF PARENT-CHILD TORT IMMUNITY

A. Background

Immunity has never been a generally accepted rule in instances of injury resulting from tortious behavior. The general rule is and has been that liability should result for the infliction of injury from negligent or other tortious conduct; immunity from such liability is the exception.\(^5\) Indeed, even specifically with respect to parents and their children, early legal scholars were of the nearly unanimous opinion that liability of the parent was the rule for tortious behavior, especially for actions resulting in personal injury to a child.\(^6\)

While there is no record in early English law of any suit by an unemancipated minor against a parent, there is also no record of any holding that such a suit could not be maintained. To the contrary, there are indications in several early English cases involving children injured by teachers that tortious injuries inflicted by parents or those persons in \textit{loco parentis} were actionable, with civil liability an appro-

\begin{enumerate}
  \item President and Directors of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942); Muskopf v. Corning Hospital Dist., 11 Cal. Rptr. 211, 359 P.2d 457 (1961); Lee v. Comer, 224 S.E.2d 721 (W.Va. 1976). The principle enunciated in these cases corresponds to the trend in modern tort law which stresses accident victim compensation as will be discussed \textit{infra}.
  \item Small v. Morrison, 185 N.C. 577, 584; 118 S.E. 12, 19 (1923).
\end{enumerate}
appropriate remedy. Years later when the parental immunity issue came before a Scottish court, the judges agreed that although it was a case of first impression under Scottish law, there was no common law immunity rule, and unanimously held that an unemancipated minor could sue his parent for parental injuries resulting from negligent conduct.

Further support for the rule of liability for tortious behavior of parents and those to whom parental authority has been delegated is contained in several early American cases involving situations of excessive or unreasonable punishment of a minor, gross neglect of a minor, or conduct which threatened a minor's life or health.

Compounding the problem of the lack of early authority for parent-child tort immunity was the well-established common law principle, adopted in most states, that unemancipated children could sue their parents for damages caused to their property, or over contracts, wills, inheritances and the like. So, as the 19th Century drew to a close, there was almost no legal authority supporting a doctrine of tort immunity between parents and children, and clear precedent existed against similar immunity for causes of action sounding in other areas. No strict rule had yet been formulated. The stage was set.

B. Origin

It was not until 1891 that any court in the United States had placed any limitation whatsoever on the right of an unemancipated child to recover in tort against a parent. In that year, the Supreme Court of Mississippi decided the case of Hewlett v. George, where a

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12. Roberts v. Roberts, 145 Eng. Rep. 399 (1657); Lamb v. Lamb, 146 N.Y. 317, 41 N.E. 26 (1895); Hollingsworth v. Beaver, 59 S.W. 464 (Tenn. Ch. App. 1900); Preston v. Preston, 102 Conn. 96, 128 A. 292 (1925); King v. Sells, 193 Wash. 294, 75 P.2d 130 (1938); Brennecke v. Kilpatrick, 336 S.W.2d 68 (Mo. 1960). It is also a well established principle of law in Florida, that an unemancipated minor child may sue his parents with respect to contracts, wills and other property rights. See 24 FLA. JUR., Parent and Child §22 (1959).
13. 68 Miss. 703, 9 So. 885 (1891).
minor daughter, who was married but living apart from her husband, brought an action against the estate of her deceased mother for personal injuries inflicted as a result of being wrongfully imprisoned by the mother in an insane asylum. In a short opinion completely devoid of any citations of legal or case authority, the Mississippi court held that solely because of the parent-child relationship, the child was not entitled to maintain the action. In so holding, the justices created a legal rule and precedent based purely on their own opinions of what public policy was and should be. The often quoted reason for the establishment of this rule was stated by the court as follows:

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.\textsuperscript{14}

With no further analysis than this, and with no basis in the common law or in statutes or prior cases, the doctrine of parent-child tort immunity was born. Its ramifications are still being felt today.

Twelve years later another jurisdiction followed Mississippi's lead in \textit{McKelvey v. McKelvey.}\textsuperscript{15} The Supreme Court of Tennessee in \textit{McKelvey} affirmed the dismissal of a suit by a minor child to recover damages for cruel and unhuman treatment inflicted by her stepmother at the instigation and with the consent of her natural father. After citing \textit{Hewlett} as the only previous case authority forbidding a child's suit against a parent, the court proceeded to create the myth of the existence of an entrenched common law basis for the parental immunity rule,\textsuperscript{16} completely ignoring the fact that the \textit{Hewlett} court had mentioned no such established common law rule. All that remained to be done was to carry the logic to some extreme conclusion and test the rule to determine its limitations. Such an opportunity presented itself just two years later in the state of Washington.

In \textit{Roller v. Roller},\textsuperscript{17} the Supreme Court of Washington was faced with a civil action where a minor daughter sought damages for injuries

\begin{itemize}
  \item \textsuperscript{14} \textit{Id.} at 887.
  \item \textsuperscript{15} 11 Tenn. 388, 77 S.W. 664 (1903).
  \item \textsuperscript{16} \textit{Id.} at 665.
  \item \textsuperscript{17} 37 Wash. 242, 79 P. 788 (1905).
\end{itemize}
inflicted as a result of being raped by her father. Even though the father had been convicted of this violent and shocking criminal offense, the court held that the daughter's rape would not be sufficient grounds for allowing her to sue the father for damages. In reversing the trial court's judgment in favor of the daughter, the court reasoned that any other result would threaten family harmony and tranquility. The opinion went on to perpetuate the myth that commenced with McKelvey that there was a well-established common law rule absolutely preventing any tort action from being brought by a minor child against a parent.

In this manner, Roller announced and justified the fact that the parental tort immunity rule, created in Hewlett and stated in McKelvey to be based on common law principles, was an absolute bar to suits by children against their parents.

C. Establishment

The opinions in Hewlett, McKelvey and Roller have been said to "constitute the great trilogy upon which American rule of parent-child tort immunity is based." Since the rule was enunciated as absolute, even though all three cases involved intentional torts, it was not difficult for courts in those and other jurisdictions throughout the country to uniformly apply the immunity rule in subsequent cases, whether the tortious conduct of the parent was intentional, willful and wanton, or negligent in nature.

18. Id.
The often cited case of *Small v. Morrison*,21 decided by the Supreme Court of North Carolina in 1923, helped to firmly establish the parent-child tort immunity rule. *Small* is indicative of the personal philosophy and narrow interpretation of public policy that underlies the great majority of decisions upholding the immunity doctrine. A nine year old girl sued her father and his insurance company for injuries suffered in an automobile accident allegedly resulting from the father's negligent driving. The court reviewed prior opinions and several legal writings dealing with parental immunity and concluded that the child had no right to sue her father in tort. The majority found that its position was supported by all authorities on the subject, with no authority to the contrary,22 a statement clearly contra to the cases and scholarly works mentioned previously herein. It justified its decision as being consonant with natural justice and in keeping with the eternal order of things,23 and further emphasized the importance of the immunity rule in maintaining the peace and tranquility of the home.24 The majority was so confident of its position that its rationale was ultimately founded upon Biblical and spiritual comparisons such as the following: “Honor thy father and thy mother that thy days may be long upon the land which the Lord thy God giveth thee . . .”25

*Small* also contains a dissenting opinion by Chief Justice Clark which has been called the “first strong, well-reasoned, and extensively quoted attack on the immunity doctrine. . .”26 The dissent carefully

114 S.W.2d 468 (1938). *See* also Annot., 41 A.L.R.3d 904 (1972). In a period of approximately thirty years, the parent-child immunity rule became firmly entrenched in almost every jurisdiction of this country. The above cases represent a sampling of these decisions adopting the immunity rule.

21. 185 N.C. 577, 118 S.E. 12 (1923).
22. *Id.* at 13.
23. *Id.*
24. *Id.* at 16.
25. *Id.*
26. Annot., 41 A.L.R.3d 904, 911 (1972). As will be shown *infra*, Justice Clark’s reasoning has been adopted by an increasing number of courts today. In *Small*, he stated:

Never before now has this court ever been called upon to take the backward track and bar the claim of justice to the weak, or to “outlaw” the children of the land from their just demand to have their pleas heard for redress of wrongs. 118 S.E. at 21.

The doors of the Temple of Justice should always stand wide open, and to every-
analyzed all prior authority and decided that neither the common law, statutory law, nor any judicial decision prior to *Hewlett* would forbid the maintenance of a tort action by a minor child against his parents. It concluded by calling for the courts to lead the way to greater justice in the redress of such grievances.

By 1930, when *Dunlap v. Dunlap*\(^\text{27}\) came before the Supreme Court of New Hampshire, the parental immunity rule was accepted in jurisdictions throughout the United States. In *Dunlap*, a sixteen year old boy sued his father for injuries suffered when a platform collapsed while he was working for his contractor-father. For the first time in any American jurisdiction, the majority opinion announced that the doctrine of parent-child tort immunity was not absolute, and that when a minor child was employed by a parent who carried liability insurance and when such minor was injured in his capacity as employee, the child could legitimately sue his parent for such negligence. The immunity doctrine was said to arise from a disability to sue, and not from a lack of any violated duty.\(^\text{28}\) The disability should, thus, not be raised when the allowance of a suit would fail to do violence to the policy underlying the immunity rule, namely the protection of family harmony and parental control.\(^\text{28}\)

Although the court only created an exception to the immunity rule where a master-servant relationship had replaced a parent-child relationship, it criticized the rule in its entirety after carefully reviewing early English and American text-writers, prior judicial precedent, American law review articles, and public policy considerations. *Dunlap* has been considered:

> a strong theoretical and broad-based attack on the concept of parental tort immunity generally, revealing its uncertain and recent origin and criticizing as vulnerable its legal foundation, particularly in view of the

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*Id.* at 24.

The Master said, "Suffer little children to come unto me and forbid them not." Certainly justice (sic) should not forbid them to plead their wrongs at her altar.

*Id.* at 25.

27. 84 N.H. 352, 150 A. 905 (1930).
28. *Id.* at 915.
29. *Id.*
liability of parents for contract and property wrongs, and the breakdown of tort immunity as between husband and wife, as well as the practical effect of the general prevalence of insurance coverage in various situations involving negligent injury to the unemancipated child.30

Dunlap did not, however, mark a turning point in the history of the parental immunity rule. This was evidenced just four years later in Briggs v. City of Philadelphia,31 where the Superior Court of Pennsylvania, although citing Dunlap, upheld the doctrine by indicating the deeply rooted policy concerns underlying the rule.32

D. Justifications:

A "rule which so incongruously shields conceded wrongdoing bears a heavy burden of justification."33 Since the establishment of parent-child tort immunity, most courts confronting the question have given specific and distinct reasons for upholding the doctrine. The most frequent justifications cited for the immunity rule include: (1) domestic harmony and tranquility; (2) parental care, discipline, and control; (3) danger of fraud and collusion; and (4) depletion of family resources. These rationales lack persuasive authority when closely scrutinized.

(1) Domestic Harmony and Tranquility

The preservation of family harmony and domestic tranquility is the leading justification used by courts to support the parental immunity rule.34 Again and again, courts have proclaimed their belief that

32. Id.
34. The family harmony rationale has been emphasized by every jurisdiction adopting the parent-child tort immunity rule as the foundation for such doctrine. See Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905); Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923); Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927); Mesite v. Kirchstein, 109 Conn. 77, 145 A. 753 (1929); Securo v. Securo, 110 W.Va. 1, 156 S.E. 750 (1931); Luster v. Luster, 299 Mass. 480, 13 N.E.2d 438 (1938); Cowgill v. Boock, 189 Or. 282, 218 P.2d 445 (1950) (The policy of the law should preserve and maintain the security, peace and tranquility of the home.); Nudd v. Matsoukas, 7 Ill.2d 608, 131
injuries sustained by minor children must remain uncompensated. The counter-argument is that it is the tortious injury itself, rather than the threatened litigation, that disrupts domestic life.\textsuperscript{35} When the wrong has been committed, the harm, if any, to the basic fabric of the family has already been done and the course of rancor and discord already introduced into family relations.\textsuperscript{38} The most acrimonious family disputes concern lawsuits over property and contract rights. Such suits have never been barred by any immunity rule; it is illogical to deny tort actions because they are disruptive of family harmony.\textsuperscript{37}

The weakness of this rationale is further demonstrated by noting that in many reported cases in this area involving automobile accidents where liability insurance is present, family harmony would be disrupted far more by denying recovery than by granting it.\textsuperscript{38} Finally, if the interest in family harmony is important enough to prevent minor children from suing their parents, it is difficult to rationalize and understand why other family members may sue each other when the possible dis-


\textsuperscript{36} Most of the decisions adopting the family harmony rationale have not specifically discussed whether the immunity rule would advance this justification with respect to their particular fact situations. The following cases have critically examined whether family harmony and domestic tranquility are, in fact, preserved by the doctrine of immunity. \textit{See} Tamashiro v. DeGama, 51 Hawaii 74, 450 P.2d 998 (1969); Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966); Sorensen v. Sorensen, 339 N.E.2d 97 (Mass. 1975); Borst v. Borst, 41 Wash.2d 642, 251 P.2d 149 (1952); Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930); Rozell v. Rozell, 281 N.Y. 16, 22 N.E.2d 254 (1939). \textit{See also} cases cited in notes 37 and 38 infra.


turbance to domestic tranquility is just as real. 39

(2) PARENTAL CARE, DISCIPLINE, AND CONTROL

A second reason frequently offered by courts to justify the parental immunity rule is that to permit a minor child to bring a tort action against his parents is to impair society’s interest in maintaining parental authority with respect to the care, discipline, and control of minor children and to encourage such children to disobey their parents. 40 These protected parental interests have been deemed to consist of the right and obligation of parents to maintain the home, to nurture and protect their children and guard them from danger, to care for them and to chastise them when necessary. 41 A fear exists among courts that to allow a minor child to bring a lawsuit against his parents would alter the natural process of child development and damage the very fabric of their relationship. 42 Many of those jurisdictions which have embraced a limited abrogation of the immunity rule view potential interference with parental care, discipline, and control as the one viable circumstance that should continue to prevent minor children from being able to sue their parents in tort. 43

39. Comments: Tort Actions Between Members of the Family—Husband and Wife—Parent and Child, 26 Mo. L. Rev. 152, 188 (1961). In this author’s opinion, this law review comment presents the finest detailed analysis of this topic to date.

40. McKelvey v. McKelvey, 11 Tenn. 388, 77 S.W. 664 (1903); Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923); Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927); Mesite v. Kirchstein, 109 Conn. 77, 145 A.753 (1929); Matarrese v. Matarrese, 47 R.I. 131, 131 A. 198 (1925); Rodebaugh v. Grand Truck Western R.R. Co., 4 Mich. App. 559, 145 N.W.2d 401 (1966). As will be discussed infra, except for domestic harmony and tranquility, the parental control argument has been the most frequently cited justification for the continued retention of the parent-child immunity rule.

41. Lemmen v. Servais, 39 Wis.2d 75, 158 N.W.2d 341 (1968); Rodebaugh v. Grand Truck Western R.R. Co., 4 Mich. App. 559, 145 N.W.2d 401 (1966); Borst v. Borst, 41 Wash.2d 642, 251 P.2d 149 (1952). In all jurisdictions, criminal sanctions have long been imposed for parental acts violating parental obligations to their children. See Fla. Stat. §§ 827.01-827.07 (1977) for the criminal penalties relating to certain delineated breaches of parental obligations to their children.

42. See Holodook v. Spencer, 26 N.Y.2d 35, 324 N.E.2d 338 (1974) for a strong statement as to the judicial concern in this area.

The parental control argument was dealt with, and rejected by, the Dunlap court which stated that the idea that children would become unruly if given a right to legal redress was farfetched.\textsuperscript{44} The problem in the typical case arises where a child is injured by his parent's negligent operation of an automobile. A suit in most instances is brought at the behest of the parents for the very purpose of allowing the child to recover against their liability insurer.\textsuperscript{45} Any judgment rendered will, in all probability, be paid by the insurer\textsuperscript{46} thereby providing the family with a fund for the child. The interests of parental control and discipline are, thus, not infringed upon nor weakened.

This rationale becomes further suspect by noting that lawsuits involving property and contract rights, which have never been barred by any immunity rule, may be as disruptive to the family unit as those involving negligently inflicted injuries.\textsuperscript{47} Furthermore, the courts that justify the immunity rule on this ground make no distinction between suits brought by parents against children or those brought by children against parents, although this justification is applicable only to cases where a child is suing parent.\textsuperscript{48}*

(3) DANGER OF FRAUD AND COLLUSION

In upholding the parental immunity rule, a number of courts have indicated concern over the proposition that to allow minor children to maintain negligence actions against their parents would foster fraud and collusion.\textsuperscript{49} The cases involving fraud and collusion have centered

\textsuperscript{*}(3)
around situations where liability insurance is present, and the insurers have raised the spectre of children and parents plotting against them.\textsuperscript{50}

An analysis of this rationale demonstrates that the possibility of fraud and collusion exists not only in situations relating to the parent-child tort immunity rule, but in all liability insurance cases where suits have been allowed.\textsuperscript{51} Courts have entertained tort actions between drivers and passengers of vehicles and close friends and family members other than parents and children without the cry of collusion preventing a consideration of the facts on their merits.\textsuperscript{52} Our legal system itself is quite capable of ferreting out those fraudulent claims that may exist without having to indiscriminately bar all meritorious claims due to a fear of fraud.\textsuperscript{53}

The fraud and collusion argument is, in actuality, entirely incompatible with the family harmony and tranquility argument most often advanced by courts in support of the parental immunity rule.\textsuperscript{54} The former rationale is premised upon the closeness of the family members whereas the latter rationale is based upon the hostility and anger a suit would bring so as to disturb the peace of the home. This blatant inconsistency is explained by taking into account the fact that the existence of liability insurance is considered by courts when dealing with the possibility of fraud but is disregarded when the same courts discuss family harmony.\textsuperscript{55} The illogical nature of this approach is indicative of the cases decided in the last twenty years have, contra to these decisions, downplayed the fraud and collusion rationale as a justification for the retention of the parent-child tort immunity rule. The abrogation of Automobile Guest Statutes in most jurisdictions has indicated the decreasing importance of fraud and collusion as a determining factor in the threshold question of whether a lawsuit should be allowed to be maintained. Florida had abrogated its guest statute in 1972. See Fla. Stat. § 320.59 (1937) (Repealed by Laws 1972, c. 72-1 § 1).

53. An example of the courts' rejection of this fraud rationale is indicated in the trend toward the elimination of Automobile Guest Statutes which have been primarily based on the fear of fraud and collusion between drivers and passengers. Florida repealed its Guest Statute in 1972. (Fla. Stat. § 320.59 (1972)). See Id.; Tamashiro v. DeGama, 450 P.2d 898 (Hawaii 1969); Rupert v. Stienne, 528 P.2d 1013 (Nev. 1974); France v. A.P.A. Transport Corp., 56 N.J. 500, 267 A.2d 490 (1970).
55. Id.
precarious base upon which the immunity rule is built.

(4) DEPLETION OF FAMILY RESOURCES

Some courts have noted that to permit a child to sue his parents in tort would deplete the family exchequer to the detriment of other children by reducing both the amount of money available for their care and the shares they would receive upon the death of their parents. The argument assumes an equality among the children and an intention on the part of parents to treat their children equally.

This assumption of equality conveniently omits the fact that the child recovering has been injured while other children and family members have not. Furthermore, the notion of equality seems to connote that a child has a vested right to a specific distributive share of the property of his parents. No such right exists. Courts advancing this rationale have also not addressed themselves to the question as to why an injured minor child should be treated differently than a third party who has always been allowed to recover against one who is a parent; both situations would allegedly deplete family resources.

A number of courts have emphasized the prevalence of liability insurance as a complete refutation of the argument that recovery by a child against his parent will deplete family resources. The insurance company is the real party in interest and is the source from which the injured child receives compensation.

E. Exceptions

The exceptions and limitations placed upon the immunity rule have been many and varied. In fact, the doctrine of parent-child tort immunity “is so limited by these exceptions it could be said liability is

56. Roller v. Roller, 27 Wash.2d 242, 79 P. 788 (1905); Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923); Barlow v. Iblings, 261 Iowa 713, 156 N.W.2d 105 (1968); Orefice v. Albert, 237 So.2d 142 (Fla. 1970); Bulloch v. Bulloch, 45 Ga. App. 1, 163 S.E. 708 (1932). This argument assumes that the negligent parent will pay the damage award, an assumption which is unrealistic given the widespread prevalence of liability insurance.


the rule and immunity the exception.\textsuperscript{59} These exceptions have centered around cases where courts consider the parent-child relationship to have been abandoned or where the tortious act of the parent does not arise out of the family relationship.\textsuperscript{60} The exceptions most often cited involve fact situations where (1) the minor child is emancipated;\textsuperscript{61} (2) the parent’s conduct is characterized as intentional or willful and wanton;\textsuperscript{62} (3) the parent is acting in his business or vocational capacity and not in his parental capacity when causing the injury;\textsuperscript{63} and (4) the parent and/or child dies as a result of the parent’s negligent act.\textsuperscript{64}

Some of these exceptions are clearly justified when examined in light of the policies underlying the parental immunity rule. Where the parents and/or children are dead as a result of the negligence of the parents, numerous courts have allowed lawsuits to be maintained on the ground that death terminates the family relationship; and, hence, family harmony and discipline would not be disturbed.\textsuperscript{65} Where a par-

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60. & \text{Teramano v. Teramano, 6 Ohio St.2d 117, 216 N.E.2d 375 (1966); Comments: Parent-Child Tort Immunity: A Rule in Need of Change, 27 U. MIAMI L. REV. 191 (1972).} \\
63. & \text{Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930); Worrell v. Worrell, 4 S.E.2d 343 (Va. 1939); Signs v. Signs, 156 Ohio St. 592, 103 N.E.2d 743 (1952); Dennis v. Walker, 284 F.Supp. 413 (D.D.C. 1968); Trevarton v. Trevarton, 151 Col. 418, 378 P.2d 64 (1963).} \\
64. & \text{Parks v. Parks, 390 Pa. 287, 135 A.2d 65 (1957); Palscy v. Tepper. 71 N.J. Super. 294, 176 A.2d 818 (1962); Hale v. Hale, 312 Ky. 867, 230 S.W.2d 610 (1950); Dean v. Smith, 105 N.H. 314, 211 A.2d 410 (1965); Brennecke v. Kilpatrick, 336 S.W. 2d 68 (Mo. 1960).} \\
65. & \text{See cases cited note 64 supra.}
\end{align*}
ent has intentionally or willfully and wantonly injured his child, the intrinsic peace and harmony of the family is greatly disrupted, if not destroyed, by the very nature of the tortious act. It will not be further disturbed by a severely injured child recovering from his parent for the parent's reprehensible conduct.66

The other exceptions do not so easily fit into the framework of the policies underlying the immunity rule. All courts have permitted an emancipated child to sue his parents on the ground that the parent-child relationship is terminated since the child is his own master and no longer under the control of his parents.67 Although the policy of parental discipline and control may no longer be of significance when a child is emancipated, the fact remains that parents and children may still constitute a very closely knit family structure. A lawsuit by an emancipated child may be just as destructive to family harmony and tranquility as one maintained by a child who is under the control of his parents. Furthermore, the same danger of fraud and collusion exists whether the child is emancipated or unemancipated.

The courts that have held a parent liable to his child for the parent's tortious conduct committed while acting in his business capacity have reasoned that an action should be permitted since the parent's negligence did not relate at all to the discharge of parental duties.68 Typical of these cases is *Trevarton v. Trevarton*,69 where a father, engaged in the business of cutting lumber, negligently injured his son by allowing a tree to be dragged over him while he was sleeping. In granting recovery to the child, the court did not concern itself with whether its decision was consonant with the policy justifications underlying the immunity doctrine. It did not discuss the disruption of family harmony, or the disturbance of parental discipline and control, or the possibility of fraud and collusion against the liability insurer of the father, although these policies were as applicable here as in any other case.

Rather than abrogate the parent-child tort immunity rule, the courts have created this series of exceptions to justify the maintenance of actions by injured children against their parents. To allow such suits courts have, in certain instances, conveniently overlooked the policy ra-

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66. See cases cited note 62 supra.
67. See cases cited note 61 supra.
68. See cases cited note 63 supra.
tionales so often quoted in support of the doctrine.

F. Abrogation of Parent-Child Tort Immunity

(1) Partial Abrogation of Immunity

A wave of recent decisions has abrogated the parental immunity rule to the extent of permitting actions by unemancipated children against their parents for negligently-inflicted injuries arising out of automobile accidents. These courts have taken judicial notice of the almost universal existence and availability of liability insurance and have indicated that although such insurance cannot create liability where there was no previous legal duty, it is a proper element to consider when discussing the rationale underlying the immunity doctrine. It is the unanimous opinion of these courts that where liability insurance is present, there is little, if any, possibility that family harmony, parental discipline and control and family resources will be disturbed. In fact, where liability insurance exists, an action by the injured child against his parent will be beneficial rather than detrimental to the family relationship.

Two jurisdictions have abrogated the parental immunity rule in automobile accident cases only to the extent of the parent's liability insurance coverage. However, the great majority of courts eliminating parental immunity in such cases have not limited their abrogation of...
the doctrine to situations specifically involving insurance, since they acknowledge that insurance is present in almost all cases and that without insurance, it is highly unlikely that any action will be instituted at all. These courts have balanced the competing considerations and have concluded that the interest in securing legal redress to injured children outweighs the policy factors supporting immunity in such cases.\textsuperscript{73}

Furthermore, two courts have indicated that if the parent-child tort immunity is to be changed with regard to the automobile accident problem, such change should be by legislative decree and not by judicial fiat. The legislatures of these states have acted upon these judicial suggestions and have partially abrogated the immunity rule as it relates to injuries caused by the negligent operation of an automobile.\textsuperscript{74}

(2) \textbf{PARTIAL RETENTION OF IMMUNITY}

The trend among the courts that have recently reviewed the parent-child tort immunity rule has been to abrogate the doctrine with the noteworthy exception of retaining such immunity for parental conduct involving the authority, care, discipline, and control of their children. The avowed purpose behind this limited retention of the immunity rule has been “preserving, fostering and maintaining a proper and wholesome parent-child relationship in a family”\textsuperscript{75} to enable parents to freely and properly discharge the duties that society exacts.\textsuperscript{76} Many of these

\textsuperscript{73} Almost all of the reported cases involving torts committed by parents unrelated to the exercise of parental functions deal with automobile accidents.

\textsuperscript{74} \textsc{Conn. Gen. Stat.} § 52-572C (1970) states as follows:

In all actions for negligence in the operation of a motor vehicle, and in all actions occurring on or after October 1, 1979, for negligence in the operation of an aircraft or vessel, as defined in Section 15-127, resulting in personal injury, wrongful death or injury to property, the immunity between parent and child in such negligence action brought by a parent against his child or by or on behalf of a child against his parent is abrogated.

\textsc{N.C. Gen. Stat.} Article 43D, § 1-539.21 states as follows:

Abolition of parent-child immunity in motor vehicle cases. The relationship of parent and child shall not bar the right of action by a minor child against a parent for personal injury or property damage arising out of the operation of a motor vehicle owned or operated by such parent.

\textsuperscript{75} Lemmen v. Servais, 39 Wis. 2d 75, 158 N.W. 2d 342 (1968).

\textsuperscript{76} The following cases are a sampling of the many jurisdictions that follow this principle: \textit{See} Rodebaugh v. Grand Truck Western R.R. Co., 4 Mich. App. 559, 145 N.W.2d 401 (1966); Borst v. Borst, 41 Wash. 642, 251 P.2d 149 (1952); Goller v.
courts cite the leading Wisconsin case of *Goller v. White*\(^77\) as persuasive authority for this exception to the abrogation of the immunity rule. The *Goller* court retained parental immunity for the following two situations: (1) where the alleged negligent act involves an exercise of parental authority over the child; 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.\(^78\) According to the language of the decision, the question that must first be decided is one of law as to whether the act falls within the scope of parental authority and discretion; the question of the reasonableness of the act has no bearing in this determination. If a court answers the question in the affirmative, an injured child cannot bring any action against his parents.

The validity of the rationale underlying this remaining area of immunity becomes suspect when analyzing a fact situation involving parental conduct which would present itself to a court for resolution. If a child sues his parents on the theory of negligent supervision or care for injuries incurred in or around the home, the action will, in all likelihood, be instituted by the parents on behalf of the child, and only if insurance is involved.\(^79\) Parental authority and discretion will not be circumscribed or disrupted in situations such as these. It is true that the possibility exists that by his own volition, an injured minor, by and through a guardian *ad litem*, may sue his parents for negligent care and supervision when no liability insurance is involved. However, this may also occur in automobile accident cases and would indicate that parental authority, discipline, and control has already been dealt a fatal blow.\(^80\)

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\(^{78}\) *Id.* at 198.

\(^{79}\) *Id.* at 197.

The *Goller* court made specific reference to the importance of insurance in negating any possible disturbance to parental discipline and authority but did not discuss the relationship of insurance to the exceptions it carved out.\(^{81}\) The court cited the *Law of Torts*, by Harper and James\(^{82}\) as authority for the proposition that an injured child should be allowed to sue his parents where family harmony is not in jeopardy and the "reasonableness of family discipline is not involved,"\(^{83}\) but it did not critically apply these factors to parental conduct involving the care and supervision of children to determine whether a tort action brought by a minor against his parent would, in reality, have an effect on family discipline.

Seven years after *Goller*, in *Cole v. Sears, Roebuck & Co.*,\(^{84}\) the Supreme Court of Wisconsin was presented with the opportunity to interpret the exceptions to the abrogation of the parental immunity rule it had earlier delineated. The question at issue was whether the parents of an injured minor child would be liable, in a third party action for contribution, for negligent supervision in allowing their child to play with a defectively designed swing set when they knew or should have known of the set's inherently dangerous nature. The court interpreted the *Goller* exceptions very broadly by stating that negligent supervision of a child's play is not an act involving parental discretion with respect to the care of the child.\(^{85}\) The term "other care" set forth in the *Goller* exceptions was deemed not to be so broad in scope as to cover all parental conduct associated with the family relationship; and, specifically, parents' supervision of their children at play was held to fall outside the area where immunity has been retained.\(^{86}\) Parental immunity was, by inference, limited to the legal obligations of exercising authority over, and providing actual necessities to, the child. Since the great majority of reported cases dealing with strictly parental transactions involve acts of supervision,\(^{87}\) the immunity exceptions are thus

\[^{81}\text{Goller v. White, 20 Wis.2d 402, 122 N.W.2d 193, 197 (1963).}\]
\[^{82}\text{Harper and James, Law of Torts, 650 § 8.11.}\]
\[^{83}\text{Id. at 650.}\]
\[^{84}\text{47 Wis.2d 629, 177 N.W.2d 866 (1970).}\]
\[^{85}\text{Id. at 869.}\]
\[^{86}\text{Id. at 868.}\]
severely limited in their application.

(3) **Total Abrogation of Immunity**

A number of jurisdictions have completely abolished the parental immunity rule. In the leading case of *Gibson v. Gibson*, a minor sued his father for negligently stopping his car at night on a highway and instructing his son to go out onto the roadway to correct the position of the wheels of the jeep he was towing. After reviewing the immunity rule, the Supreme Court of California recognized the concern voiced by courts with regard to questions of parental discretion and supervision and cited *Goller* as the precedent setting case for the retention of immunity for such parental conduct.

In rejecting the *Goller* approach, the court summarily rejected the granting of spheres of influence to parents where their actions could not be reviewed as a matter of law. Parents could thus act negligently toward their children with impunity. For example, a child could be injured by the negligence of his mother in leaving a known defective electric wire easily within his reach. Pursuant to the *Goller* exceptions, the child foreseeably would not have his day in court regardless of the negligence of his mother and the existence of insurance to pay the damage award. The reasonableness of the mother’s actions would not be reviewed.

A further concern of the Supreme Court of California was the spectre that the courts adopting the *Goller* rationale would develop a superstructure of arbitrary and conflicting distinctions as to whether specific parental conduct lies within the immunity guidelines. The

N.Y.2d 35, 324 N.E.2d 338 (1974). Some courts have interpreted *Goller* in a different manner so as to include parental supervision and control as areas where immunity still remains. See note 94 infra.


89. 92 Cal. Rptr. 288, 479 P.2d 648 (1971). The Gibson rationale has been cited in numerous law review articles which call for the total abrogation of the parent-child tort immunity rule.

90. *Id.* at 652.

91. *Id.* at 653.

92. *Id.*
emergence of such a structure is already developing as courts spend much of their time determining if an exception applies in the specific fact situation as opposed to determining the reasonableness of parental conduct regardless of any exception. This lack of uniformity in approach can only lead to confusion as courts concentrate on categorizing a parent’s conduct as opposed to analyzing whether any circumstances exist for allowing a child’s injuries to remain uncompensated.

The solution proposed by the Supreme Court of California is to abrogate the parental immunity rule in its entirety and judge parental conduct according to the following question: “What would an ordinarily reasonable and prudent parent have done in similar circumstances?” A parent is thus held to a standard of reasonableness viewed in light of the parental role, regardless of the classification of his conduct.

The California approach will not interfere with the exercise of parental discretion as long as parental actions are reasonable. To allay the fears of those who raise the cry of tampering with the parental prerogative, the court acknowledged that parents must be allowed a wide range of discretion in the performance of their parental functions. The “reasonable parent” standard should thus be construed to

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93. See Lemmen v. Servais, 39 Wis.2d 75, 158 N.W.2d 341 (1968). The Supreme Court of Wisconsin decided that alleged parental negligence in failing to instruct their child in how to leave a school bus and cross a highway was not actionable since the act involved the exercise of parental discretion with respect to the care of their child; Gross v. Sears, Roebuck and Co., 158 N.J. Super. 442, 386 A.2d 442 (Super. Ct. App. Div. 1978). The Superior Court of New Jersey decided that the alleged negligence of a father in mowing his lawn and injuring his child was actionable since the act did not arise out of the exercise of “parental authority.” The entire opinion dealt with whether an exception was applicable to this fact situation. See also Rodenbaugh v. Grand Trunk Western R.R. Co., 4 Mich. App. 559, 145 N.W.2d 401 (1966); Holodook v. Spencer, 36 N.Y.2d 35, 324 N.E.2d 338 (1974).

94. The confusion and lack of uniformity already exists as evidenced by the number of courts interpreting the Goller exceptions to apply to parental functions in general, including supervision. Whereas the court that decided Goller has interpreted the decision to allow actions for parental negligence in supervising their children. See Cole v. Sears, Roebuck and Co., 47 Wis.2d 629, 177 N.W.2d 886 (1970); but see Holodook v. Spencer, 36 N.Y.2d 35, 324 N.E.2d 338 (1974); Rodenbaugh v. Grand Trunk Western R.R. Co., 4 Mich. App. 559, 145 N.W. 2d 401 (1966).


96. Id. at 653.
take into consideration situations where parents may be forgetful or careless without such conduct being interpreted as stepping beyond reasonable parental behavior. When parental conduct is deemed to be unreasonable under this standard, the time has possibly arrived for consideration of the imposition of criminal sanctions and has certainly arrived for granting a civil remedy to the child to recover for the damages he has suffered. Such parental conduct should not be tolerated.

Where the Goller approach gave to parents a "right" to be negligent in the performance of certain parental functions, the Gibson approach would subject parental conduct to judicial review to determine whether such conduct was clearly unacceptable and unreasonable in view of the wide latitude of discretion that should be granted to parents. Given the state interest in insuring the safety and well being of children, the Gibson rationale is clearly preferable.

3. FLORIDA: BASTION OF PARENT-CHILD TORT IMMUNITY

Florida's appellate courts first addressed the question of whether a negligence action could be maintained between a parent and child in 1961 when the Second District Court of Appeal decided Meehan v. Meehan. In Meehan, a father sued his minor son, and others, for the

98. The Florida legislature has specifically provided for criminal penalties against a parent or third party who willfully or through culpable negligence abuses or maltreats a minor child, or deprives a minor child of necessary food, clothing, shelter or medical treatment.
FLA. STAT. § 827.03 deals with aggravated child abuse. FLA. STAT. § 827.04 deals with the willful or culpable deprivation of basic necessities to a minor child and the knowing or culpable allowance of physical or mental injury to the child. FLA. STAT. § 827.05 deals with an individual, though financially able, negligently depriving a minor child of basic necessities. FLA. STAT. § 827.07 deals with the abuse of minor children by willful or negligent acts and provides the procedural mechanisms through which public agencies come into play to safeguard the welfare of the minor child.
wrongful death of another minor son and alleged that the defendant child was negligent in failing to inform his deceased brother of a known defective condition of an electric buffing machine when he gave the machine to him. As a result of the failure to warn, the deceased child was electrocuted while using the machine.

With no precedent in this state to guide it, the court viewed the question facing it as solely one involving public policy. In affirming the summary judgment granted the defendants in the lower court, the District Court of Appeal adopted the position that neither parents nor their representatives could maintain an action in tort against an unemancipated minor child. The rationale advanced for adhering to the parental immunity rule, prevalent in the majority of jurisdictions at that time, was the importance of preserving family unity and maintaining family discipline. No discussion appeared relating to whether the area of immunity the court was creating was justified under the facts of the case in light of the rationale it cited.

The Second District Court of Appeal again had the opportunity to review the immunity doctrine in Rickard v. Rickard, where a seven year old child, by and through his father, sued his parents for negligence in failing to provide him with a safe place to play. While in his parents' home, the plaintiff and two of his friends were squirting charcoal lighter fluid when a match was struck by one of the boys resulting in plaintiff's clothing being engulfed in flames. In affirming the lower court's dismissal of plaintiff's complaint, the court cited Meehan, noting that the rule adopted there should be controlling regardless of

tional killing of the other parent. It would thus seem that although such actions are statutory in nature, these cases can stand for the broader principle that a child can sue a parent for an intentional tort.

In Henderson, the Court of Record of Escambia County reviewed and discussed the parental immunity doctrine as it had developed on the national scene. The court concluded that although parental immunity should exist where the tort involved the discharge of parental duties or the exercise of parental control, there was no sound reason for applying immunity in cases that do not involve parental control and discipline; i.e., automobile accidents where a parent has negligently injured a child. The court went on to state that this view was the only one "for a court in this enlightened age to follow." A trial court decision, Henderson has not been cited by appellate courts in their discussion of the immunity doctrine. However, the reasoning in Henderson was far more extensive than most of the appellate decisions following it.

100. 203 So.2d 7 (Fla.2d Dist. Ct. App. 1967).
101. Id. at 8.
the fact that a minor was now suing his parents, not a parent suing a
minor child. Again, the court emphasized the importance and necessity
of preserving and encouraging family unity and maintaining family dis-
cipline as the policy justifications underlying the parental immunity
rule.102

Although the court indicated that the immunity rule was not not
absolute and existed only where the suit would disturb family rela-
tions,103 it did not undertake to analyze whether family harmony and
discipline would be disturbed since the father was, in reality, instituting
the action against himself and his wife. The court also did not discuss
the effect of the parents’ homeowners’ insurance policy which insured
them against personal legal liability for bodily injury to another, nor
were the policy goals the court was attempting to achieve through the
doctrine of immunity delineated. The insurance policy was not deemed
to be material to the action.104

The Fourth District Court of Appeal next considered the question
of parental immunity in Denault v. Denault,105 where an unemanci-
pated minor child sued her mother for the negligent infliction of inju-
ries sustained in a collision in which the minor was a passenger in the
mother’s automobile. This case was of significance since it was the first
in Florida to deal with a negligence action arising out of an automobile
accident. In affirming the lower court’s dismissal of the action on the
authority of Meehan106 and Rickard,107 the District Court of Appeal did
not discuss the factual differences in the cases or whether such differ-
ences should possibly lead to different results. Meehan and Rickard
involved the exercise of parental duties and discretion peculiar to the
family relation itself, where Denault dealt with a duty to drive with
reasonable care, an obligation which was neither limited to the family
nor involved parental discretion. Furthermore, the court did not men-
tion the existence or non-existence of liability insurance coverage under
the specific facts, and the only conclusion thus to be reached is that it
did not consider this factor important in arriving at its decision.

102. Id.
103. 39 AM. JUR., Parent and Child § 90 (1942).
106. 133 So.2d 776 (Fla. 2d Dist. Ct. App. 1961).
107. 203 So.2d 7 (Fla. 2d Dist. Ct. App. 1967).
In 1970, the Florida Supreme Court decided *Orefice v. Albert*, a decision which remains the leading case in Florida on the subject of parent-child tort immunity. In *Orefice*, a minor and his father were both killed in an airplane crash due to the negligence of the father-pilot who was also the co-owner of the airplane. On the basis of the parental immunity rule, the court held that as a matter of law, lawsuits brought by the mother, in her own right and as a parent, and by the estate of the deceased minor child, would be barred. The court indicated that established policy in Florida prevented children from suing their parents and that such policy was grounded upon the protection of family harmony and resources, although no prior Florida decision had ever mentioned the preservation of family resources as a reason for upholding the immunity rule.

There was no discussion by the court as to whether the policies underlying the immunity doctrine would be applicable to the facts of the case since both the father and son were killed, and the family relationship was thus terminated. As in *Denault*, no statement appeared regarding the existence of liability insurance and its effect upon the preservation of family harmony and resources. The Florida Supreme Court followed the lead of the district courts of appeal that had previously considered the parental immunity question by repeating general policy statements without critically examining whether the application of the immunity rule in the particular case furthered these declared policy goals.

In 1972, the Third District Court of Appeal first reviewed the immunity rule in *Webb v. Allstate Insurance Co.*, where a nine year old child, through a guardian, brought an action against his father, his father's automobile liability insurer, his father's employer and the employer's insurer. The plaintiff had accompanied his father to work where the father became so intoxicated that several fellow employees discussed having someone drive him and his son home. The father then took a vehicle belonging to his employer and, while driving home with

108. 237 So.2d 142 (Fla. 1970).
109. *Id.* Orefice has been cited by all subsequent cases in Florida involving the question of tort immunity between parents and children.
110. *Id.* at 145.
111. 220 So.2d 27 (Fla. 4th Dist. Ct. App. 1969).
his son as a passenger, negligently collided with the rear of another car causing injuries to the child. The court affirmed the lower court’s granting of a summary judgment in favor of the father and his insurer on the ground that, as a matter of law, an unemancipated minor child cannot maintain an action against his parents for negligence.

Although the father’s liability insurance carrier was a named party defendant, nowhere in the opinion was the importance of insurance mentioned as it related to the policies underlying the immunity rule. The court also did not analyze whether the father’s voluntary intoxication removed the shield of immunity surrounding him by making his actions so grossly negligent and/or willful and wanton that he completely departed from his parental role. As in prior Florida cases, this district court of appeal justified its legal position solely on the basis of broad statements of general public policy. The circumstances of the particular case were not considered.

The same year Webb was decided, the Second District Court of Appeal, in Vinci v. Gensler, applied the parental immunity rule to a tragic situation where an entire family, consisting of a mother, father, and two minor children, died in an airplane accident caused by the alleged negligent operation or maintenance of the airplane by the deceased father. The personal representative of the estates of the mother and children brought an action against the administrator of the father’s estate and Fireman’s Fund Insurance Company, the liability insurer of the subject airplane. The policies underlying the disability of the child’s suit against his parents were not even mentioned in this per curiam decision which upheld the lower court’s dismissal of the plaintiff’s complaint.

The dissent in Vinci was lengthy and sharp in its criticism of the majority’s failure to scrutinize the “mistaken axioms and ill-founded reasons” upon which the parental immunity rule was based; and further alleged that “in this particular case even those ill-founded reasons are absent.” Since no family member survived the crash, the disruption of family harmony, the danger of fraud and collusion, the destruction of parental discipline and control and the raid on family resources, all often quoted reasons for the maintenance of immunity, were ren-

113. Id. at 841.
115. Id. at 22.
dered moot. The existence of liability insurance, in and of itself, would render most of these rationales inapplicable to this and all cases involving the immunity rule. The majority did not address itself to any of these issues.

The parent-child tort immunity rule is strongly entrenched in Florida tort law. In decisions consistently upholding the immunity doctrine, Florida courts have resisted the changes in the rule that are being proposed and adopted in a majority of courts throughout the country.

4. PARENT-CHILD TORT IMMUNITY: AN ANACHRONISM IN FLORIDA TORT LAW

Florida has experienced rapid change in its tort law in the 1970’s with the judicial adoption of comparative negligence in 1973, the statutory waiver in 1973 of sovereign immunity for tort actions, the legislative enactment in 1975 of the Uniform Contribution Among Tortfeasors Act (UCATA), and the judicial adoption of strict liability in tort in 1976. Changes such as these have led the First District Court of Appeal to state:

In view of the recent developments in the tort field, the abrogation of contributory negligence, the adoption of comparative negligence, the enactment of the Uniform Contribution Among Tortfeasors Act, and others, the time may be ripe for the abrogation of the family immunity doctrine. It appears that this would be consistent with the recent development that a loss should be apportioned among those whose fault contributed to the event, as well as providing for contribution among joint tortfeasors.

In abrogating the doctrine of contributory negligence and adopting a pure comparative negligence system, the Florida Supreme Court emphasized its concern for the automobile accident problem and the need to secure just and adequate compensation for accident victims. The

120. West v. Caterpillar Tractor Co., Inc., 336 So.2d 80 (Fla. 1978).
court was also concerned with adopting a more socially desirable method of loss distribution so that when the negligence of more than one person contributed to an accident causing injuries, each tortfeasor should pay the proportionate share of the total damages he had caused the injured party.\textsuperscript{123}

Shortly after the adoption of comparative negligence, Justice Dekle, in a special concurring opinion in \textit{Ward v. Ochoa},\textsuperscript{124} noted that Florida's common law doctrine preventing contribution among joint tortfeasors was inconsistent with its newly adopted doctrine of apportionment of fault.\textsuperscript{125} To accomplish complete equity in determining liability and in achieving a more desirable method of loss distribution, the UCATA was untimely adopted,\textsuperscript{126} permitting contribution when two or more persons become jointly or severally liable in tort for the same injury.

The widespread availability and use of liability insurance has played an important role in the judicial adoption of comparative negligence and the legislative enactment of the UCATA.\textsuperscript{127} When the doctrines of fault and contributory negligence first came into prominence during the period of the Industrial Revolution,\textsuperscript{128} the legal question to then be decided was solely whether a loss should fall on the plaintiff or defendant. Liability insurance against accidents was unknown until the latter part of the nineteenth century.\textsuperscript{129} Such insurance is the vehicle by which the burden of bearing losses is shifted from the individual to all the policyholders benefiting from the insured activities.\textsuperscript{130} Accident victims may be compensated and human suffering may be lessened by apportioning fault and allocating losses through insurance.\textsuperscript{131}

In addition to these methods for providing adequate compensation for accident victims and distributing losses, the legislature has also in-

\textsuperscript{123} \textit{Id.} at 437.
\textsuperscript{124} 284 So.2d 385 (Fla. 1973).
\textsuperscript{125} \textit{Id.} at 388.
\textsuperscript{126} FLA. STAT. § 768.31 (1975).
\textsuperscript{128} \textit{Id.} at 137.
\textsuperscript{129} \textit{Id.} at 138.
\textsuperscript{130} James, \textit{Accident Liability Reconsidered: The Impact of Liability Insurance}, 57 YALE L. J. 549 (1948).
\textsuperscript{131} \textit{Id.}
dicated its interest in this area by its enactment of the Florida Automobile Reparations Reform Act in 1971.\textsuperscript{132} This act requires every owner or registrant of a motor vehicle in this state to show proof of security by an insurance policy\textsuperscript{133} or other means provided by the Financial Responsibility Law.\textsuperscript{134} The purpose of such security is to provide for payment of personal injury protection benefits to certain designated individuals, regardless of fault, for specifically delineated medical expenses and services, funeral expenses and disability benefits.\textsuperscript{135} By recognizing and primarily employing the mechanism of insurance, the legislature has thus provided a means for guaranteeing the payment of specified amounts to an injured victim by a distribution of losses borne by the total group of policyholders.

The Florida Supreme Court again emphasized the tort goals of accident victim compensation and the distribution of losses resulting from such compensation by its adoption of the theory of strict liability in tort.\textsuperscript{136} The court characterized the doctrine of strict liability as one of "enterprise liability" where the cost of injuries should be borne by the makers of products who place them in commerce, rather than by the injured persons who are usually powerless to protect themselves.\textsuperscript{137} Strict liability was held applicable to not only users and consumers of defective products, but also to foreseeable bystanders who might be injured by such products.\textsuperscript{138}

The theory of enterprise liability is based, in part, on the concept of "risk spreading" whereby manufacturers absorb the inevitable losses incurred as a result of the use of their products by passing such losses on to the public.\textsuperscript{139} Manufacturers are in a better position to spread this risk by insuring themselves against the risk of injuries and distributing

\textsuperscript{132} FLA. STAT. §§ 627.730-.741 (1975).
\textsuperscript{133} FLA. STAT. § 627.733 (1975).
\textsuperscript{134} FLA. STAT. § 324.031 (1975).
\textsuperscript{135} FLA. STAT. § 627.731 (1975).
\textsuperscript{136} West v. Caterpillar Tractor Co., Inc., 336 So.2d 80 (Fla. 1978).
\textsuperscript{137} \textit{Id.} at 92.
\textsuperscript{138} \textit{Id.} at 88. The strict liability doctrine set forth in the \textit{Restatement (Second) of Torts} § 402A (1965) was adopted by the Florida Supreme Court. The language of the \textit{Restatement} applies strict liability to users and consumers of products, but public policy considerations surrounding the concepts of enterprise liability are equally applicable to innocent bystanders.
\textsuperscript{139} Prosser, \textit{The Assault Upon the Citadel}, 69 \textit{Yale L. J.} 1099, 1120 (1960).
the price of such insurance to the public as a cost of doing business.\textsuperscript{140} Although few courts have overtly discussed the importance of liability insurance and its relationship to the theory of enterprise liability, a number of writers have emphasized such insurance as critical to the theory's vitality.\textsuperscript{141}

The continued failure of Florida's courts to permit a minor child to recover against his parents for injuries negligently inflicted is incongruous in view of these clearly delineated tort goals and policies. The compensation of accident victims and the distribution of losses through the vehicle of liability insurance is clearly hampered by the immunity rule.

5. PARENTAL IMMUNITY AND THE UCATA

The Florida courts were recently faced with a series of cases in which the avowed goals of fault apportionment\textsuperscript{142} and loss distribution\textsuperscript{143} came into direct confrontation with the parental immunity rule.\textsuperscript{144} All of the cases involved the question as to whether a tortfeasor could obtain contribution from another tortfeasor who was immune from suit by the injured party because of either parental or interspousal immunity. In \textit{Mieure v. Moore},\textsuperscript{145} a case involving injuries suffered in an automobile accident, the First District Court of Appeal answered the question in the negative, unanimously finding that the negligent father/husband was not a joint tortfeasor with the third party defendant seeking contribution from him since, on the basis of the family immunity rule, there was no common liability to the injured chil-

\textsuperscript{140.} Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 150 P.2d 436, 441 (1944).
\textsuperscript{141.} Prosser, \textit{supra} at 1121.
\textsuperscript{142.} See note 121 \textit{supra}.
\textsuperscript{143.} See note 123 \textit{supra}.
\textsuperscript{144.} Mieure v. Moore, 330 So.2d 546 (Fla. 1st Dist. Ct. App. 1976); Paoli v. Shor, 345 So.2d 789 (Fla. 4th Dist. Ct. App. 1977); Shor v. Paoli, 353 So.2d 825 (Fla. 1977); 3-M Electric Corp. v. Vigoa, 369 So.2d 405 (Fla. 3d Dist. Ct. App. 1979); Florida Farm Bureau Ins. Co. v. Gov't Employees Ins. Co., 371 So.2d 166 (Fla. 1st Dist. Ct. App. 1979); Petrick v. New Hampshire Ins. Co., -- So.2d -- (Fla. 1st Dist. Ct. App. 1979) [1979 FLW 758]. In each of these cases, a third party sought contribution from the negligent spouse and/or child of the injured victim or the liability insurance carrier of such spouse or child.
\textsuperscript{145.} 330 So.2d 546 (Fla. 1st Dist. Ct. App. 1976).
dren and wife who were plaintiffs. The court considered itself bound by established precedent to reach its decision, and it called on the Florida Supreme Court to review the wisdom of retaining the family immunity rule in light of recent developments in Florida tort law.

Approximately one year after Mieure was decided, the Fourth District Court of Appeal, in Paoli v. Shor, considered a very similar question when a plaintiff husband was injured while a passenger in an automobile being driven by his wife where both the wife and a third party were negligent. In allowing the contribution claim by the negligent third party against the wife, the majority of the court held, contra to Mieure, that the doctrine of interspousal immunity does not bar a right of contribution that would otherwise exist under the UCATA. To hold otherwise, the majority found, would be unfair to the defendant and a windfall to the tortfeasor wife. The dissent noted that the effect of the majority opinion is to “dilute and compromise” the family immunity doctrine since according to such doctrine, the wife and third party cannot be considered joint tortfeasors for the purpose of allowing

146. Id. at 547. See Annot., 34 A.L.R.2d 1108. Until the last decade, most courts that have considered this question have denied a third party tortfeasor the right of contribution from a parent or child on the ground that the essential element of contribution, namely common liability of the tortfeasors to the injured person, is lacking. See also London Guarantee and Accident Co. v. Smith, 242 Minn. 211, 64 S.W.2d 781 (1954); Scruggs v. Meredith, 135 F. Supp. 376 (D. Hawaii 1955); Lewis v. Farm Bureau Mutual Automobile Ins. Co., 243 N.C. 55, 89 S.E.2d 788 (1955); Strahorn v. Sears, Roebuck and Co., 50 Del. 50, 123 A.2d 107 (Super. Ct. 1956); Chosney v. Konkus, 64 N.J. Super. 328, 165 A.2d 870 (Essex County Ct. 1960). However, a number of courts that have recently addressed themselves to this issue have allowed contribution claims to take precedence over the rules of parent-child tort immunity or interspousal immunity. See Peterson v. City and County of Honolulu, 51 Hawaii 484, 462 P.2d 1007 (1970); France v. A.P.A. Transport Corp., 57 N.J. 500, 267 A.2d 490 (1969): Hayon v. Coca Cola Bottling Co. of New England, 378 N.E.2d 442 (Mass. 1978); Zarrella v. Miller, 100 R.I. 545, 217 A.2d 673 (1966); Ross v. Atwell, 315 So.2d 333 (La. Ct. App. 1975); Perchell v. District of Columbia, 444 F.2d 997 (D.C. Cir. 1971).

147. Mieure v. Moore, 330 So.2d 546 (Fla. 1st Dist. Ct. App. 1976). Although this case involved interspousal tort immunity, the policy concerns and issues involved are the same as in the consideration of the parent-child immunity rule. Furthermore, reference is made in the case to the broad doctrine of family immunity.


149. Id. at 790.
contribution. 150

The Florida Supreme Court, in Shor v. Paoli, 161 responded to the Fourth District’s certified question 162 by affirming the majority position and adopting its reasoning. Both courts stated that permitting contribution would not destroy the family unit and thus would not injure the very underpinning of the family immunity doctrine. 163

However, a closer look at Shor indicates that by favoring the tort objectives of fault apportionment and loss distribution, the Florida Supreme Court’s opinion did, on its face, do violence to the family immunity rule it so clearly delineated in the leading case of Orefice v. Albert. 164 The Orefice court stated that the preservation of family harmony and resources was the cornerstone of the immunity rule. By allowing a negligent third party to obtain contribution against a spouse or child, the court is denying full recovery to the injured family member since the family unit, which in reality must be looked upon as a whole, is not receiving the full amount of compensation that would be due the victim. Family resources are thus drained because such resources must be used to fully compensate the injured party and as a result, family harmony may be threatened due to the costly negligence of the family member. 165

150. Id. at 791.
151. 353 So.2d 825 (Fla. 1977).
152. Paoli v. Shor, 345 So.2d 789, 790 (Fla. 4th Dist. Ct. App. 1977). The question certified by the Fourth District Court of Appeal to the Florida Supreme Court was as follows:

DOES THE COMMON LAW DOCTRINE OF INTERSPOUSAL IMMUNITY CONTROL OVER THE UNIFORM CONTRIBUTION AMONG JOINT TORTFEASORS ACT (75-108 LAWS OF FLORIDA, SECTION 768.31, FLORIDA STATUTES) TO PREVENT ONE TORTFEASOR FROM SEEKING A CONTRIBUTION FROM ANOTHER TORTFEASOR WHEN THE OTHER TORTFEASOR IS THE SPOUSE OF THE INJURED PERSON WHO RECEIVED DAMAGES FROM THE FIRST TORTFEASOR?

The court certified this question due to the obvious conflict of its opinion with that of the opinion of the First District Court of Appeal in Mieure v. Moore, 330 So.2d 546 (Fla. 1st Dist. Ct. App. 1976).

153. Id. at 790; Shor v. Paoli, 353 So.2d 825 (Fla. 1977).
154. 237 So.2d 142 (Fla. 1970).
155. Underlying the court’s decision in Shor v. Paoli, supra must have been an awareness that the existence of liability insurance would prevent the disturbance of family harmony and resources. Otherwise, its policy goals would have been in jeopardy. The liability insurance carriers of both the plaintiff and defendant were named parties in interest. The Florida Supreme Court, following the pattern set by other Flor-
The court's decision in *Shor* has marked a judicial retreat from its strict adherence to the parental immunity rule. The UCATA is to be liberally interpreted to achieve the tort goals of fault apportionment and loss distribution; neither the interspousal tort immunity rule nor the parent-child tort immunity rule are to hinder their accomplishment.\(^{156}\)

The First District Court of Appeal has very recently strengthened the controlling position of the UCATA over the parental immunity rule in two cases dealing with family exclusion clauses in automobile

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idai courts in their consideration of this doctrine, did not directly confront the family immunity issue by relating the facts of the particular case to policy concerns.

156.  See Judge Mager's special concurring opinion in Paoli v. Shor, *supra* where he quoted with approval from Zarrrella v. Miller, 100 R.I. 545, 217 A.2d 673 (1966), an opinion which gave precedence to the UCATA over the interspousal immunity doctrine prevalent in that state. Judge Mager quoted as follows:

> [W]e cannot believe that in enacting such act the legislature intended to extend the doctrine of interspousal immunity to actions under the act in the light of modern-day conditions. Such intent would be contrary to common sense and justice. We are convinced that the legislature intended contribution in a case such as this. We agree with the words of Dean Prosser that 'There is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally unintentionally responsible, to be shouldered onto one alone * * * while the latter goes scot free.'

PROSSER, TORTS 2d 3d., Chap. 8 § 46, p. 248. However, in 3-M Electric Corp. v. Vigoa, 369 So.2d 405 (Fla. 3d Dist. Ct. App. 1979), the Third District Court of Appeal retreated, in part, from Shor in its interpretation of the UCATA. Parents sued an electrical contractor on behalf of their minor child, alleging that the child was injured by the contractor's negligence in leaving a pipe protruding in their backyard. The court denied the contractor's counterclaim for contribution against the parents stating that there was a lack of common liability between the parents and defendant due to the family immunity doctrine. The court simply stated that the "instant case remains within the parameters of the Mieure decision in regard to precluding contribution from the parents." No policy or other rationale was offered regarding the purposes of the UCATA or the tort objective of loss distribution. This case differs from the others involving the UCATA in that contribution was sought against parents for their negligent supervision of the injured child, and not for their negligent operation of a vehicle. If contribution is allowed in this case, and the parents are without liability insurance or are under-insured, then a part of anything the child recovers against the defendant will have to come out of the family's resources. This is, in all probability, the reason why the Third District Court of Appeal distinguished this case from Shor. *See also*, Schneider v. Coe, — A.2d — (Del. 1979).
liability insurance policies. In *Florida Farm Bureau Insurance Co. v. Government Employees Insurance Company*, a wife, injured in an accident while a passenger in a vehicle being driven by her husband, sued the third party driver, owner, and the owner's insurer for negligence. After paying the damage award to the wife, the defendant insurer filed a third party complaint against the husband's insurer seeking contribution. The husband's insurer denied coverage based upon a family exclusion clause in its policy which precluded coverage "to bodily injury or to death of the insured or any member of the family of the insured residing in the same household." The court affirmed the trial court's allowance of the contribution claim and stated that *Shor v. Paoli* had clearly given the UCATA precedence over the doctrine of interspousal immunity. Family exclusion clauses were contrary to the established public policy of apportioning joint tortfeasors' responsibility for the payment of claims of innocent injured parties.

In *Petrik v. New Hampshire Insurance Co.*, decided by the First District on the same day as *Florida Farm Bureau Insurance Co.*, the court applied the same rationale to allow a third party contribution against a child's insurer when the parents of the child were injured in an accident due to the negligence of both the third party and the child. The family exclusion clause in the child's liability insurance policy was found to be against public policy. In both cases, the First District certified questions to the Florida Supreme Court.

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158. 371 So.2d 166 (Fla. 1st Dist. Ct. App. 1979).
159. *Id.* at 167.
160. *Id.*
161. *Id.*
162. — So.2d — (Fla. 1st Dist. Ct. App. 1979) [1979 FLW 758].
163. In *Florida Farm Bureau Insurance Co.*, note 157 *supra*, the court certified the following question:

DOES A FAMILY EXCLUSION CLAUSE IN AN AUTOMOBILE LIABILITY INSURANCE POLICY CONTROL OVER THE UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT TO PREVENT ONE TORTFEASOR FROM SEEKING CONTRIBUTION FROM ANOTHER TORTFEASOR WHEN THE OTHER TORTFEASOR IS THE SPOUSE OF THE INJURED PERSON WHO HAS RECEIVED DAMAGES FROM THE FIRST TORTFEASOR?

In *Petrick v. New Hampshire Insurance Co.*, note 157 *supra*, the court certified the following question:
It is time for the Florida Supreme Court to critically examine the parental immunity rule in light of its avowed goals of accident victim compensation, fault apportionment and loss distribution as evidenced by the judicial adoption of comparative negligence and strict liability in tort, the statutory waiver of sovereign immunity for tort actions and the legislative enactment of both the Florida Automobile Reparations Reform Act and the Uniform Contribution Among Tortfeasors Act. The importance of liability insurance to the accomplishment of these goals must be recognized. The increasing number of questions certified to the high court indicate the confusion in this area and the friction between the maintenance of the immunity rule and the policies in tort law being espoused by our legislature and courts. The present law barring an injured minor child from suing a parent continues to perpetuate the human suffering which our legal system has been attempting to alleviate.

If the policy reasons which gave birth to the parental immunity rule are no longer valid, it is within the authority of the Florida Supreme Court to change or abrogate the doctrine. Preservation of family harmony and resources can no longer be cited as unquestioned
policy arguments for the maintenance of such immunity. In fact, the continued existence of parental immunity threatens the family harmony and resources which the doctrine was meant to preserve.\textsuperscript{166}

The recent Florida cases dealing with the family immunity doctrine and the UCATA have created cracks in a dam of unyielding dogma whose time for a critical review has arrived. A setback in the attempt to deal with losses suffered by accident victims occurs each time a court precludes an injured child from recovering, as a matter of law, against his parents and against, in the overwhelming number of cases, his parent's liability insurer.

**CONCLUSION**

One of the greatest strengths of the common law is its flexibility and capacity to change, grow and adapt to new conditions and developments in society\textsuperscript{167} so as to provide remedies to all wrongs committed.\textsuperscript{168} Courts have tended to implement such change gradually by "differentiation, exception, and ultimately extinction" of outmoded legal doctrines.\textsuperscript{169} In the grand tradition of the common law, recent years have seen the edifice of family immunity beginning to crumble. The time has come to set aside the parent-child tort immunity rule along with all of the exceptions and limitations that have grown around it. The cries of justice must be heard and a remedy provided for what, in reality, is our most precious resource, our children.

\begin{itemize}
  \item \textsuperscript{166} See cases cited note 72, supra.
  \item \textsuperscript{167} 15 Am.Jur.2d Common Law § 2 (1976).
  \item \textsuperscript{168} 11 Am.Jur., Common Law § 2 (1937).
  \item \textsuperscript{169} Hastings v. Hastings, 33 N.J. 247, 163 A.2d 147, 155 (1960) (Jacobs, J., dissenting).
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