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AN INDIANA APPROACH TO THE EMERGING PASSIVE PARENT ACTION

I. INTRODUCTION

Historically, our society has refused to acknowledge the widespread prevalence of child sexual abuse.[1] Recently, child sexual abuse has attracted an increasing amount of attention.[2] Unfortunately, child sexual abuse has reached unbridled proportions.[3] A recent study determined that as many as thirty-eight percent of the female population has experienced sexual molestation by the age of eighteen.[4] Furthermore, the number of children who are victims of incest is frightening.[5] As alarming as the figures are, they still fail to

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1. ELLEN GRAY, UNEQUAL JUSTICE: THE PROSECUTION OF CHILD SEXUAL ABUSE 1 (1993). "We have begun to acknowledge the possibility that adults—even parents—use children sexually to feed their own compulsions and quiet their own demons." *Id.* "Thanks to blanketing public awareness and education efforts, the general public now recognizes (albeit reluctantly) and has some understanding of the neglect or physical abuse of children . . . ." *Id.* at 5. "Until recently, however, most people seemed incapable of *acknowledging* the phenomenon of child sexual abuse." *Id.* at 5-6. *See also* JUDITH L. HERMAN, FATHER-DAUGHTER INCEST 7-8 (1981) (discussing the fact that those investigators who have discovered incest in the past have ended the investigations by suppressing the evidence because it was too threatening to be maintained in the public consciousness).

2. Professional journals and the popular press are now starting to give child sexual abuse the same type of attention that rape, child abuse, and spouse abuse received 10 to 15 years ago. Shirley J. Asher, *The Effects of Childhood Sexual Abuse: A Review of the Issues and Evidence*, *in* HANDBOOK ON SEXUAL ABUSE OF CHILDREN 3 (L. Walker ed. 1988). Asher attributes this recent recognition in part to the women's liberation movement which called attention to the victimization of women and children. *Id.* The liberation movement led researchers to more rigorously pursue data and compile more studies regarding the prevalence and severity of childhood sexual abuse. *Id.*

3. *See* GRAY, *supra* note 1, at 1. "We have just now begun to allow into our minds the possibility that sexual abuse of children—not always violent, not necessarily classifiable within current mental health typologies, and not only at the hands of strangers—happens extensively." *Id.*

4. Diana E. H. Russell, *The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children*, *in* HANDBOOK *supra* note 2, at 25. Furthermore, the study found that of the 38% of women who had suffered some form of child molestation, 16% suffered intrafamilial child sexual abuse. *Id.* at 22. *See also* JOSEPH E. CRNICH & KIMBERLY A. CRNICH, SHIFTING THE BURDEN OF TRUTH V (1992) (stating that one in three girls and one in seven boys are sexually abused by the time they reach the age of 18).

Studies conducted in the 1970s confirmed that incest and child sexual abuse follow a similar pattern in that the majority of victims are female and the majority of perpetrators are male. HERMAN, *supra* note 1, at 18-19. Five separate studies analyzed a total of 506 incest cases and found that 399 of the cases involved a father molesting his daughter. *Id.* at 19. Of the parent-child incest cases, the father was the perpetrator of the sexual abuse in 97% of the cases. *Id.* at 18.

5. Exact incidence figures of child sexual abuse do not exist, but, according to the National Incidence Study, there were 155,900 countable cases of child sexual abuse in 1986, and more than 200,000 cases per year by 1984 estimates that accounted for underreporting. *See* GRAY, *supra* note

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represent the extent of the problem because, as some sources indicate, only two to three percent of child sexual abuse cases are actually reported.[6] Yet even though child sexual abuse is now being confronted in today's society, child victims often go uncompensated.[7]

With the abrogation of parental immunity[8] in a majority of jurisdictions,[9]

1, at 5.

6. *See* Russell, *supra* note 4 (noting that in a survey of adult women, only two percent reported the abuse to authorities). *See also* HERMAN, *supra* note 1, at 164 (stating that the Child Advocate Association of Chicago estimates that only three percent of incestuous abuse cases are reported).

7. *See* CRNICH & CRNICH, *supra* note 4.

8. The parental immunity doctrine prohibited tort actions between parents and children regardless of whether the tort was intentional or negligent. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 122, at 904 (5th ed. 1984) [hereinafter PROSSER AND KEETON].

9. Fourteen of the 43 states that initially adopted some form of parental immunity have completely rejected the doctrine. *See* Rousey v. Rousey, 528 A.2d 416 (D.C. 1987) (en banc); Black v. Solmitz, 409 A.2d 634 (Me. 1979); Anderson v. Stream, 295 N.W.2d 595 (Minn. 1980); Hartman v. Hartman, 821 S.W.2d 852 (Mo. 1991) (en banc); Transamerica Ins. Co. v. Royle, 656 P.2d 820 (Mont. 1983); Imig v. March, 279 N.W.2d 382 (Neb. 1979); Rupert v. Stienne, 528 P.2d 1013 (Nev. 1974); Vickers v. Vickers, 242 A.2d 57 (N.H. 1968); Guess v. Gulf Ins. Co., 627 P.2d 869 (N.M. 1981); Winn v. Gilroy, 681 P.2d 776 (Or. 1984); Falco v. Pados, 282 A.2d 351 (Pa. 1971); Elam v. Elam, 268 S.E.2d 109 (S.C. 1980); Thomas v. Kells, 191 N.W.2d 872 (Wis. 1971). Of the remaining 29 states, 25 have significantly limited the doctrine. Some states permit immunity for negligence only. *See* Attwood v. Estate of Attwood, 633 S.W.2d 366 (Ark. 1982); Coleman v. Coleman, 278 S.E.2d 114 (Ga. Ct. App. 1981); Frye v. Frye, 505 A.2d 826 (Md. 1986). Others permit immunity only for negligent supervision of a child and discretionary acts regarding necessities. *See* Streenz v. Streenz, 471 P.2d 282 (Ariz. 1970); Farmer's Ins. Group v. Reed, 712 P.2d 550 (Idaho 1985); Turner v. Turner, 304 N.W.2d 786 (Iowa 1981); Rigdon v. Rigdon, 465 S.W.2d 921 (Ky. 1970); Sweeney v. Sweeney, 262 N.W.2d 625 (Mich. 1978); Foldi v. Jeffries, 461 A.2d 1145 (N.J. 1983); Holodook v. Spencer, 324 N.E.2d 338 (N.Y. 1974); Sixkiller v. Summers, 680 P.2d 360 (Okla. 1984); Silva v. Silva, 446 A.2d 1013 (R.I. 1982); Felderhoff v. Felderhoff, 473 S.W.2d 928 (Tex. 1971); Wright v. Wright, 191 S.E.2d 223 (Va. 1972). Still others allow full immunity, except for motor-vehicle related negligence. *See* Dzenutis v. Dzenutis, 512 A.2d 130 (Conn. 1990); Schneider v. Coe, 405 A.2d 682 (Del. 1979); Ard v. Ard, 414 So.2d 1066 (Fla. 1982); Sorensen v. Sorensen, 339 N.E.2d 907 (Mass. 1975); Lee v. Mowett Sales Co., 342 S.E.2d 882 (N.C. 1986); Dellapenta v. Dellapenta, 838 P.2d 1153 (Wyo. 1992). Finally, some states have adopted very specific limitations to the immunity doctrine. *See* Gibson v. Gibson, 479 P.2d 648 (Cal. 1971) (en banc) (adopting the reasonable parent standard of parental conduct); Schlessinger v. Schlessinger, 796 P.2d 1385 (Colo. 1990) (en banc) (allowing no immunity if a claim is based on willful and wanton or intentional misconduct); Cates v. Cates, 588 N.E.2d 330 (Ill. App. Ct. 1992) (holding that a parent is not immune from a child's suit to recover for personal injuries caused by the parent's allegedly negligent operation of an automobile); Barnes v. Barnes, 603 N.E.2d 1337 (Ind. 1992) (holding that no immunity exists for intentional felonious conduct); Jilani v. Jilani, 767 S.W.2d 671 (Tex. 1988) (allowing an unemancipated minor child to bring an automobile tort action against a parent); Merrick v. Sutterlin, 610 P.2d 891 (Wash. 1980) (en banc) (holding that immunity will be decided on a case-by-case basis; suit allowed if, after evidentiary hearing, the court concludes that the legal proceedings will not disrupt family harmony); Lee v. Comer, 224 S.E.2d 721 (W. Va. 1976) (holding that abrogation of parental immunity is confined to automobile accident cases or where a parent causes the injury or death of the child from intentional or willful conduct, but it does not arise from reasonable corporeal punishment for

many children now have the opportunity to hold their parents liable through a civil cause of action. One such cause of action just recently recognized is that brought by a child against a non-abusive parent for allowing continued sexual abuse by the other parent. A passive parent action[10] is so novel that it has not reached an appellate court in any jurisdiction[11] and has not been heard at any level in Indiana.

The passive parent action is based on negligence and offers the sexually abused child a possible advantage over a suit against an abusive parent based on the abusive parent's intentional tortious conduct. The advantage is that some homeowner's liability insurance policies provide that the negligent acts of the non-abusive parent are covered, therefore facilitating recovery for the prevailing child. In contrast, the intentional tortious acts of the abusive parent are usually excluded by the terms of the policy.[12] Despite the advantage homeowner's policies may offer, many problems exist with a suit against a non-abusive parent. The most important problems include the parental immunity doctrine and the difficulties involved in imposing the legal duty of the non-abusive parent to protect the child from the abusive parent.

Because this cause of action involves a child suing a parent, the parental immunity doctrine creates a bar to recovery in those jurisdictions that have neither partially nor fully abrogated the doctrine.[13] Indiana has only partially abrogated the parental immunity doctrine[14] to allow suits for intentional felonious conduct; therefore, the doctrine must be further abrogated or an exception made in order to allow a passive parent action to stand. In a passive parent action, the required intentional felonious conduct is not present, as all theories of liability would be based on negligence.[15] Therefore, the Indiana courts must once again carve an exception into the parental immunity doctrine

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disciplinary purposes).

10. Throughout this note, a cause of action brought by a child against a non-abusive parent for failing to prevent the other parent's sexual abuse will be referred to as a "passive parent action."

11. Mark Hansen, *Liability for Spouse Abuse: New Theory Holds Mothers Accountable for Failing to Protect Children*, 79 A.B.A. J. 16 (Feb. 1993).

12. *See* National Union Fire Ins. Co. v. Lynette C., 279 Cal. Rptr. 394 (Cal. Ct. App. 1991) (holding that a foster parent's liability policy, which excluded from coverage liability for sexual misconduct if the insured acted with lasciviousness or immoral purpose and intent, provided coverage to a foster mother who negligently failed to protect a foster child from sexual molestation by the foster father). *See also* State Farm Fire & Casualty Co. v. Nycum, 943 F.2d 1100 (9th Cir. 1991) (holding that the allegation that the insured had sexually molested a child did not preclude coverage under the homeowner's policy absent a showing that the insured's act was intentional molestation).

13. *See supra* note 9.

14. Barnes v. Barnes, 603 N.E.2d 1337 (Ind. 1992) (holding that a child will be permitted to bring a suit against a parent provided that the parent's conduct was intentional and felonious).

15. *See* LEONARD KARP & CHERYL L. KARP, DOMESTIC TORTS § 8.18A, at 225 (Supp. 1995).

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to entertain a passive parent cause of action.

Once an exception to parental immunity has been created, the child who is suing must state a cause of action upon which the court may grant relief. Since the sexually abused child's suit would be negligence-based, the child would have to prove that the non-abusive parent had a legal duty to act reasonably to prevent the continuing abuse, that the non-abusive parent knew or should have known of the abuse and failed to act, therefore breaching the duty, and that the breach of that duty was the proximate cause of a resulting injury to the child.[16] By establishing these elements, a child may successfully maintain a negligence cause of action which should be recognized and compensated for by Indiana courts.[17] This Note discusses the barriers that face a passive parent action in Indiana. This includes a full discussion of the parental immunity doctrine, its origin, its current status in Indiana, and most importantly, its application to a passive parent action.

Section II of this Note examines the historical basis for parental immunity,[18] its development in Indiana,[19] and the justifications that support the doctrine. In addition, this Section discusses the inapplicability of these justifications when applied to a passive parent action[20] and explains the exceptions that other states have made to the parental immunity doctrine.[21] Section III examines the current state of the law concerning the passive parent action, including the problematic aspect of establishing a duty to report[22] and protect[23] on the non-abusive parent. This Section also addresses the way in which other jurisdictions have resolved the passive parent action.[24] Section IV proposes that Indiana adopt the reasonable parent standard of parental immunity[25] and suggests one possible approach for establishing a passive parent action.[26]

16. *See* PROSSER AND KEETON, *supra* note 8, at 164-65 (stating that the elements of a cause of action founded upon negligence are duty, breach, causation, and damages).

17. The law of tort is "directed toward the compensation of individuals, rather than the public, for losses which they have suffered within the scope of their legally recognized interests generally, rather than one interest only, where the law considers that compensation is required." *Id.* at 5-6.

18. *See infra* notes 27-103 and accompanying text.

19. *See infra* notes 104-32 and accompanying text.

20. *See infra* notes 131-38 and accompanying text.

21. *See infra* notes 139-68 and accompanying text.

22. *See infra* notes 169-78 and accompanying text.

23. *See infra* notes 179-217 and accompanying text.

24. *See infra* notes 218-30 and accompanying text.

25. *See infra* notes 231-54 and accompanying text.

26. *See infra* notes 255-83 and accompanying text.

II. Development and Deterioration of Parental Immunity

A. *Historical Basis for Parental Immunity*

At common law, although the parent retained custody, children were considered distinct and separate legal entities from their parents.[27] A child's identity did not merge with either parent, unlike a wife, whose legal identity merged with that of her husband.[28] As a result, children were free to sue or be sued in either legal or equitable proceedings, based on contract or tort.[29] Parents and children also retained the right to bring actions against each other in property matters.[30] The individualism that existed between a parent and child was unlike the unity existing in the marital relationship.

Despite a child's individualism, parental retention of custody over minor children brought with it the duty of rearing and disciplining children.[31] A parent's right to inflict bodily injury upon his or her child, to the extent that the parent's behavior was non-criminal, was traditionally recognized and given privileged status.[32] From this privilege, the parental immunity doctrine developed, whereby children were prohibited from suing their parents in tort for the infliction of bodily injury.[33]

English common law did not recognize the parental immunity doctrine.[34]

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27. PROSSER AND KEETON, *supra* note 8, at 908. "[T]he child remained a separate legal person, entitled to the benefits of his own property and to the enforcement of his choices in action, including those in tort, and was liable in turn as an individual for his own torts." *Id.* at 904.

28. *Id.*

29. *Id. See also* Rogers v. Smith, 17 Ind. 323 (1861); Stockton v. Farley, 10 W. Va. 171, 173 (1877).

30. PROSSER AND KEETON, *supra* note 8, at 904. *See, e.g.*, Preston v. Preston, 128 A. 292 (Conn. 1925) (allowing a child to sue her parent in matters affecting the creation of a trust); Young v. Wiley, 107 N.E. 278 (Ind. 1915) (allowing a suit between children and their parent for a matter affecting the title of real estate); McKern v. Beck, 126 N.E. 641 (Ind. Ct. App. 1920) (allowing a parent to sue his children in a matter concerning real property); Lamb v. Lamb, 41 N.E. 26 (N.Y. 1895) (allowing children to sue their mother for rent for her use and occupation of a house).

31. William E. McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1059 (1930). *See also* Emery v. Emery, 289 P.2d 218, 224 (Cal. 1955) (stating that "the law imposes on the parent a duty to rear and discipline his child and confers the right to prescribe a course of reasonable conduct for its development").

32. *See* McCurdy, *supra* note 31.

33. The parental immunity doctrine has also been recognized as forbidding parents to bring a tort suit against their child. *See, e.g.*, Latz v. Latz, 272 A.2d 435, 442-43 (Md. Ct. Spec. App. 1971). Reference to parental immunity in this note will only include suits brought by children against their parents.

34. Dunlap v. Dunlap, 150 A. 905, 907 (N.H. 1930). In *Dunlap*, the court noted that "[u]pon the issue of the child's personal rights the English decisions are simply silent." *Id.* The court in *Dunlap* went on to state that "[a]ll that can be gathered from the early English law and its history

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Rather, beginning in 1891, the parental immunity doctrine was judicially established by a series of cases called the "great trilogy."[35] The first case, *Hewlette v. George*,[36] was precluded by the Mississippi Supreme Court in 1891 without citing any precedent. The *Hewlette* court precluded a minor child from suing her mother in a tort action for false imprisonment.[37] The court established what would become one of the most widely accepted justifications for parental immunity when it reasoned that allowing a child to maintain such an action would disrupt family harmony and tranquility.[38] However, the doctrine of parental immunity was not absolute.[39] When creating parental immunity, the *Hewlette* court recognized that instances would arise when the application of parental immunity may not be appropriate.[40] Regardless, the decision of the Mississippi Supreme Court that created the parental immunity doctrine began a national trend of denying children the right to sue their parents in tort.[41]

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is that there are parental rights and duties which may be superior to independent personal rights of the child." *Id.* *See also* McCurdy, *supra* note 31, at 1063.

35. Edwin D. Akers & William H. Drummond, *Tort Actions Between Members of the Family-Husband & Wife-Parent & Child*, 26 MO. L. REV. 152, 182 (1961).

36. 9 So. 885 (Miss. 1891).

37. *Id.*

38. *Id.* at 887. The court explained:

> 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. The state, through its criminal laws, will give the minor child protection from parental violence and wrongdoing, and this is all the child can be heard to demand.

Id. The preservation of family harmony has remained an important justification for courts that uphold the parental immunity doctrine. *See, e.g.*, Davis v. Grinspoon, 570 N.E.2d 1242 (Ill. App. Ct. 1991).

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

40. *Id.* The court noted that:

> [when] the relation of parent and child had been finally dissolved, insofar as that relationship imposed the duty upon the parent to protect and care for and control, and the child to aid and comfort and obey, then it may be the child could successfully maintain an action against the parent for personal injuries. But so long as the parent is under 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.

Id.

41. All but seven states have adopted the parental immunity doctrine in some form. Those that have never adopted parental immunity are: Alaska, Hawaii, Kansas, North Dakota, South Dakota, Utah and Vermont. Gail D. Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, 50 FORDHAM L. REV. 489, 494 n.39 (1982). *See* Hebel v. Hebel, 435 P.2d 8 (Alaska 1967); Peterson v. City & County of Honolulu, 496 P.2d 4 (Haw. 1972); Nocktonick v. Nocktonick, 611 P.2d 135 (Kan. 1980); Nuelle v. Wells, 154 N.W.2d 364 (N.D. 1967); Elkington v. Foust, 618 P.2d 37, 40 (Utah 1980); Wood v. Wood, 370 A.2d 191 (Vt. 1977). "[I]t seems likely that the trend toward abrogation of the parent-child immunity will continue, and that such abrogation will become the dominant doctrine in the United States." FOWLER HARPER ET AL., THE

The establishment of parental immunity in *Hewlette* was further refined in *McKelvey v. McKelvey*.[42] In 1903, the *McKelvey* court reinforced the parental immunity doctrine when it rejected a child's claim against her father and mother for cruel and inhumane treatment.[43] In sustaining the doctrine, the court provided additional justification for parental immunity by analogizing parental immunity to spousal immunity.[44] Similar to a wife's duty to obey her husband, so was a child subject to parental control and charged with a duty of obedience.[45] Another justification advanced by the *McKelvey* court was that of allowing leeway for parents in the exercise of parental authority.[46] Based on these justifications, the court refused to sustain the child's action against her parents.[47]

The final case of the parental immunity trilogy was *Roller v. Roller*.[48] In 1905, the *Roller* court extended the parental immunity doctrine to its outer limits by barring a daughter's action against her father for rape.[49] *Roller* differed from *Hewlette* and *McKelvey* in that the parent's conduct in *Roller* was so heinous as to have already caused a substantial disruption to the precious family

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LAW OF TORTS § 8.11, at 581 (2d ed. 1986).

42. 77 S.W. 664 (Tenn. 1903). In *McKelvey*, a minor child sued her father and stepmother for the cruel and inhumane treatment of her stepmother. *Id.* The minor child further alleged that the inhumane treatment inflicted by her stepmother was done so with the consent of her father. *Id.*

43. *Id.* at 665.

44. *Id.* In *McKelvey*, the court stated that "[a]n analogy is furnished in the relation of husband and wife. It has been held that neither husband nor wife can maintain an action against the other for wrongs committed during coverture." *McKelvey*, 77 S.W. at 665.

45. *Id.* At common law, the husband was considered the guardian of the wife and was obligated to protect and maintain her. Consequently, "the law gave him a reasonable superiority and control over her person, authorizing him to put gentle restraints upon her liberty if her conduct were such as to require it." *Id.* (citing 2 Kent's Com. 180).

46. *McKelvey*, 77 S.W. at 664. In setting forth the parental authority justification, the *McKelvey* court noted that:

> the right of the father to the control and custody of his infant child grew out of the corresponding duty on his part to maintain, protect, and educate . . . . The right to control involved the subordinate right to restrain and inflict moderate chastisement upon the child. In case parental power was abused, the child had no civil remedy against the father for the personal injuries inflicted.

Id.

47. *Id.* at 664. The court dismissed the suit on the theory that the criminal system was the best redress for parental abuse. *Id.* The court relied heavily on the "peace of society" reasoning of the *Hewlette* court, along with the analogy between parental and spousal immunity and the right of a parent to exercise parental discretion. *Id.*

48. 79 P. 788 (Wash. 1905). In *Roller*, a 15-year-old girl sued her father for his previous acts of rape. *Id.* The defendant had already been convicted and sentenced for raping his minor daughter. *Id.*

49. *Id.* As a result of the parental immunity doctrine, the court held that the minor daughter did not have standing to sue. *Id.*

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fabric.[50] Further, the act of rape would most likely not be classified as an act of parental authority or discretion.[51] Realizing that it could not rely on the theory that parental immunity was necessary to maintain the familial harmony or that the doctrine was required to protect parental rights of discipline, the *Roller* court provided even further justifications for parental immunity. These justifications included possible reacquisition of the child's tort damages by intestate succession if the child predeceased the parent[52] and preserving the family funds for the entire family's necessities.[53] The *Roller* court reasoned that the depletion of family funds may work to the detriment of other siblings.[54]

Hewlette, McKelvey, and *Roller* established the theoretical foundation for the parental immunity doctrine. Together these cases advanced six justifications for the parental immunity doctrine: 1) the state's interest in maintaining and preserving family harmony;[55] 2) the fear of fraudulent and collusive claims;[56] 3) the protection of family finances;[57] 4) the possibility of parental inheritance

50. *Id.*

51. The act of rape does not resemble other parental conduct which has been held to be an act of parental authority or discretion. *See, e.g.,* Lemmen v. Servais, 158 N.W.2d 341 (Wis. 1968) (holding that a child injured while crossing the street could not recover from her parents because of the fact that the parents failed to tell the child how to cross the street which was found to be an exercise of ordinary parental discretion); Cherry v. Cherry, 203 N.W.2d 352 (Minn. 1972) (holding that parents who left their eight-month-old child where she could chew on an extension cord were exercising ordinary parental discretion).

In fact, rape seems to go far beyond some of the acts which courts have previously held were not acts of parental discretion or authority. *See, e.g.,* Thoreson v. Milwaukee & Suburban Transp. Co., 201 N.W.2d 745 (Wis. 1972) (holding that a mother's negligence in leaving her child alone watching television, when he subsequently was injured while crossing the street, was not an exercise of ordinary parental discretion); Hush v. Devilbiss Co., 259 N.W.2d 170 (Mich. Ct. App. 1977) (holding that the parents' act of leaving a vaporizer where their fifteen-month-old child could spill it on himself was negligent supervision and not an act of parental discretion).

52. Roller v. Roller, 79 P. 788, 788-89 (Wash. 1905). The *Roller* court stated that "if a child should recover a judgment from a parent, in the event of its death the parent would become heir to the very property which had been wrested by the law from him." *Id.*

53. *Id.* at 789. The court further explained that "the public has an interest in the financial welfare of other minor members of the family, and it would not be the policy of the law to allow the estate, which is looked to for the support of all the minor children, to be appropriated by any particular one." *Id.*

54. *Id.*

55. *See supra* note 38 and accompanying text.

56. *See, e.g.,* Dennis v. Walker, 284 F.Supp. 413, 417 (D.D.C. 1968) (discussing fraud, collusion, and parents' encouragement of their children's suits as reasons for adopting parental immunity); Coleman v. Coleman, 278 S.E.2d 114, 114-15 (Ga. Ct. App. 1981) (citing the possibility of fraud or collusion as a reason for retaining parental immunity in negligence actions).

57. Roller v. Roller, 79 P. 788, 789 (Wash. 1905).

of the child's recovery;[58] 5) the protection of parental discretion and authority;[59] and 6) the analogy to interspousal immunity.[60]

Upon closer examination of the above rationales, it becomes apparent that the traditional reasons for the parental immunity doctrine do not justify barring a cause of action by a child against the child's non-abusive parent. The first and perhaps most often-cited justification for the parental immunity doctrine is that prohibiting suits between child and parent will maintain and preserve family harmony.[61] The basis for this argument is that preventing suits between the parent-tortfeasor and the child-victim promotes domestic tranquility.[62] Critics of parental immunity have found various flaws in the rationale underlying this argument.[63] First, to prohibit tort actions between parents and children while permitting property actions is inconsistent because some of the most disruptive

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58. *Id.* If a child were to recover a judgment from a parent, in the event of the child's death, the parent would become heir to the property which had just been taken from the parent. *Id.*

59. *See supra* note 46 and accompanying text.

60. *See supra* note 44 and accompanying text. *See also Roller*, 79 P. at 788. The *Roller* court noted that parental immunity is "analogous to coverture, where a husband or wife is forbidden to sue the other spouse for torts or wrongs committed upon them to their damage during coverture, even refusing the action after the relation, by a divorce, has ceased to exist." *Id.* at 789.

61. *See supra* note 38 and accompanying text. A suit brought by a child against the child's parent for failing to prevent or report sexual abuse may have repercussions beyond the immediate family, to the extended family. This further disruption may occur if a member of the extended family (i.e. aunt, uncle, or grandparent) takes on the responsibility of representing the child in the suit against the child's parent.

To avoid this possible further disruption of family harmony, the court handling the suit should appoint a guardian *ad litem* to represent the child. A guardian ad litem has been defined as "a person appointed by a court to promote and protect the interests of a child involved in a judicial proceeding through assuring representation of those interests in the courts and throughout the social service and ancillary service system." Davidson, *The Guardian Ad Litem*, *in* PROTECTING CHILDREN THROUGH THE LEGAL SYSTEM 835, 843 (1981). Historically, guardians *ad litem* have been appointed to assert children's interests and rights in personal injury cases. Dayle D. Deardurff, *Representing the Interests of the Abused and Neglected Child: The Guardian Ad Litem and Access to Confidential Information*, 11 U. DAYTON L. REV. 649, 650 (1986). Another advantage to appointing a guardian *ad litem* is that it will avoid the possibility that an extended family member will incorporate their own agenda into the lawsuit. By appointing a guardian *ad litem* to represent the child, the court assures that an impartial person will represent the child. A full discussion of the intricacies involved with a court-appointed guardian *ad litem* is beyond the scope of this note. For a more detailed discussion of the role of a guardian *ad litem*, see Eric T. Lanham, *Suing Parents in Tort for Child Abuse: A New Role for the Court Appointed Guardian Ad Litem*, 61 MO. L. REV. 101 (1992).

62. *See supra* note 38 and accompanying text. *See also* Strahorn v. Sears, Roebuck & Co., 123 A.2d 107 (Del. 1956); PROSSER & KEETON, *supra* note 8, at 905.

63. Price v. Price, 732 S.W.2d 316 (Tex. 1987). The court in *Price* noted that "[i]t is difficult to fathom how denying a forum for the redress of any wrong could be said to encourage domestic tranquility." *Id.* at 318; Sorensen v. Sorensen, 339 N.E.2d 907 (Mass. 1975). The *Sorensen* court stated that "[t]he argument that parental immunity is necessary to preserve the tranquility and harmony of domestic life misconceives the facts of domestic life." *Id.* at 913.

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family disputes have arisen in the property context.[64] Further, denying a child redress does not eliminate the conflict because the injury itself is the disruptive act.[65] When the wrong has been committed, the harm to the family has already occurred and "the source of rancor and discord"[66] has already been introduced into the family relations.[67]

The familial harmony justification is even further undermined in those instances where the defendant, non-abusive parent, has homeowner's insurance that covers negligent acts.[68] The existence of liability insurance removes the adversarial relationship between a parent and child.[69] Instead of suing the child's parent, the child is, in essence, suing the insurance company because the insurance company would be responsible for paying for any judgment against the negligent parent.[70] Arguably, a lawsuit brought under these circumstances would disrupt family relations only to the extent of a possible increase in insurance premiums.

Additionally, in cases where parents abuse their own children, the family harmony has already been shattered and is not deserving of preservation or

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64. *See* McCurdy, *supra* note 31, at 1075.

65. Falco v. Pados, 282 A.2d 351, 355 (Pa. 1971); Gibson v. Gibson, 479 P.2d 648, 651 (Cal. 1971) (en banc); Jilani v. Jilani, 767 S.W.2d 671, 674 (Tex. 1988) (stating that the actual tort itself is the stronger threat of disruption than the lawsuit).

66. *Sorensen*, 339 N.E.2d at 913.

67. *See* Tamashiro v. DeGama, 450 P.2d 998 (Haw. 1969). According to Dean Prosser, to prohibit a suit in the name of familial harmony is to say that "an uncompensated tort makes for peace in the family." WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS 866 (4th ed. 1971). Furthermore, to hold that minors' "pains must be endured for the peace and welfare of the family is something of a mockery." Badigian v. Badigian, 174 N.E.2d 718, 724 (N.Y. 1961) (Fuld, J., dissenting).

68. *Gibson*, 479 P.2d at 651 (stating that "the risk of family discord is much less in negligence actions, where an adverse judgment will normally be satisfied by the defendant family member's insurance carrier"); *Sorensen*, 339 N.E.2d at 912 (stating that "[i]t can hardly aid family reconciliation to deny the injured child access to the courts and, through them, to any liability insurance which the family might maintain").

69. *Sorensen*, 339 N.E.2d at 914 (stating that when the parent carries insurance, the "action between the parent and child is not truly [adversarial]"); Streenz v. Streenz, 471 P.2d 282, 284 (Ariz. 1970) (en banc) (stating that the lawsuit is actually "between [the] child and [the] parent's insurance carrier").

70. Fleming James, Jr., *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948). According to Professor James:

> [r]ecovery by the unemancipated minor child against his parent is almost uniformly denied for a variety of reasons which involve the integrity of the family unit and the family exchequer and the importance of parental discipline. But in truth, virtually no such suits are brought except where there is insurance. And when there is, none of these threats to the family exists at all.

Id. at 553.

maintenance.[71] This is true even in situations involving a sexually abused child and a non-abusive parent who does nothing to combat the abuse.[72] For example, one sexual abuse victim whose mother failed to take affirmative action to prevent her abuse resented her non-abusive mother more than her abusive father.[73] In another instance, a non-abusive mother forfeited her rights of visitation of her child in order to live with the child's abusive stepfather who had served a prison term for abusing the child.[74] These two cases represent situations in which the familial harmony had already deteriorated and denying the child redress would not contribute to preserving the peace and tranquility of the home.

An additional consideration relating to family harmony is the possibility that recognizing a civil cause of action may lead to criminal prosecution. However, a passive parent action would not instigate criminal liability because criminal liability for failure to protect and report has already been recognized in some states, including Indiana.[75]

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71. *See* Hurst v. Capitell, 539 So.2d 264 (Ala. 1989). The *Hurst* court abrogated the parental immunity doctrine for sexual abuse cases. *Id.* The court reasoned that "[t]o leave children who are victims of such wrongful, intentional, heinous acts without a right to redress those wrongs in a civil action is unconscionable, especially where the harm to the family fabric has already occurred through that abuse." *Id.* at 266; Wilson v. Wilson, 742 F.2d 1004, 1005 (6th Cir. 1984) (concluding that the "common law parental immunity rule holds only insofar as it subserves the domestic peace and tranquility of the family, and '[w]here the reason fails the rule should not apply,'") (citing Brown v. Selby, 332 S.W.2d 166, 169 (Tenn. 1960)).

72. Blake Bailey & Earl Drott, *The Doctrine of Parental Immunity in Sexual Abuse Cases: The Last Throes of a Texas Dinosaur*, 25 TRIAL LAW. F. 27, 29 (1991).

> When a child is being sexually abused by a family member as a result of a parent's negligence, neither the child nor the parent is enjoying the much revered 'harmony' in the family that some argue should be protected. When the fabric of a family has degenerated to the point that a parent, stepparent, or other family member is satisfying his sexual urges by sexually molesting a child under the very nose of other adult family members, then that family unit is no longer something that should be protected.

Id.

73. *See* Hansen, *supra* note 11, at 16.

74. The stepfather served two and one half years of an 18-year prison term for two counts of indecency with his wife's child. *Id.* The wife forfeited her right to visit her child when she decided to reconcile with her husband. *Id.*

75. State v. Williquette, 385 N.W.2d 145 (Wis. 1986). In *Williquette*, the Wisconsin Supreme Court considered whether a mother should be liable for failing to protect her children from their father's abuse even though she never actively participated in the abuse. *Id.* The court upheld the mother's conviction for child abuse due to her knowing failure to protect. *Id.* at 147. *See also* State v. Adams, 557 P.2d 586 (N.M. Ct. App. 1976) (upholding the child abuse conviction of a father who failed to protect his 28-month-old daughter from her mother's abuse).

Indiana also imposes criminal liability on any person who fails to report known acts of child abuse. Indiana Code § 31-6-11-20 makes it a class B misdemeanor to fail to report child abuse. IND. CODE ANN. § 31-6-11-20 (West Supp. 1993). This demonstrates Indiana's concern in making sure that the problem of child abuse is exposed and discouraged.

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The second justification for parental immunity is the fear of fraud and collusion among family members to obtain an unjustified insurance award.[76] Courts have discredited this rationale on the basis that courts and juries are well equipped to deal with the possibility of fraud and collusion on a case-by-case basis.[77] Moreover, the mere fact that some members of a particular group may be guilty of fraud or collusion does not require that the courts deny relief to everyone in that class.[78] The possibility of fraud exists with all suits and there is no greater likelihood of fraud among children and their parents than there is between adult family members who have always had the freedom to sue.[79]

In addition, the fear of fraud or collusion is inconsistent with the concern for preserving family harmony. The collusion argument assumes that family members are conspiring to defraud a third-party into paying for a non-existent wrong. In this situation, no threat exists to the family harmony and "domestic harmony will not be disrupted so much by allowing the action as by denying it."[80]

The third justification for the parental immunity doctrine is that to pay the injured child would deplete family finances to the detriment of other innocent

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76. *See* PROSSER AND KEETON, *supra* note 8, at 905.

77. *See* Kirchner v. Crystal, 474 N.E.2d 275 (Ohio 1984). The court in *Kirchner* rejected the argument that abrogation of the parental immunity doctrine will promote fraudulent or collusive lawsuits. *Id.* at 278. The court reasoned that the likelihood of fraudulent or collusive claims is possible in any legal action. *Id.* Furthermore, American Society depends on the judicial system to filter out the fictitious claims from the real ones. *Id.* The court stated that:

> [o]ur system is well equipped with sufficient safeguards which are designed to thwart the opportunity for fraud or collusion. The deterrent effect of a perjury charge, extensive and detailed pretrial discovery procedures, the opportunity for cross-examination, and the availability of summary judgment motions are but a few examples of the tools available to our judicial system in exposing fraudulent claims in any type of lawsuit.

Id. See also Price v. Price, 732 S.W.2d 316, 318 (Tex. 1987); Jilani v. Jilani, 767 S.W.2d 671, 674 (Tex. 1988) (Mauzy, J., concurring) (stating that the possibility of fraud exists in almost every lawsuit, especially those involving insurance, and that the American legal system is well equipped to detect fraud or collusion).

78. *See* Moulton v. Moulton, 309 A.2d 224 (Me. 1973), stating that:

> A generalized policy concern to prevent fraud or collusion . . . [i]s insufficiently weighty to render tolerable the basic unfairness and inequity inhering in the denial of a remedy to one who has suffered wrong at the hands of another . . . [the courts should] not have so little trust in the general ethics and honor of our citizenry, and in the abilities of our judges and jurors to discern the genuine from the spurious, that they must take refuge in [this] kind of unselective overkill.

Id. at 229. *See also* Nocktonick v. Nocktonick, 611 P.2d 135, 142 (Kan. 1980).

79. PROSSER AND KEETON, *supra* note 8, at 905; Gelbman v. Gelbman, 245 N.E.2d 192 (N.Y. 1969); Freehe v. Freehe, 500 P.2d 771 (Wash. 1972).

80. WILLIAM PROSSER, TORTS § 116, at 889 (3d ed. 1964).

family members.[81] Upon closer examination, this argument loses its persuasive force. Property and contract actions have always been allowed between family members without worry for the financial well-being of other family members.[82] Some of the most bitter family disputes are over property.[83] No apparent distinction exists between these actions and tort actions. Further, family finances remain vulnerable to suits brought by strangers for a parent's negligent act.[84] One of the consequences of permitting recovery in legal actions is that when a defendant is held liable for damages, the family finances are depleted. It does not seem logical for an injured stranger to get priority over an injured family member with respect to compensation from family finances. The only feature which distinguishes a parent-child suit from a parent-stranger suit is that the plaintiff-child is related to the other children whose interests would be adversely affected. This factor alone neither makes the child any less deserving of compensation nor the siblings any more deserving of protection.[85]

The fourth justification for parental immunity is the possibility that parents may inherit their child's recovery through intestacy.[86] This argument is contingent on the condition that the child dies before the parent and that the parent is the child's beneficiary according to state intestacy laws. It hardly seems equitable that a possibility as remote as this would force a child sexual abuse victim to go uncompensated.[87] Furthermore, if the non-abusive parent had paid the recovery from his or her own assets, any recovery would be a return as opposed to a profit.[88] Lastly, judicial avenues exist that would allow recovery for the child, and, at the same time, forbid the parent from receiving the child's award through intestacy.[89]

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81. Roller v. Roller, 79 P. 788, 789 (Wash. 1905).

82. *See generally* Preston v. Preston, 128 A. 292 (Conn. 1925) (allowing a child's suit against her parents to set aside a certain trust deed and to require an accounting of certain wills and trusts); King v. Sells, 75 P.2d 130 (Wash. 1938) (allowing and upholding a suit by children against their mother for converting the children's gifts into cash and unwisely investing the money).

83. *See* McCurdy, *supra* note 31, at 1075. McCurdy refutes the notion that actions for property will not disturb the family relations, whereas an action for personal injuries will. *Id.* McCurdy describes this notion as "baseless." *Id.*

84. Sneed v. Sneed, 705 S.W.2d 392, 397 (Tex. Ct. App. 1986). The *Sneed* court could not understand "why a child may not be compensated for an injury by his parent while a stranger will be allowed to deplete the 'family exchequer.'" *Id.*

85. *See* Hollister, *supra* note 41, at 499.

86. Roller v. Roller, 79 P. 788, 789 (Wash. 1905).

87. *See* Gibson v. Gibson, 479 P.2d 648 (Cal. 1971) (en banc). The remoteness of this possibility rests in the fact that it is conceivable that the child had spent all of the compensatory funds. *See also* Hollister, *supra* note 41, at 497.

88. *See* Hollister, *supra* note 41, at 497.

89. One possibility would be for the court to establish a formal trust for the award that would at no time benefit the culpable parent. This mechanism has already been suggested as a way to discourage both collusive suits and parental conversion of the child's award. Note, *The "Reasonable Parent" Standard: An Alternative to Parent-Child Tort Immunity*, 47 U. COLO. L. REV. 795, 816

The fifth rationale given by courts in justifying parental immunity is that the doctrine preserves a parent's inherent authority to discipline and control his or her child.[90] Parents fear that judges or juries may substitute their own hindsight for unorthodox parental disciplinary measures.[91] This is the most persuasive of the rationales, and, to an extent, it has been afforded constitutional protection.[92] However, parents do not enjoy complete and unbridled discretion in raising their children.[93] Courts routinely intervene when a parent's conduct is criminal or when a child's physical or mental health is endangered.[94] This court intervention is justified by the state's strong interest in preserving the well-

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(1976).

For example, the court could impose a constructive trust on the award. A constructive trust is a remedial device that is instituted to correct those instances when a party has been unjustly enriched. Paul G. Haskell, *Preface* to WILLS, TRUSTS AND ADMINISTRATION 302 (1987). A constructive trust works by declaring that the unjustly enriched person shall be a constructive trustee for an unjustly deprived person, and the court directs that legal title be transferred to the deprived party. *Id.* Courts have used the constructive trust to bar murderers from receiving any type of inheritance from their victim's estate through intestacy. WILLIAM M. MCGOVERN, JR. ET AL., WILLS, TRUSTS AND ESTATES § 2.4, at 70 (1988). In this situation, the murderer becomes the constructive trustee for the person who would have received the property had the murderer predeceased the victim. Riggs v. Palmer, 22 N.E. 188, 190 (N.Y. 1989).

This mechanism can also be applied to those instances when a child has received a damage award from the non-abusive parent, but predeceases that parent, resulting in a possible intestacy award to the parent. In this situation, the unjustly enriched person would be the non-abusive parent, and the unjustly deprived person would be that person who would have received the award had the non-abusive parent predeceased the child. Here, the non-abusive parent would act as the trustee of the award for the benefit of that person who would have otherwise received the award. Consequently, the parent would not receive the benefit of inheriting the child's damage award. It should be noted that the constructive trust is just one of many possible mechanisms for the court to assure that a child-victim would be compensated without bestowing an unjustified monetary award upon a guilty parent.

90. *See* Turner v. Turner, 304 N.W.2d 786, 787 (Iowa 1981) (holding that at least outside the area of parental authority and discretion, unemancipated children are not barred by parental immunity from suing their parents for negligent torts).

91. *See Id. See also* Holodook v. Spencer, 324 N.E.2d 338, 345-46 (N.Y. 1974).

92. Bellotti v. Baird, 443 U.S. 622, 638 (1979) (recognizing a parent's right to be free of undue, adverse interference by the state); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (stating that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder").

93. *Prince*, 321 U.S. at 167 (stating that the state has a wide range of power to limit parental freedom and authority in matters affecting a child's welfare); Wisconsin v. Yoder, 406 U.S. 205, 233-34 (1972) (stating that "the power of the parent . . . may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens").

94. W. David Kiser, *Termination of Parental Rights-Suggested Reforms and Responses*, 16 J. FAM. L. 239, 242-44 (1978).

being of children, who are among the most vulnerable members of society.[95]

A parent-spouse who passively observes as the other parent abuses the child is surely endangering the child's physical and mental health. Even the importance of maintaining parental discretion cannot justify a rule which permits a child sexual abuse victim to remain uncompensated by a passive parent who allows the abuse to continue.[96] Furthermore, a parent's failure to intervene into his or her own child's sexual abuse stretches far beyond a mere unorthodox act of parental discretion. Allowing this continued sexual abuse cannot be categorized within the traditional classifications of parental authority.[97]

The sixth and final justification advanced for parental immunity is an analogy to interspousal immunity.[98] It also has been soundly rejected as a basis for supporting the parental immunity doctrine.[99] At common law, the relationship of husband and wife was viewed differently from that of parent and child. A woman's legal identity merged with that of her husband.[100] Therefore, individuals could not sue their spouses because to do so would have been analogous to suing themselves. This merger of legal identities did not occur between parent and child at the common law, as the child had a completely separate identity.[101] Consequently, the reasoning advanced for establishing interspousal immunity is not a valid basis for supporting the parental immunity doctrine.

It was not long after the states had fully accepted parental immunity that

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95. *Id.* at 243. When a state intervenes into family matters to protect its own interests, those interests will have to meet a strict scrutiny standard of review. *Id.* However, when a state intervenes into family matters to assert society's interest in protecting the well-being of children, the standard will be lessened due to the fact that children have some rights which are worthy of protection. *Id.* For example, children have been granted a "right of protection" which includes food, clothing, shelter, education, and freedom from physical abuse. *Id.* at 244.

96. *See* Hurst v. Capitell, 539 So.2d 264, 266 (Ala. 1989) (recognizing that child-victims need a right to redress wrongs in a civil action). Although the power residing in parents is very open-ended in nature, this power does not extend to those situations where there is public policy to the contrary, such as the sexual abuse of children. *See* Kiser, *supra* note 94, at 241 (citing Andrew Jay Kleinfeld, *The Balance of Power Among Infants, Their Parents and the State*, 4 FAM. L. Q. 410, 413 (1970)).

97. *See infra* notes 139-53 and accompanying text.

98. The doctrine of interspousal immunity provides that neither spouse may maintain a tort cause of action against the other for either personal or property torts. PROSSER & KEETON, *supra* note 8, at 901-02.

99. Signs v. Signs, 103 N.E.2d 743, 747 (Ohio 1852). Any analogy between parent-child immunity and husband-wife immunity fails because the legal merger of identities that exists with husband and wife is absent with parent and child. *Id.*

100. PROSSER & KEETON, *supra* note 8, at 901.

101. *See supra* notes 26-30 and accompanying text.

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states began to fashion qualifications and exceptions to the rule.[102] Of the states that originally adopted some form of the parental immunity doctrine, an increasing number have either partially or fully rejected the doctrine.[103]

B. Development of Parental Immunity in Indiana

The first Indiana case addressing the parental immunity doctrine was the 1901 case, *Treschman v. Treschman*,[104] in which a child brought suit against her stepmother for outrageous and inhumane physical abuse.[105] The stepmother disputed the sufficiency of the complaint by arguing that she stood *in loco parentis*[106] to the child and it was contrary to the policy of the law to allow the child's cause of action.[107] The Indiana Appellate Court rejected this argument and imposed liability on the stepmother for her outrageous and inhumane conduct.[108]

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102. *See generally* Robert A. Belzer, Comment, *Child v. Parent: Erosion of the Immunity Rule*, 19 HASTINGS L.J. 201 (1967).

103. *See supra* note 9 (discussing the present state of the parental immunity doctrine in those states that initially adopted the doctrine).

104. 61 N.E. 961 (Ind. Ct. App. 1901). In *Treschman*, a 13-year-old girl brought an action against her stepmother for assault and battery. *Id.* at 962. The complaint alleged that the stepmother grabbed the child by each side of the child's head and repeatedly jammed the child's head against a brick wall. *Id.* As a result of the stepmother's conduct, the child received permanent and incurable injuries. *Id.*

105. *Id.*

106. The term *in loco parentis* means "in place of a parent" and refers to a person who is charged with parental rights, duties, and responsibilities. BLACK'S LAW DICTIONARY 787 (6th ed. 1990).

> *In Loco Parentis* exists when a person assumes the responsibility to care and control a child in the absence of such care by the child's natural parents and in the absence of legal approval, and is temporary and not to be confused with a formal adoption which is permanent in nature. Griego v. Hogan, 377 P.2d 953, 955-56 (N.M. 1963).

107. *Treschman*, 61 N.E. at 962.

108. In affirming a judgment for the child, the *Treschman* court stated that:

> [i]t is not to be anticipated that acts so abhorrent to the family relation will be committed, but when they have been committed and have been committed malo animo, as here charged, and an injury inflicted which can never be compensated for thereafter through the family relation, howsoever exemplary it may be, courts should not hesitate to redress the wrong insofar as it may be redressed through an action for damages.

Id. at 963. The *Treschman* court also asserted that a step-parent is neither given the rights nor duties of a parent in raising a child. *Id.* Furthermore, a step-parent's marriage to the parent of an infant child does not alone place that parent *in loco parentis* to the child. *Id.* at 962 (citing Grossman v. Lauber, 29 Ind. 618 (1868)).

The court should be very careful in invading the privacy of the home or questioning the developing relationships of a household. *Treschman*, 61 N.E. at 963. However, these interests should not be asserted to allow a parent to avoid liability flowing from a "palpable wrong." *Id.* Criminal liability for assault and battery exists for those parents who physically injure their children. *Id.* (citing Hornbeck v. State, 45 N.E. 620 (Ind. Ct. App. 1896)).

Although *Treschman* involved an action by a child against her stepparent, the court briefly discussed the application of parental immunity to suits between children and natural parents.[109] The court concluded that instances may exist when a child is permitted to maintain a tort action against a natural parent.[110]

Despite the reasoning of *Treschman* that would allow a child to sue a natural parent, Indiana applied full parental immunity for the first time in 1924, in *Smith v. Smith*.[111] The *Smith* case involved an action by a son against his father for violence inflicted on the son and for the father's refusal to send the son to school.[112] The *Smith* court held that a minor child could not sue a parent for damages arising out of the parent's tortious acts while the child is unemancipated and a member of the parent's family.[113] The main justification cited by the *Smith* court was the importance of parental control during the child's minority.[114]

It was not until 1974, in *Vaughan v. Vaughan*,[115] that the Indiana court again considered the parental immunity doctrine. In *Vaughan*, a grandfather brought suit on behalf of his four-year-old grandson against the child's parents to recover for injuries the child sustained while visiting a cemetery with his parents.[116] The suit alleged that the boy's parents were negligent in supervising the child.[117] In retaining the parental immunity doctrine and

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109. *Treschman*, 61 N.E. at 963.

110. *Id.* The *Treschman* court noted that "there may be good ground for questioning an infant child's right of action against its father or against the mother, as head of the family, but we are not prepared to say that in no case should such an action be allowed." *Id.*

111. 142 N.E. 128 (Ind. Ct. App. 1924).

112. *Id.* The complaint brought by the child was in two paragraphs. *Id.* The first paragraph was based on acts of personal violence which the child suffered at the hands of his father while he was a member of his father's family. *Id.* The violent acts were alleged to have occurred over the course of many years and were characterized as "cruel, inhuman, excessive, unreasonable, unwarranted, and malicious." *Id.* The second paragraph of the complaint alleged that the father was neglectful in failing and refusing to send the son to school, or alternatively, in failing to provide for the child's education while the child was still a minor. *Id.* The son claimed that the father's refusal to provide the child with an education violated the laws of the state by unlawfully depriving the child of an education. *Id.*

113. *Id.*

114. *Id.* at 129. The *Smith* court stated that:

> [f]rom our knowledge of the social life of today, and the tendencies of the unrestrained youth of this generation, there appears to be much reason for the continuance of parental control during the child's minority, and that such control should not be embarrassed by conferring upon the child a right to civil redress against the parent, under the circumstances stated in the question we are now considering.

Id.

115. 316 N.E.2d 455 (Ind. Ct. App. 1974).

116. *Id.* at 456.

117. *Id.*

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dismissing the child's action, the *Vaughan* court expressed an interest in preserving the peace and harmony of the family.[118] Additionally, the court reinforced the parental authority rationale set forth by the *Smith* court.[119] However, the court also noted that situations may exist when Indiana courts should refrain from applying the parental immunity doctrine.[120] Just as in *Treschman*, the discussion in *Vaughan* lends support to the view that the parental immunity doctrine in Indiana is not absolute.

In 1982, in *Buffalo v. Buffalo*,[121] a mother and child brought an action against the child's father to recover for injuries the child sustained when attacked and bitten by the father's dog.[122] Relying on the absence of a possible disruption to the family harmony, the *Buffalo* court held that the parental immunity doctrine would not preclude a suit by an unemancipated minor against a negligent, noncustodial parent where the marriage of the child's parents was dissolved prior to the child's injury.[123] The court articulated Indiana's main policy justification for parental immunity when it stated that parents should be vested with control over their children during minority and must be free to discipline and control their children without fear of being sued.[124] The *Buffalo* court also stressed the importance of preserving family harmony but noted that situations exist when this rationale will not justify applying parental immunity.[125] Like *Vaughan*, *Buffalo* supports the Indiana courts' apparent willingness to refrain from applying the parental immunity doctrine when justifications for the doctrine are not present.

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118. *Id.* at 456-57. While adhering to the family harmony justification, the *Vaughan* court rejected the justification that litigation between parent and child would serve to spawn fraud and collusion, even where insurance was involved. *Id.* at 456.

119. *Id.* at 457.

120. Vaughan v. Vaughan, 316 N.E.2d 455, 457 (Ind. Ct. App. 1974). The *Vaughan* court stated that, "under extreme circumstances the immunity may not exist, however, a failure to supervise, as in this case, would not be sufficient, in our opinion to qualify." *Id.*

121. 441 N.E.2d 711 (Ind. Ct. App. 1982).

122. *Id.* In *Buffalo*, the child's parents were divorced for three years before the child received his injuries. *Id.* at 712. The mother had custody of the child, but the father retained reasonable visitation rights along with the responsibility of paying child support and medical expenses for the child. *Id.* While visiting his father, the child suffered permanent injuries when he was attacked by the father's dog. *Id.* The child sued his father for the personal injuries, and the mother sued for medical expenses and lack of the child's services. *Id.*

123. *Id.* at 714. The *Buffalo* court noted that in this instance "[t]he domestic peace and tranquility of the family already has been broken . . . ." *Id.*

124. *Id.* at 712. The *Buffalo* court stated that "[f]rom our knowledge of the social life of today, and the tendencies of the unrestrained youth of this generation, there appears to be much reason for the continuance of parental control during the child's minority . . . ." *Id.* (citing Smith v. Smith, 142 N.E.2d 128, 129 (Ind. Ct. App. 1924)).

125. *Buffalo*, 441 N.E.2d at 713.

Hansen: An Indiana Approach to the Emerging Passive Parent Action

In two recent cases involving child sexual abuse by a parent,[126] the Indiana Supreme Court held that where the issue of parental privilege has not been raised, the parental immunity doctrine will not bar a child's suit based on the intentional felonious conduct of an abusive parent.[127] The court declined to justify its adoption of this exception, and merely stated that parental immunity will not bar a claim based upon intentional felonious conduct absent an issue of parental privilege.[128] These holdings represent a long-awaited departure from a parental immunity doctrine that had remained unchanged for sixty-eight years. The significance of this change is that it is an indication of Indiana's willingness to conform its judicial decisions when previous policy reasons no longer support present situations. A passive parent action likewise exemplifies a cause of action that should not be barred by outdated policy justifications.

In a case where a sexually abused child is suing the child's non-abusive parent, the required intentional felonious conduct is not present because the failure to report abuse is a misdemeanor and does not rise to the level of intentional felonious conduct.[129] Similarly, the failure to protect does not fit into the intentional felonious conduct exception to parental immunity because the exception also is based on negligence. Therefore, further abrogation of the parental immunity doctrine is necessary to allow a passive parent action in Indiana. There are no indications that Indiana would be hostile to further abrogation of the parental immunity doctrine, as evidenced by its continual erosion of the doctrine.

The court in *Barnes* refused to decide whether to generally abrogate parental immunity in negligence cases because the issue was not before the court.[130] However, the Indiana Legislature enacted legislation that serves to

126. Barnes v. Barnes, 603 N.E.2d 1337 (Ind. 1992). In *Barnes*, a 17-year-old girl brought an action against her father for multiple acts of rape and sexual molestation which occurred when the girl was 15-years-old. *Id.* at 1339. The girl further alleged that the molestation resulted in injuries including post-traumatic stress disorder. *Id.* Fager v. Hundt, 610 N.E.2d 246 (Ind. 1993). *Fager* involved an action by an adult daughter against her father for his alleged sexual abuse that occurred during the daughter's minority. *Id.* at 248.

127. *Barnes*, 603 N.E.2d at 1337; *Fager*, 610 N.E.2d at 246.

128. *Barnes*, 603 N.E.2d at 1342. In *Barnes*, a daughter sought compensatory and punitive damages from her father based on an alleged assault and rape. *Id.* at 1339. *See Fager*, 610 N.E.2d at 248.

129. Indiana Code § 31-6-11-20 makes it a class B misdemeanor for a person, who has reason to believe such abuse or neglect exists, to knowingly fail to report his or her belief to the local child protection service or law enforcement agency. IND. CODE ANN. § 31-6-11-20 (West 1979).

130. *Barnes*, 603 N.E.2d at 1341. The court noted that:

> [d]etermination of the present appeal, however, does not require us to decide whether to generally abrogate the immunity in parental negligence cases. Principles of judicial restraint counsel to the contrary. In the case before us, the plaintiff's action is not predicated upon a claim of parental negligence, but rather alleges intentional felonious

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partially abrogate parental immunity.[131] Indiana Code Section 34-4-40-3 provides that a motor vehicle operator who is not being paid is not liable for damages arising from injuries to certain designated family members, including children, unless caused by wanton or willful misconduct.[132] Therefore, both case law and legislation demonstrate that Indiana may be willing to further abrogate the parental immunity doctrine.

C. Application of Parental Immunity to Suit Against A Passive Parent

Previous Indiana cases that have applied the parental immunity doctrine have justified their decisions by citing two primary policy justifications: 1) the importance of upholding parents' rights to exercise authority and discipline over their children; and 2) the importance of preserving peace and tranquility in the family.[133] When these policy justifications cease to exist, one Indiana court has indicated that the parental immunity doctrine will no longer be applicable.[134] In a passive parent action, the above two justifications for the parental immunity doctrine are not present, and the doctrine should not act as a barrier to such a suit.

First, a parent's authority to discipline does not extend to situations that endanger the health and life of the parent's child. A parent's passive refusal to acknowledge abuse and prevent the other parent from sexually abusing the child endangers the physical and mental well-being of that child.[135] Other means that courts can utilize exist to assure that parents will retain the power and ability to reasonably discipline their children. One such way to acknowledge the importance of the parental right to reasonably discipline their children is to require that the non-abusive spouse's failure to report, warn, or protect be proven by a "clear and convincing" standard instead of a "mere preponderance"

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conduct.

Id.

131. IND. CODE ANN. § 34-4-40-3 (West Supp. 1993).

132. *Id.* This statute has been interpreted as creating an exception to the parental immunity doctrine in Indiana. Farmers & Merchants State Bank v. Norfolk & Western Ry. Co., 673 F. Supp. 946, 949 (N.D. Ind. 1987).

133. *See supra* notes 114, 115-19 and accompanying text.

134. Buffalo v. Buffalo, 441 N.E.2d 711, 713 (Ind. Ct. App. 1982) (refraining from applying the parental immunity doctrine when the familial harmony was already disturbed).

135. Childhood sexual abuse can create many problems for a child as that child grows older. Some of these problems include depression, anger and hostility, poor self-esteem, feelings of isolation and stigma, marital and relationship problems, and difficulty in trusting others. David Finkelhor & Angela Browne, *Assessing the Long-Term Impact of Child Sexual Abuse: A Review Conceptualization*, *in* HANDBOOK *supra* note 2, at 55-57. Many sexual difficulties are also present including frigidity, vaginismus, inability to tolerate sexual arousal, and flashbacks. *Id.* at 57. Additionally, childhood sexual abuse is cited as a background factor for drug and alcohol abuse and prostitution. *Id.*

of the evidence. In fact, one court already requires a clear and convincing standard when a child sues a parent in a sexual abuse case.[136]

Secondly, in a situation where a child is being abused by a parent while the other parent fails to stop the abuse, the cherished family harmony no longer exists. Courts should not be expected to preserve familial harmony in a setting where a parent is using his or her own child for continuous sexual satisfaction while the other parent allows the sexual abuse to continue. According to *Buffalo*, when the domestic peace and tranquility of the family has been broken, the parental immunity doctrine is no longer applicable.[137]

As the traditional justifications for the parental immunity doctrine are absent, no reason exists to prevent a passive parent action. Furthermore, Indiana's willingness to partially abrogate the parental immunity doctrine shows its reluctance to universally apply parental immunity without closely scrutinizing the facts of each particular case.[138] This indicates that Indiana may be willing to abrogate parental immunity even further if presented with a factual situation where the policy justifications are not strong enough to justify continued adherence. Over the years, states have created many different exceptions when abrogating the parental immunity doctrine.

D. Exceptions to Parental Immunity

In 1963, in *Goller v. White*,[139] Wisconsin became the first jurisdiction to partially abrogate the parental immunity doctrine and allow a child-parent tort suit.[140] The *Goller* court held that the parental immunity doctrine should be abrogated in negligence cases except where the alleged negligent act involved an exercise of: 1) parental authority over the child; or 2) ordinary parental discretion with respect to the provision of food, clothing, housing, medical and

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136. Hurst v. Capitell, 539 So. 2d 264 (Ala. 1989). The *Hurst* court stated:

> [i]n the interest of preserving the unqualified right of parents to reasonably discipline their children, we do deem it appropriate, however, to require that the proof of alleged sexually abusive conduct be tested under a "clear and convincing" standard, as opposed to a mere "substantial evidence" standard. Because we are restricting this exception to the general rule to cases involving "sexual abuse," and requiring a "clear and convincing" standard of proof, we do not perceive of our recognition of this narrow exception as posing an undue risk of limiting the parents' legitimate role in the disciplining of their children.

Id. at 266.

137. *Buffalo*, 441 N.E.2d at 713.

138. *See supra* note 124 and accompanying text.

139. 122 N.W.2d 193 (Wis. 1963).

140. *Id.* at 198. In *Goller*, a son sued his father in negligence for allowing the child to ride on the drawbar of a tractor where his leg became caught on a wheel bolt and suffered serious injury. *Id.* at 193.

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dental services, or other care.[141] In creating these exceptions, the *Goller* court declined to explain its reasoning.

Although the *Goller* court failed to articulate the reasoning behind its parental authority and discretion exceptions, other courts have given theoretical justification for the *Goller* rule.[142] In *Felderhoff v. Felderhoff*, the Texas Supreme Court reasoned that the establishment and maintenance of "peace, tranquility, and discipline in the home" dictates that parents retain a high level of parental authority.[143] In addition, the *Felderhoff* court stated that normal parental duties may be seriously impaired if discretionary leeway, through the *Goller* exceptions is not allowed for parents.[144] According to the Wisconsin Supreme Court in *Lemmen v. Servais*,[145] the two exceptions created by *Goller* are a means of allowing parents to perform those duties which society requires of parents.[146] An additional rationale for the *Goller* exceptions, advanced in *Foldi v. Jeffries*,[147] was a reluctance to allow juries to second-guess a parent's exercise of parental authority or provision of necessities and to substitute their own views after only a brief view of the family situation.[148]

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141. *Id.* at 198.

142. Foldi v. Jeffries, 461 A.2d 1145, 1152 (N.J. 1983) (holding that although parental immunity would bar a cause of action alleging negligent supervision, it does not protect a parent who has acted willfully or wantonly in failing to watch over his or her child); Felderhoff v. Felderhoff, 473 S.W.2d 928, 933 (Tex. 1971) (holding that parental immunity did not bar a son's action against his father when his father accidentally engaged farm machinery which the son was cleaning within the sphere of the son's employment and outside the sphere of parental duties and responsibilities); Lemmen v. Servais, 158 N.W.2d 341, 343 (Wis. 1968) (holding that parents were not liable for negligently failing to properly instruct their child how to exit a bus and cross the highway because the parents were exercising ordinary parental discretion with respect to the care of their child).

143. *Felderhoff*, 473 S.W.2d at 933.

144. *Id.* According to the *Felderhoff* court, normal parental duties include the provision of a home, food, schooling, family chores, medical care, and recreation. *Id.* The *Felderhoff* court's main concern was that parental duties would be grossly impaired if parents' unintentional errors or ordinary negligence in performing these duties would subject the parents to lawsuits by their unemancipated children. *Id.*

145. 158 N.W.2d 341 (Wis. 1968). In *Lemmen*, a six-year-old brought suit against the driver of her school bus when she was struck by an automobile after getting off the bus. *Id.* at 342. The defendant filed a third-party complaint against the child's parents alleging that the parents were causally negligent regarding the safety of their child because they had failed to properly instruct the girl about how to leave the school bus and properly cross the street. *Id.* at 342-43.

146. *Id.* at 344. The *Lemmen* court upheld the trial court's decision that "the parents [could] be held negligent in any respect." *Id.* at 343. The court concluded that the child's parents were acting within the scope of a reasonable exercise of parental discretion with respect to the care of their child. *Id.* This care was considered just one of the legal obligations which are inherent in parenthood. *Id.*

147. 461 A.2d 1145 (N.J. 1983).

148. *Id.* at 1152. The *Foldi* court refused to believe that a court or jury has the ability to evaluate the highly subjective factors associated with rearing and disciplining children, without somehow displacing the parent's own individual philosophy. *Id.* The *Foldi* court was convinced

Despite these justifications, the *Goller* approach has met with much criticism. One criticism of this approach addresses the judiciary's inability to form a consistent interpretation as to the types of conduct that constitute parental authority.[149] As a result, application of the *Goller* approach has sometimes resulted in ambiguous or overly restrictive results.[150] For example, in Wisconsin, a six-year-old child who was injured while crossing a street was denied recovery from her parents because, by not telling her how to cross streets, the parents were exercising parental discretion.[151] In another case, a three-year-old child was injured while crossing the street after his mother left him while he was watching television.[152] In this case, the child was permitted to recover because the parent's conduct did not fall within any of the *Goller* exceptions, including the vague "other care" exception.[153] While these two cases appear similar, the apparent distinction is that in the first case, the parent failed to properly educate the child, whereas in the second case, the parent failed to properly supervise the child. At first glance, however, it seems as though either case could be categorized under the vague classification of "other care." These cases typify the ambiguity surrounding the *Goller* exceptions.

Another criticism of the *Goller* approach is that it allows parents to act negligently so long as they can categorize their conduct under one of the two

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that certain areas of activity within the family framework involving parental discipline, care, and control should remain free from "judicial intrusion." *Id.*

149. *See* Hollister, *supra* note 41, at 513-15.

150. Schmidt v. United States, 369 F. Supp. 64 (E.D. Wis. 1974). The *Schmidt* court found that the operation of a motor vehicle was not "other care" under the *Goller* standard, nor was it otherwise within the scope of everyday acts of upbringing. *Id.* at 66. Consequently, the court determined that parents could be held liable for injuries sustained by their children as a result of an accident caused by the alleged negligent operation of a motor vehicle by the parent when driving the children home from high school. *Id* at 66-67. *See also* Horn v. Horn, 630 S.W.2d 70 (Ky. 1982). In *Horn*, the court permitted an action by a child against his parent for injuries the boy sustained while riding a trail bike alongside his father. *Id.* at 71. The court held that the father was not entitled to parental immunity because the activity did not involve disciplining the child, nor was it an exercise of discretion in providing care and necessities which he as a parent was legally obligated to furnish. *Id.* at 72.

151. Lemmen v. Servais, 158 N.W.2d 341 (Wis. 1968). The *Lemmen* court stated that by failing to tell their child how to cross the street, the parents were exercising "ordinary parental discretion with respect to other care of their child." *Id.* at 343.

152. Thoreson v. Milwaukee & Suburban Transp. Co., 201 N.W.2d 745, 747 (Wis. 1972). In *Thoreson*, the child left the house and proceeded to run in front of a bus which struck the boy causing him severe brain damage. *Id.* The negligence was apportioned 60% to the bus driver and 40% to the child's mother. *Id.*

153. *Id.* at 753. *See also supra* text accompanying notes 139-41. For an example of the "other care" exception, see *supra* note 148.

exceptions.[154] If parents can classify their behavior under the ambiguous classifications of parental discretion or authority, then the parents can escape liability for otherwise culpable conduct. Despite these criticisms, the holding in *Goller* began a nationwide trend of abrogating parental immunity.[155] Today, a majority of states have either partially or fully abrogated the parental immunity doctrine.[156]

In 1971, in response to criticism of the *Goller* rule, California adopted the "reasonable parent" standard in *Gibson v. Gibson*.[157] In examining the issue before it, the court noted with approval the *Goller* court's partial abrogation of the parental immunity doctrine.[158] However, the *Gibson* court specifically rejected the *Goller* court's two absolute exceptions to non-immunity, noting that "within certain aspects of the parent-child relationship, the parent had 'carte blanche' [authority] to act negligently."[159]

Instead of adopting what the court viewed as the partially flawed *Goller* approach, the *Gibson* court adopted the "reasonable parent" standard.[160] The *Gibson* court reasoned that although a parent has the prerogative and duty to exercise authority over a minor child, this prerogative must be exercised within reasonable limits.[161] Advantages of this approach include the familiarity of the reasonableness standard to courts and juries and the standard's past success.[162]

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154. Gibson v. Gibson, 479 P.2d 648, 653 (Cal. 1971) (en banc) (rejecting the *Goller* approach stating that "the notion that if a parent can succeed in bringing himself within the 'safety' of parental immunity, he may act negligently with impunity" is intolerable); Hartman v. Hartman, 821 S.W.2d 852, 857 (Mo. 1991) (en banc) (criticizing the *Goller* exceptions because they "appear to give parents 'carte blanche' [authority] to act negligently with respect to their children," assuming the parents can classify their behavior under one of the two exceptions).

155. Chanse Mcleod, Jilani v. Jilani: *The Erosion of the Parental Tort Immunity Doctrine in Texas*, 28 HOUS. L. REV. 717, 719-20 (1991).

156. *See supra* note 9.

157. 479 P.2d 648 (Cal. 1971) (en banc). In *Gibson*, the plaintiff-son was riding with his father at night in a car which was towing a jeep. *Id.* at 648-49. The son's father negligently stopped the car and negligently ordered the son to get out and adjust the wheels of the vehicle that they were towing. *Id.* at 649. While doing so, the son was struck by another car and injured. *Id.*

158. *Id.* at 652. According to the court in *Gibson*, a parent must have the power to exercise certain authority over the child which may be considered tortious if exercised over anybody else. *Id.*

159. *Id.* at 652-53.

160. *Id.* at 653. The *Gibson* court stated that "although a parent has the prerogative and the duty to exercise authority over his minor child, this prerogative must be exercised within reasonable limits . . . . [t]hus, we think the proper test of a parent's conduct is this: what would an ordinarily reasonable and prudent *parent* have done in similar circumstances?" *Id.* (emphasis in original).

161. *Id.*

162. Carolyn L. Andrews, Comment, *Parent-Child Torts in Texas and the Reasonable Prudent Parent Standard*, 40 BAYLOR L. REV. 113, 125-27 (1988). Perhaps the most important characteristic of the reasonable parent standard is that it correctly recognizes that parents should have

The standard also allows juries the flexibility of taking into account such factors as differences in background, education, and wealth while providing adequate room for a high degree of parental deference so long as this deference is not abused.[163] Despite these advantages, the reasonable parent standard has also been criticized.

Critics of the reasonable parent standard assert that due to diversity, there is no such thing as a "reasonable prudent parent."[164] For example, Idaho has asserted that it would be impossible to make a single common standard applicable because of its geography, population, and the diversity of its citizens.[165] Another concern with the *Gibson* standard is that jurors will substitute their own views for what constitutes the reasonable parent.[166] Despite criticism, the *Goller* approach and the *Gibson* "reasonable parent" standard remain the dominant alternatives to the parental immunity doctrine.[167] It should be noted at this time, however, that a number of other alternatives exist.[168]

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more discretion than others with respect to conduct toward their children and that traditional concepts of negligence cannot be blindly applied to the parent-child relationship. *Id.* at 125. At the same time, this standard acknowledges that recovery should be permitted when parental conduct falls below the standard of care required for a child's safety and protection. *Id.*

163. Carla Marcolin, Rousey v. Rousey: *The District of Columbia Joins the National Trend Toward Abolition of Parental Immunity*, 37 CATH. U. L. REV. 767, 788-89 (1988). Marcolin states that a reasonable parent standard will expect defendant parents to conform their parental behavior to a reasonable standard relative to similarly situated parents. *Id.* at 788. Proof of this is that the reasonableness standard has thus far been applied to most defendants who come before the various courts in tort actions. *Id.*

164. Pedigo v. Rowley, 610 P.2d 560, 564 (Idaho 1980). In *Pedigo*, the Idaho Supreme Court stated that it would be impossible and impractical to adopt a single standard for its citizens because of the "diversity in [their] religious, ethnic and cultural backgrounds." *Id.*

165. *Id.*

166. Anderson v. Stream, 295 N.W.2d 595, 602 (Minn. 1980) (Rogosheske, J., dissenting). In his dissent, Judge Rogosheske stated that "jury verdicts based on a reasonable parent standard in this value-laden area do not inspire public confidence, since they would necessarily substitute parental judgments based upon the individual juror's view of proper or ideal child-rearing practices." *Id.*

167. *See* KARP & KARP, *supra* note 15, at 397-409.

168. New York has adopted yet another standard. In New York, a child may sue a parent only if the parent breached a duty that would be owed to the world at large, not just to the child. Holodook v. Spencer, 324 N.E.2d 338, 346 (N.Y. 1974) (holding that an infant plaintiff had no cause of action against a parent for negligent supervision in a case where no duty was ordinarily owed, apart from the family relation).

Another limitation placed on the parental immunity doctrine is partially abolishing the doctrine in a factual situation involving an auto accident without specifically addressing parental immunity in other circumstances. Silva v. Silva, 446 A.2d 1013, 1016 (R.I. 1982) (holding that suits between unemancipated children and their parents for injuries suffered as a result of negligent operation of a motor vehicle are not barred by the parental immunity doctrine); Cates v. Cates, 588 N.E.2d 330, 335 (Ill. App. Ct. 1992) (holding that a parent was not immune from a suit brought by his child

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III. Current State of the Law Concerning Passive Parent Actions

A. Establishing a Duty on the Non-Abusive Parent

Once the parental immunity doctrine has been at least partially abrogated to allow a passive parent action, the next step for a sexually abused child who wishes to sue the nonabusive, passive parent is to state a cause of action upon which relief can be granted. To do this, the child will have to prove the four elements of a negligence suit.[169] Of the four elements, the most difficult to establish in a passive parent action is the duty of the non-abusive parent. The sexually abused child will assert that the non-abusive parent had a duty to report the abuse to the proper authorities and/or a duty to protect the child from the abusive parent.

1. Duty to Report

Indiana Code Section 31-6-11-7 requires that persons report any suspected or known abuse or neglect of a child.[170] However, one Indiana appellate court, concerned about the causation requirement of negligence suits, has held that this statute does not give rise to a private cause of action.[171] Recent courts, however, outside Indiana, have begun to recognize that a parent's negligence in failing to report known sexual abuse of his/her child is the proximate cause of continuing abuse.[172]

Furthermore, at least one state has created a statutory reporting duty

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alleging personal injury proximately caused by the parent's negligent operation of a motor vehicle). Other states have abandoned parental immunity to the extent that there is liability insurance. Ard v. Ard, 414 So. 2d 1066, 1067 (Fla. 1982) (holding that an unemancipated minor child could bring suit against his mother for damages sustained from her alleged negligence in unloading the child from a motor vehicle, but only to the extent of mother's insurance coverage). Lastly, seven states chose never to adopt parental immunity. *See supra* note 41.

169. The four elements which constitute a negligence cause of action are: duty, breach of that duty, proximate cause, and injury. For a detailed discussion of these four elements, see PROSSER AND KEETON, *supra* note 8, at 164-65.

170. IND. CODE ANN. § 31-6-11-3 (West Supp. 1994).

171. Borne v. Northwest Allen County Sch. Corp., 532 N.E.2d 1196, 1203 (Ind. Ct. App. 1989). The maintenance of a private cause of action "would raise substantial questions of causation since the failure [to report] would not in the direct sense be a proximate cause of the injury to the child." *Id.* The Indiana Supreme Court has yet to consider whether this section would confer a private cause of action.

172. Richie v. Richie No. 91-03635, (Scott County Dist Ct. Minn. Oct. 2, 1992), *reported in* TRIAL, Jan. 1993 at 16, 109. Additionally, in a Texas case decided in a bench trial, a judge awarded two sisters damages against their mother and stepfather for a five year pattern of sexual abuse. Hansen, *supra* note 11, at 16.

specifically designed to protect those in society who are among the most vulnerable.[173] The Minnesota Vulnerable Adult Act requires health care professionals to report the abuse of vulnerable adult patients.[174] The purpose of this Act is to protect a limited class of persons from their own inexperience, lack of judgment, inability to protect themselves, and inability to resist pressure.[175] An analogy can be drawn between vulnerable adult patients and vulnerable young children. A child is just as vulnerable to the child's parent as a patient is to the patient's institution. Interestingly, the Vulnerable Adult Act confers a private cause of action to abused adults for healthcare professionals who fail to report known abuse.[176] Just as the Vulnerable Adult Act allows a private cause of action for vulnerable adults, a cause of action should be established for vulnerable children who are victims of incestual sexual abuse.

Unlike Indiana, other states have expressly stated in their reporting statutes that civil liability applies when a failure to report is the proximate cause of further abuse.[177] This offers a great societal advantage because it takes the guesswork out of determining whether a civil cause of action will be allowed. A similar statute in Indiana conferring a private cause of action to abused children against a non-abusive parent for failing to report sexual abuse is necessary to protect and compensate sexual abuse victims.[178]

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173. Vulnerable Adult Act, MINN. STAT. § 626.557 (1982 & Supp. 1983).

174. *Id.* The public policy of the Vulnerable Adult Act is expressed in its first subdivision: "[t]he legislature declares that the public policy of this state is to protect adults who, because of . . . [reliance on] institutional services, are particularly vulnerable to abuse or neglect." *Id.*

175. Thelen v. St. Cloud Hosp., 379 N.W.2d 189, 193 (Minn. Ct. App. 1975) (citing Scott v. Independent Sch. Dist. No. 709, 256 N.W.2d 485, 488-89 (Minn. 1977)).

176. *Thelen*, 256 N.W. 2d at 193. In *Thelen*, the plaintiff, a vulnerable adult, brought suit against a hospital after it failed to report known abuse by one of its health care professionals upon the plaintiff. *Id.* at 190-91. The court held that the Act imposes absolute liability for damages caused by the violator's failure to report abuse of vulnerable adults. *Id.* at 194.

177. ARK. CODE ANN. § 12-12-504(b) (Michie 1987 & Supp.1993); 22 COLO. REV. STAT. ANN. § 19-3-304(4)(b) (1986 & Supp. 1990); IOWA CODE ANN. § 232.75(2) (West 1985 & Supp. 1991); MICH. COMP. LAWS § 722.633 13(1) (West 1993 & Supp. 1994-95); MONT. CODE ANN. § 41-3-207(1) (1994); N.Y. SOC. SERV. § 420(2) (McKinney 1992); R.I. GEN. LAWS § 40-11-6.1 (Michie 1990) (imposing civil liability for damages proximately caused by failure to report child abuse). For further discussion on civil liability for failing to protect, see Jody Aaron, *Civil Liability for Teachers' Negligent Failure to Report Suspected Child Abuse*, 28 WAYNE L. REV. 183, 191-207 (1981) (discussing theories of civil liability for not reporting child abuse and neglect).

178. *See supra* note 17.

2. Duty to Protect

Historically, no general duty existed to protect others from harm.[179] However, over the years courts have carved out many exceptions to this general rule.[180] In particular, courts have created a duty to protect others when a "special relationship" exists between the defendant and a third party who injures the plaintiff.[181] This "special relationship" is well illustrated in *Tarasoff v. Regents of University of California*.[182] The court in *Tarasoff* held that a psychiatrist who determined that his patient presented a serious danger to an identifiable person incurred an obligation to use reasonable care to protect the foreseeable victim.[183] The court grounded its decision on the foreseeability of the danger to the third party victim.[184] The foreseeability factor was determined by the special relationship existing between the psychiatrist and the patient.[185]

The duty to protect created in *Tarasoff* was extended in *McIntosh v. Milano*.[186] The *McIntosh* court held that psychiatrists have a duty to take whatever steps are reasonably necessary to protect an intended or potential victim from their patient when they determine, or should determine, that the

179. L.S. Ayres & Co. v. Hicks, 40 N.E.2d 334, 337 (Ind. 1942), *reh'g denied*, 41 N.E.2d 195 (1942). "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." RESTATEMENT (SECOND) OF TORTS § 314 (1965). *See also* Osterlind v. Hill, 160 N.E. 301, 302 (Mass. 1928) (holding that even if the defendant willfully, wantonly, and recklessly chose to ignore his customers' cries for help, he owed no duty to come to their aid); Robertson v. Deak Perera (Miami), Inc., 396 So. 2d 749, 750 (Fla. Dist. Ct. App. 1981) (stating that the mere knowledge of the plaintiff's danger did not create a duty).

180. PROSSER & KEETON, *supra* note 8, at 906.

181. *See* RESTATEMENT (SECOND) OF TORTS §§ 314-19 (1965).

182. 551 P.2d 334 (Cal. 1976) (en banc). In *Tarasoff*, an outpatient allegedly confided to his psychiatrist his intention to kill a third party. *Id.* at 339. The psychiatrist warned no one of the outpatient's intention to kill, and the outpatient later killed the threatened third party. *Id.* at 340. Subsequently, the third party's parents sued the psychiatrist for failing to confine the outpatient and for failing to warn the third-party of the danger. *Id.*

183. *Id.* at 347-48. Reasonable care meant only warning the third party or the police of the possible danger. *Id.* at 347. The *Tarasoff* court fashioned a test to determine when it should make an exception to the general no-duty rule. *Id.* Of the several factors balanced in the test, the court placed the greatest weight on foreseeability, especially when combined with a relationship that places the defendant in a position to avoid the injury by controlling the actor or warning the plaintiff of the danger. *Id.* at 342-43.

184. *Id.* at 346-47.

185. *Id.*

186. 403 A.2d 500 (N.J. Super. Ct. Law Div. 1979). In *McIntosh*, a woman's estate brought a claim for wrongful death against a psychiatrist whose patient murdered the woman, alleging that although the patient never directly threatened to harm the woman, the psychiatrist, based on the information at his disposal, should have known that the patient posed a threat to her. *Id.* at 505.

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patient presents a probability of danger to the victim.[187] The *McIntosh* court reasoned that the social benefits of imposing a duty to protect on psychiatrists outweighed the costs of a possible breach of the psychiatrist-patient relationship.[188] As a result of the *Tarasoff* and *McIntosh* cases, psychiatrists have a duty to protect an identifiable third party from a patient when the psychiatrist knows, or should know, that the patient presents a risk of danger to the third party.

The same reasons given in *Tarasoff* and *McIntosh* for creating a duty to protect and warn can be applied in passive parent actions to create a duty on a non-abusive parent to protect the child from the abusive parent. First, the victim of the abuse is surely identifiable to the non-abusive parent. Second, the relationship of husband and wife is such that the non-abusive parent should be capable of foreseeing the abusive parent's harm to the child. Indeed, there are many cases in which a parent has knowledge that the other parent is sexually abusing the child.[189] In some situations, the child tells the non-abusive parent that (s)he is being sexually abused by the other parent, but the non-abusive parent fails to acknowledge the abuse.[190] In other situations, the parent may be put on notice by circumstantial evidence of the sexual abuse.[191] With knowledge of previous or present abuse, it follows that the non-abusive parent should foresee that abuse will continue absent intervention.

Lastly, it would seem that an even stronger incentive exists for imposing a duty to protect on a parent than a psychiatrist, given the parent's moral

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187. *Id.* at 511-12.

188. *Id.* at 512-13.

189. This note does not propose imposition of liability on a parent who has no reason to know that the parent's spouse is sexually abusing the child. Rather, this note requires that the non-abusive parent have a reasonable cause to suspect that the child is being sexually abused by the other parent. "Reasonable cause to suspect" exists when a person of ordinary intelligence would decide that "there is a reasonable basis to suspect that child [sexual] abuse has occurred." State v. Hurd, 400 N.W.2d 42, 45 (Wis. Ct. App. 1986).

190. Hansen, *supra* note 11, at 16. According to the child-victim's attorney, Kathy Tatone, "[t]here are a lot of situations where mothers knew or should have known of the abuse but did nothing to stop it. This seems to be fairly common in incest families." Julie Gannon Shoop, *Mother Liable for Failure to Protect Child from Sexual Abuse*, TRIAL, Jan. 1993, at 109.

In other situations, parents acknowledge the abuse but refuse to take any action. *See* State v. Williquette, 385 N.W.2d 145 (Wis. 1986). *Williquette* involved the criminal prosecution of a mother who had been told of the abuse by her children and still failed to make an attempt to stop the abuse. *Id.* at 147. In *Williquette*, two children testified that they told their mother of the repeated physical and sexual abuse suffered at the hands of their father, but she "did not do anything about it." *Id.* at 148.

191. Richie v. Richie, No. 91-03635, (Scott County Dist. Ct. Minn. Oct. 2, 1992). The complaint in *Richie* alleged that the non-abusive spouse discovered her husband missing from their bed on several occasions and saw him coming out of the child's room. *Id.* *See also* Shoop, *supra* note 190, at 109.

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obligation to the child.[192] If a psychiatrist is liable for failing to protect an identifiable stranger from a known danger, it follows that a parent should be liable for failing to protect the parent's own child from a known danger.[193] The moral obligation that calls upon parents to protect their children from danger is just as strong, if not stronger than the obligation a psychiatrist has to an unknown third party.

Although a parent may have a moral duty to protect his or her child, this moral duty in and of itself is not sufficient to impose liability without an accompanying legal duty.[194] In the criminal context, there is a trend toward broadening the scope of liability in child abuse cases.[195] This is being done by finding a legal duty to protect one's children through the special relationship exception to the "no duty to act" rule.[196]

In *State v. Williquette*,[197] the Wisconsin Supreme Court upheld a mother's child abuse conviction as a result of her knowing failure to protect her children from her husband's abuse.[198] The court relied on the presence of the legal

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192. Knox v. Commonwealth, 735 S.W.2d 711, 712 (Ky. 1987) (stating that a mother's failure to intervene or take action to protect her child from the father's sexual abuse was morally objectionable).

193. *Id.* at 713 (Wintersheimer, J., dissenting). In his dissent, Wintersheimer stated that it "defie[d] common sense" to legislate a duty to report and prevent child abuse that applies to any non-parent who has care, custody, or control of a child, yet hold that a parent has no duty whatsoever to prevent the same abuse. *Id.*

194. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 183 (1972). LaFave and Scott state that "[f]or criminal liability to be based upon a failure to act it must first be found that there is a duty to act—a legal duty and not simply a moral duty . . . . [a] moral duty to take affirmative action is not enough to impose a legal duty to do so." *Id.*

195. State v. Adams, 557 P.2d 586 (N.M. Ct. App. 1976) (upholding the child abuse conviction of a father who failed to protect his 28 month-old daughter from her mother's abuse); Palmer v. State, 164 A.2d 467 (Md. 1960) (affirming the involuntary manslaughter conviction of a teenage mother who failed to protect her 20 month-old child from prolonged beatings inflicted by the mother's lover in the mother's presence). For a general discussion concerning the broadening scope of criminal liability for non-abusive parents, see Susan Smith Hudson, *The Broadening Scope of Liability in Child Abuse Cases*, 27 J. FAM. L. 697 (1989).

196. *See* Hudson, supra note 195, at 712; State v. Williquette, 385 N.W.2d 145 (Wis. 1986). In *Williquette*, a mother was charged with child abuse due to a knowing failure to protect the children from their father's physical and sexual abuse. *Id.* at 147. The children testified that their father sodomized them and required them to eat defecated material from the toilet bowl. *Id.* at 148. Additionally, there was evidence that the mother knew of some of the abuse, but she continued to leave the children with the father when she went to work. *Id.* at 147-48.

197. 385 N.W.2d 145 (Wis. 1986).

198. *Id.* at 155. The holding in *Williquette* was consistent with an earlier Wisconsin case. *See* Cole v. Sears, Roebuck & Co, 177 N.W.2d 866 (Wis. 1970) (citing 39 AM. JUR. *Parent and Child* § 46 (1942)). In *Cole*, the court held that:

> [i]t is the right and duty of parents . . . to protect their children, to care for them in sickness and in health, and to do whatever may be necessary for their care,

duty, created by the special relationship between the parent and the child, on the part of the mother.[199] In upholding the conviction, the court reasoned that "[t]he special relationship exception to the 'no duty to act' rule represents a choice to retain liability for some omissions, which are considered morally unacceptable."[200] The *Williquette* court also found that the defendant's conduct was a substantial factor which increased the risk of future sexual abuse of the child.[201]

A parent's moral obligation to protect his or her child may have led Indiana, in 1993, to place an affirmative duty on parents to protect their children and do whatever is necessary to ensure their care, maintenance, and preservation.[202] Clearly, ensuring a child's care, maintenance, and preservation includes taking steps to prevent and protect the child from an abusive spouse.

Whether a person may be held civilly liable to the victim of child sexual abuse when he or she knows of the abuse but fails to report it to authorities has been considered by the Indiana courts on one occasion, in *J.A.W. v. Roberts*.[203] The *J.A.W.* court applied a standard negligence test.[204] The

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> maintenance, and preservation, including medical attendance, if necessary. An omission to do this is a public wrong which the state, under its police powers, may prevent.

Cole, 177 N.W.2d at 869.

199. *Williquette*, 385 N.W.2d at 154. In these instances,

> "[t]he common law imposes affirmative duties upon persons standing in certain personal relationships to other persons-upon parents to aid their small children . . . . [T]hus a parent may be guilty of criminal homicide for failure to call a doctor for his sick child, a mother for failure to prevent the fatal beating of her baby by her lover . . . . "

LAFAVE & SCOTT, *supra* note 194, at 184.

200. *Williquette*, 385 N.W.2d at 151.

201. *Id.* at 150.

202. Fager v. Hundt, 610 N.E.2d 246 (Ind. 1993) (citing 59 AM. JUR. 2D, *Parent and Child* § 14 (1987)). The *Fager* court stated that "[i]t is the right and duty of parents to protect their children and to do whatever may be necessary for their care, maintenance, and preservation." *Id.* at 251. Other states have imposed a similar duty on parents. *See* Laser v. Wilson, 473 A.2d 523 (Md. Ct. Spec. App. 1984) (holding that the parental duty of maintaining the care and welfare of a child includes protection from known or obvious dangers); Holodook v. Spencer, 324 N.E.2d 338 (N.Y. 1974). In *Holodook*, the court noted that "[p]arents are obligated in accordance with their means to support and maintain their children" and to provide guidance or suffer consequences. *Id.* at 342. The court added that "the cases before us involve a parent's duty to protect his child from injury—a duty which not only arises from the family relation but goes to its very heart." *Id.* at 346.

203. 627 N.E.2d 802 (Ind. Ct. App. 1994). *J.A.W.* involved a 23 year-old adult who suffered physical and sexual abuse by his foster father. *Id.* at 806. The boy was taken into custody by the foster father when the boy was eight years old, and the abuse began a month later. *Id.* Six years later, the father began allowing other men to molest the boy. *Id.* The boy eventually left the house when he was 19 years-old and filed this suit a year later. *Id.* Two complaints were filed, the second of which alleged that the defendants had knowledge of the molestations, materially assisted

J.A.W. court was primarily concerned with establishing a duty on the part of the person who knew of the abuse but failed to report it to the authorities.[205] In determining whether a person owes a common law duty to another, the *J.A.W.* court first analyzed whether a special relationship existed between the plaintiff and the defendant.[206] Whether a special relationship existed was resolved by the level of interaction or dependency between the parties.[207]

The second factor considered by the *J.A.W.* court in determining whether one owes a common law duty to prevent harm to another was the reasonable foreseeability of the harm.[208] When analyzing the foreseeability element, the Indiana courts have generally concentrated on the reasonable foreseeability of both the victim and the type of harm inflicted on that victim.[209] In particular, the *J.A.W.* court held that continued sexual abuse is foreseeable if the defendant should have known that failure to intervene created an unreasonable risk of continued abuse.[210] However, the *J.A.W.* court was somewhat ambiguous in setting forth its analysis of the foreseeability requirement. The court stated that it will look at the "forces and human conduct" that would likely enter the situation and "weigh the dangers likely to flow from the challenged conduct in

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204. The tort of negligence is comprised of four elements: 1) a legal duty requiring the person to conform to a certain standard of conduct for the protection of others against unreasonable risks; 2) a breach of that duty owed by the defendant; 3) a reasonably close causal connection between the conduct and the resulting injury (proximate cause); and 4) actual loss or damage to the interests of another. PROSSER & KEETON, *supra* note 8, at 165.

Although the tort of negligence is ordinarily described in four elements, Indiana courts have combined the third and fourth elements, thus articulating the tort of negligence as three elements: 1) a duty on the part of the defendant to conform his conduct to a standard of care arising from his relationship to the plaintiff; 2) a failure of the defendant to conform his conduct to the requisite standard of care; and 3) an injury to the plaintiff proximately caused by the defendant's breach of duty. Webb v. Jarvis, 575 N.E.2d 992, 995 (Ind. 1991) (citing Miller v. Griesel, 308 N.E.2d 701, 706 (Ind. 1974)).

205. *J.A.W.*, 627 N.E.2d at 808-09.

206. *Id.* at 809. When the defendant's alleged negligence arises from a failure to act, then "the duty to act must arise from a special relationship between the parties." *Id.* The court will not impose an affirmative duty on the defendant to prevent harm to the plaintiff absent a special relationship. *Id.*

207. *Id.* at 809-10. Indiana courts have determined that a parent and child relationship constitutes a special relationship. Johnson v. Pettigrew, 595 N.E.2d 747 (Ind. Ct. App. 1992).

208. J.A.W. v. Roberts, 627 N.E.2d 802, 809, 811 (Ind. Ct. App. 1994).

209. Webb v. Jarvis, 575 N.E.2d 992, 997 (Ind. 1991). "The duty of reasonable care is not, of course, owed to the world at large, but rather to those who might reasonably be foreseen as being subject to injury by the breach of the duty." Thiele v. Faygo Beverage, Inc., 489 N.E.2d 562, 574 n.4 (Ind. Ct. App. 1986).

210. *J.A.W.*, 627 N.E.2d at 812. In *J.A.W.*, the court concluded that the defendants should have known that their failure to report the abuse created an unreasonable risk that the abuse would continue. *Id.* The court based this conclusion on the record which indicated that the defendants were aware of the foster father's sexual molestation of the young boy. *Id.*

light of these forces and conduct."[211] The court noted that the foreseeability of continued abuse weighs in favor of imposing a common law duty to report alleged child sexual abuse to the proper authorities.[212]

Public policy was the third factor considered by the *J.A.W.* court when deciding whether to impose a common law duty to protect.[213] The primary public policy considered was whether the legislature had codified a civil cause of action against an adult who knowingly fails to report child abuse.[214] The *J.A.W.* court concluded that public policy concerns counseled against the imposition of a common law duty to protect "under the facts of this case."[215] The fact that the *J.A.W.* court restricted its conclusion to the facts of that case shows that the Indiana courts may be willing to use public policy concerns to support the imposition of liability in a different factual situation.

Under *J.A.W.*, even where public policy does not support a common law duty to protect by reporting known sexual abuse, the existence of both a special relationship and foreseeability can themselves support such a common law duty.[216] Public policy is only one of three factors to consider in determining whether a common law duty exists. Public policy alone will not preclude Indiana from creating a common law duty to protect by reporting known sexual abuse. As long as two of the three factors are present, the jury will be called on to decide whether a duty existed.[217]

B. The Passive Parent Action in Other Jurisdictions[218]

Passive parent actions have arisen in only a few jurisdictions, but in a number of different factual scenarios. The first reported passive parent action

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211. *Id.*

212. *Id.*

213. J.A.W. v. Roberts, 627 N.E.2d 802, 809, 812-13 (Ind. Ct. App. 1994).

214. *Id.* at 813.

215. *Id.* The *J.A.W.* court expressed a particular concern with "extending a civil remedy to a victim of abuse or neglect against *all* persons who know of child abuse and fail to report child abuse . . . ." *Id.* (emphasis added). This note does not suggest that a civil remedy should be created for all those who know of child abuse and fail to report it. Rather, this note proposes to impose liability only upon a parent who knows the other parent is sexually abusing the child, yet fails to take measures to prevent the abusive parent from continuing to abuse the child.

216. In *J.A.W.*, the court refused to grant summary judgment for a defendant who could have foreseen continued abuse and possibly had a special relationship with the child-plaintiff. *Id.* at 813-14. The court added that whether a special relationship existed was a question of fact for the jury. *Id.* at 813.

217. *Id.*

218. No passive parent action has reached an appellate court. Therefore, a full, detailed discussion on the already decided passive parent actions is not possible. However, this section will give a brief description of those passive parent actions that have been decided at the trial level.

was *Richie v. Richie*.[219] In *Richie*, the mother admitted during the trial that she suspected her daughter was being molested, but claimed to have not known for sure.[220] After receiving her judgment, the child in *Richie* made a claim against her parent's homeowner's insurance company, seeking to recover the policy limits based on her mother's negligence.[221]

In Texas, a woman whose two pre-teen daughters were molested by their stepfather was found fifty percent liable for a judgment against the stepfather and mother.[222] The judge concluded that the mother had been put on notice of the stepfather's abuse and failed to take any corrective action.[223] Instead, the mother merely told the children to resist any further advances by the stepfather.[224] The children in this case have also made a claim against their mother's homeowner's insurance company.[225]

Similarly, a California judge, in a bench trial, found foster parents jointly and severally liable for the repeated acts of sexual molestation of their foster daughter by the foster father.[226] The foster mother was found negligent in not advising the authorities that her home was inappropriate for foster child placement.[227] She was also found negligent for failing to protect her foster

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219. No. 91-03635, (Scott County Dist. Ct. Minn. Oct. 2, 1992), *reported in* Julie Gannon Shoop, *Mother Liable for Failure to Protect Child from Sexual Abuse*, 29 TRIAL 16, 109 (Jan. 1993). In *Richie*, the mother of a woman who was molested by her father as a child was found jointly liable for part of a $2.4 million jury award against him. *Id.* The mother was found negligent for allowing the abuse to occur. *Id.*

220. *See* Hansen, *supra* note 11, at 16.

221. No. 91-03635, (Scott County Dist. Ct. Minn. Oct. 2, 1992), *reported in* Julie Gannon Shoop, *Mother Liable for Failure to Protect Child from Sexual Abuse*, 29 TRIAL 16, 109 (Jan. 1993). While the Richies' homeowners' insurance policy excluded coverage for intentional wrongdoing, it covered claims for negligence. *Id.* Since the Richies were jointly and severally liable for the $2.4 million judgment, the negligent based passive parent action against the mother gave the child victim an opportunity to recover the full amount from the insurance company. This is particularly important given that the Richies would be unable to pay the judgment out of their own assets. *Id.* At the time of this note's publication, the judgment against the Richies was being litigated with the Richies' insurance company, which defended the Richies in the case. *Id.*

222. *Id.*

223. *Id.* The judge did not say that the mother had actual notice of the abuse, just that she was put on constructive notice. *Id.*

224. *Id.*

225. *Id.* At the time of this note's publication, the children's judgment was being litigated with the mother's insurance company, which defended the mother in the case. *Id.*

226. National Union Fire Ins. Co. v. Lynette C., 279 Cal. Rptr. 394, 395 (1991). In *Lynette C.*, a child was placed in a foster home where she was sexually molested by the foster father while the foster mother did nothing to stop the abuse. *Id.* The court found that the mother knew, or should have known, that the father had a propensity to sexually molest children. *Id.* Furthermore, the court found that the mother was negligent in not protecting the child from the father's molestations. *Id.*

227. *Id.*

daughter.[228]

Finally, in Wisconsin, a jury found for two girls who had been sexually molested by their neighbor.[229] The defendants' insurer paid each plaintiff for the judgment, based on the neighbor's wife's negligent failure to warn and notify proper authorities of her husband's behavior.[230] Due to the novelty of passive parent actions, there are no further cases regarding its consideration or acceptance. The cases discussed in this Section clearly evidence the beginning of an acceptance of passive parent actions in a variety of jurisdictions across the country.

IV. Reforming Indiana's Parental Immunity and The Passive Parent Action

A. Suggested Reform of Parental Immunity in Indiana

A lawsuit brought on behalf of a sexually abused child against a parent for failing to protect the child is a novel concept. Few states have had the opportunity to consider whether to recognize this as a valid cause of action.[231] Those states that have considered it have not only accepted it as a valid suit, but also have ruled in favor of the child.[232] One distinct characteristic of these states is that the parental immunity doctrine has been abrogated in each state and does not act as a barrier to a passive parent action.[233] However, in Indiana the parental immunity doctrine would bar a passive parent action because the claim sounds in negligence, and Indiana has only abrogated parental immunity to permit suits for intentional felonious conduct.[234]

Once parental immunity is abrogated to allow this cause of action, the child's next hurdle would be to prove the parent's negligence.[235] After

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228. *Id.*

229. Doe v. Roe, No. 88-CV-384 (Kenosha County Cir. Ct., Wis. Sept. 21, 1991), *reported in* DOMESTIC TORTS, *supra* note 15, at 225. In *Doe*, the judgment was rendered against the husband who sexually molested the girls, and his wife who negligently failed to: (1) warn them about her husband's prior acts of child molestation; (2) notify proper authorities of her husband's aberrant sexual behavior; and (3) seek psychiatric help for her husband. *Id.*

230. *Id.*

231. The passive parent action was litigated for the first time in October, 1992, and has yet to be heard by an appellate court in any state. Hansen, *supra* note 11, at 16.

232. *Id.*

233. The following states have permitted a child to bring a suit against their parent for failure to protect the child from the other parent's abuse: Minnesota, Texas, California, and Wisconsin. For a discussion of the status of parental immunity in these states, see *supra* note 9.

234. *See supra* note 14.

235. For a list of the four elements of negligence, see *supra* note 204.

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analyzing the policy reasons supporting parental immunity,[236] it is clear that justice would be best served by abrogating parental immunity and recognizing an abused child's cause of action against a non-abusive, but passive, parent.

In *Barnes v. Barnes*,[237] the Indiana Supreme Court decided to abrogate parental immunity and allow children to sue parents when the parents' behavior rises to the level of intentional felonious conduct.[238] Although this was a step forward in recognizing the weaknesses of the parental immunity doctrine, Indiana courts should adopt the "reasonable parent" standard[239] as the analysis for assessing a parent's culpability in negligence cases between parents and children. A reasonableness standard, among other things, would reduce those instances where a child is required to bear the burden of a parent's negligence by going uncompensated for injuries inflicted by that parent.

In applying a reasonableness standard to a passive parent action, a jury would be required to decide whether the parent's conduct was a "reasonable exercise of parental discretion" or an "unreasonable disregard of parental duty."[240] The reasonableness of the parent's conduct would be "viewed in light of the parental role."[241] Parents would retain the opportunity to discipline and control their children as long as the disciplinary conduct was reasonable. Ultimately, the reasonable parent standard would not infringe on the parent's right to exercise ordinary parental discretion in raising their children; however, it would allow an injured child redress when a parent's conduct fails to meet the standard of care that a reasonable parent would have provided under similar circumstances.[242]

To further insure that courts do not infringe on a parent's right of authority and discipline, a clear and convincing evidence standard, instead of a preponderance standard, should be utilized when assessing the reasonableness of a parent's conduct. Requiring a clear and convincing evidence standard

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236. *See supra* notes 55-60 and accompanying text (listing the six justifications advanced by courts in supporting the parental immunity doctrine).

237. 603 N.E.2d 1337 (Ind. 1992).

238. *Id.* at 1342.

239. *See supra* notes 157-67 and accompanying text (discussing in detail the "reasonable parent" standard, its justifications, and criticisms).

240. *See* Carolyn L. Andrews, Comment, *Parent-Child Torts in Texas and the Reasonable Prudent Parent Standard*, 40 BAYLOR L. REV. 113, 125 (1988).

241. Gibson v. Gibson, 479 P.2d 648, 653 (Cal. 1971) (en banc). The *Gibson* court noted the uniqueness of the parent-child relationship and that "traditional concepts of negligence cannot be blindly applied to it." *Id.* at 652. Additionally, the court noted that parents have the prerogative and the duty to exercise parental authority over their children, provided that this duty was exercised within reasonable limits. *Id.*

242. *See* Andrews, *supra* note 240, at 125.

would allow a child an opportunity for redress without imposing an undue risk of limiting a parent's role in disciplining his or her child.[243] A clear and convincing standard would be one more safeguard protecting a parent's right to reasonably control and discipline his or her child.

The application of a reasonableness standard to parental conduct would provide a more consistent method for determining a parent's responsibility to his or her child in negligence actions. Particularly, this standard would remove the element of unpredictability in distinguishing which type of parental conduct is immunized from liability. Instead, a reasonableness standard would provide the courts with an opportunity to apply a single standard that is familiar to both courts and juries.[244]

The primary argument against the reasonableness standard is that such an objective standard is unworkable in light of the diversity in parent-child relationships.[245] Parents are afraid that, under an objective, reasonableness standard, they will lose the opportunity to apply the parental discretion that may be personal in nature. This argument fails to recognize that the reasonableness standard has been recognized for many years and has been applied to a substantial number of defendants in tort actions.[246] These defendants represent diverse populations, and no reason exists to assume that the same system would be any less effective when applying a reasonable parent standard. In addition, the standard is inherently flexible enough to allow diverse child-rearing

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243. Hurst v. Capitell, 539 So. 2d 264, 266 (Ala. 1989). In applying the "clear and convincing" standard of proof to sexual abuse cases, the *Hurst* court stated that:

> In the interest of preserving the unqualified right of parents to reasonably discipline their children, we do deem it appropriate, however, to require that the proof of alleged sexually abusive conduct be tested under a "clear and convincing" standard, as opposed to a mere "substantial evidence" standard.

Id. The *Hurst* court additionally emphasized that by requiring a "clear and convincing" standard for child-parent sexual abuse suits, the court would avoid unduly limiting parents' role in disciplining their children. *Id.*

244. *See* Marcolin, *supra* note 163, at 789. *See also* Anderson v. Stream, 295 N.W.2d 595 (Minn. 1980). The *Anderson* court noted that the standard of reasonable care is well understood in tort law and does not require a parent to meet some idealized standard. *Id.* at 599.

245. Pedigo v. Rowley, 610 P.2d 560 (Idaho 1980). In rejecting the reasonable parent standard, the *Pedigo* court stated that "[t]he people of Idaho are too diverse and independent to be judged by a common standard in such a delicate area as the parent-child relationship." *Id.* at 564. As examples of the diversity of Idaho residents, the *Pedigo* court noted the geography, population, religious, ethnic, and cultural backgrounds of Idaho residents. *Id.* However, the court additionally noted that it was unwilling to adopt any rule that would prohibit parent-child suits on the basis of an absolute immunity. *Id.*

246. *See* Marcolin, *supra* note 163, at 788. Marcolin stated that "these defendants represent a multitude of social economic, racial, and religious groups, yet all are held to one standard of reasonableness." *Id.*

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practices.[247]

To further preserve parental discretion, courts must provide the jury with a clear explanation of the reasonableness standard.[248] Supporters of this method claim that a proper jury instruction, describing the standard, would safeguard parental rights while allowing children a fair opportunity for recovery.[249] The reasonable parent standard itself assumes that the role of a parent brings with it certain responsibilities unique to the parent-child relationship. These responsibilities should be explained to the jury and considered when assessing the reasonableness of a parent's conduct. The court is also vested with the power to explain to the jury that it can take into consideration certain facts that may be specific to an individual or family situation.[250]

The most important quality of the reasonableness standard is that parents will no longer have free reign to act negligently toward their children with the assurance that they will be immune from all possible liability.[251] Parents will be expected to conduct themselves reasonably within the scope of the parent-child relationship. Once a parent's conduct is deemed unreasonable, that parent will be liable to his or her child for any injuries sustained as a result of that conduct,[252] just as the parent would be liable to a stranger for unreasonable behavior relative to that relationship. Finally, by accepting the reasonableness standard, Indiana courts would be entrusting the jury as the final trier of fact,

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247. Hartman v. Hartman, 821 S.W.2d 852, 857 (Mo. 1991) (citing Note, *The Reasonable Parent Standard: An Alternative to Parent-Child Tort Immunity*, 47 U. COLO. L. REV. 795, 807-09 (1976)). The *Hartman* court stated that the "*Gibson* alternative is sufficiently flexible to accommodate disparate child-rearing practices yet protects children from negligent parental excesses." *Id.*

248. Anderson v. Stream, 295 N.W.2d 595 (Minn. 1980). The *Anderson* court concluded that instructing the jury on a reasonable parent standard would adequately protect parental functions; therefore, continued adherence to the *Goller* exceptions was no longer justified. *Id.* at 598-99. *See also* Hollister, *supra* note 41, at 520, 526.

249. *Hartman*, 821 S.W.2d at 857 (citing Anderson v. Stream, 295 N.W.2d 595, 598 (Minn. 1980)).

250. Some of the limited characteristics which the court may allow the jury to take into consideration are background, education, and wealth. *See* Marcolin, *supra* note 163, at 788.

251. *Hartman*, 821 S.W.2d at 857. *See also* Note, *The "Reasonable Parent" Standard: An Alternative to Parent-Child Tort Immunity*, 47 U. COLO. L. REV. 795, 809 (1976) (stating that the reasonable parent approach is preferable to the *Goller* approach because it does not give parents the right to neglect any of their duties).

252. More importantly, the child can be protected without forcing the parent to give up parental discretion in raising the child. *See The "Reasonable Parent" Standard*, *supra* note 251, at 809. The reasonable parent standard is capable of a construction that would take into account those instances when a parent is occasionally forgetful or careless within the home, without classifying this conduct as "unreasonable." *Id.*

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which is the basis of the American jurisprudential system.[253]

In view of the above reasons, Indiana should abrogate the parental immunity doctrine further by applying a reasonable parent standard. Once parental immunity has been abrogated, or an exception has been recognized to allow a child to sue a non-abusive, but passive, parent, the child must then state a valid cause of action. To do this, the child would proceed by proving the elements of an ordinary negligence action.[254]

B. Establishing a Cause of Action Against a Non-Abusive Parent

To establish a negligence action, a child would initially be required to establish a parental duty to take affirmative steps to prevent harm to the child.[255] This is the most problematic aspect of the negligence requirements in passive parent action and will therefore be covered in more detail than the other requirements. Although one ordinarily has no duty to aid a victim in peril,[256] certain circumstances may create such a duty.[257] One such circumstance is the existence of a special relationship between the defendant and the plaintiff[258] or the third-party perpetrator.[259]

In a situation where a parent knows that the other parent is sexually abusing the couple's child and fails to take any affirmative action to prevent the abuse, a special relationships exists. First, a special relationship exists between the child-plaintiff and the passive parent-defendant. The existence of this special relationship is based upon the unusually high level of interaction and dependency between parents and child.[260] Young children are dependant on parents for everything from food and shelter to protection from danger. Indiana has yet to define the term "special relationship," but prior case law gives some indication that a parent-child relationship will likely be considered "special."[261]

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253. *See* Andrews, *supra* note 240, at 119.

254. *See supra* note 204 (listing the four elements that must be proved to sustain an ordinary negligence action).

255. *See supra* note 204 (stating that the first element of a negligence suit is a legal duty).

256. PROSSER & KEETON, *supra* note 8, at 375 (discussing in detail the general rule which states that there is no general duty to aid a person who is in danger, absent special circumstances).

257. *Id.* at 376. For example, a common carrier has been required to take affirmative steps to aid a passenger in danger and innkeepers to aid their guests. *Id.*

258. *See supra* note 206-07 and accompanying text.

259. *See supra* note 181 and accompanying text.

260. *See supra* note 207.

261. Indiana courts have refrained from defining the term "special relationship" but have determined that the relationship exists in certain circumstances which indicate a high level of interaction and dependency. Cowe v. Forum Group, Inc., 575 N.E.2d 630, 636 (Ind. 1991) (stating that a nursing home owed its patient a duty of reasonable care due to the relationship between the parties); Miller v. Griesel, 308 N.E.2d 701, 706 (Ind. 1974) (stating that teachers have a special

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Second, a duty to aid could also arise from a special relationship formed between a defendant and a third-party perpetrator. The foundation of this duty requires an identifiable victim and a foreseeable risk of harm to that victim.[262] In a case where a non-abusive parent fails to prevent harm to his or her child, both factors are present. The child-victim is identifiable because no liability would attach unless the parent knew, or should have known, that the child was being sexually abused by the other parent.[263] Consequently, the risk of future harm to the child is foreseeable. Provided the parent had knowledge of previous or present abuse, it is foreseeable that the abuse will continue, absent intervention.[264]

In addition to the special relationship requirement, Indiana courts have explicitly stated that two factors exist in determining whether a person owes a duty to another: the reasonable foreseeability of harm to the plaintiff and public policy concerns.[265] When looking at foreseeability, the court focuses on the foreseeability of the victim and the type of harm.[266] Once again, the knowledge requirement imposed on the non-abusive parent incorporates the foreseeability requirement.

By requiring on the part of the non-abusive parent knowledge of present or past sexual abuse perpetrated by the other parent, courts will be requiring the non-abusive parent to foresee the possibility of future abuse absent some type of intervention. If the parent lacks knowledge that the child has been abused by the other parent, then the child should not be permitted to bring the suit because future sexual abuse to the child would not be foreseeable. In this situation, neither the victim nor the injury is identifiable; therefore, both elements of foreseeability are lacking. Indiana courts have specifically stated that the foreseeability of continued abuse weighs in favor of imposing a common law

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responsibility to supervise their students because they have been entrusted with the care of those children); Johnson v. Pettigrew, 595 N.E.2d 747, 753 (Ind. Ct. App. 1992) (stating that those entrusted with the care of children have a special responsibility of supervision over those children); Burrell v. Meads 569 N.E.2d 637, 639-40 (Ind. Ct. App. 1991) (citing Hammond v. Allegretti, 311 N.E.2d 821 (Ind. 1974)) (holding that a landowner owes a duty of reasonable care to an invitee); Welch v. Railroad Crossing Inc., 488 N.E.2d 383, 388 (Ind. Ct. App. 1986) (stating the Indiana rule that proprietors of taverns owe a duty of reasonable care to protect patrons from foreseeable disorderly acts of other patrons).

262. *See supra* notes 183-84 and accompanying text.

263. *See infra* notes 268-69 and accompanying text discussing the knowledge requirement for liability on a passive parent.

264. Webb v. Jarvis, 575 N.E.2d 992, 996-97 (Ind. 1991).

265. *Id.* at 995.

266. *Id.* at 997. "The duty of reasonable care is not, of course, owed to the world at large, but rather to those who might reasonably be foreseen as being subject to injury by the breach of the duty." Id. (citing Thiele v. Faygo Beverage Inc., 489 N.E.2d 562, 574 (Ind. Ct. App. 1986)).

duty to report known child abuse to the proper authorities.[267]

The third factor taken into account by Indiana courts in deciding whether to impose a common law duty to aid another is public policy.[268] The Indiana Appellate Court has ruled that public policy does not support creating a common law duty for a stranger to protect an abused child. However, such a common law duty may exist for a parent.

In deciding whether to impose the duty, all three factors[269] must be considered together. In a passive parent action, two of the three factors favor creating a common law duty for a parent to take affirmative action to prevent continued sexual abuse to his or her child. First, a special relationship exists between the non-abusive parent-defendant and both the plaintiff-child and the perpetrator.[270] Furthermore, it is foreseeable that absent some type of intervention, the child will be exposed to future sexual abuse by the abusive parent.[271] Although public policy concerns may not support imposing a duty to aid, such concerns are not crucial to the creation of the duty. Indiana courts can impose a common law duty to protect, provided that two of the factors are present. Based on the special relationship among the parties and the foreseeability of the victim and type of harm, Indiana courts should create a common law duty for a parent to aid their child when the parent knows, or should know, that the child is being sexually abused by the other parent.

Once the duty has been established, a child must prove that the parent breached that duty by failing to act. To devise a clear and concise point at which the breach would occur, it is helpful to look to an area which has already set a firm standard. One such area deals with a case where a school district official failed to protect a student from abuse on school grounds.[272] The standard used to determine when school officials have breached a duty owed to the students can also be used to establish the point at which non-abusive parents

267. J.A.W. v. Roberts, 627 N.E.2d 802, 812 (Ind. Ct. App. 1994).

268. *Webb*, 575 N.E.2d at 995.

269. The three factors necessary to establish a common law duty to protect are: the existence of a special relationship between the plaintiff and defendant, whether the harm to the injured party was reasonably foreseeable, and public policy concerns. *J.A.W.*, 627 N.E.2d at 809.

270. This conclusion is based on the large amount of interactivity and dependency that naturally exists between children and their parents. *See supra* note 206 and accompanying text.

271. In a situation where a child is bringing a suit against the passive parent, both the victim and the type of harm are foreseeable. *Webb*, 575 N.E.2d at 997.

272. Linda L. Hale & Julie Underwood, Comment, *Child Abuse: Helping Kids Who are Hurting*, 74 MARQ. L. REV. 560, 560-63 (1991) (discussing school officials' responsibility to report suspected child abuse and neglect to the appropriate child protection agencies).

have breached a duty to their children.[273] Using the school standard as a guideline, liability would be imposed on a non-abusive parent if the parent knew, or should have known, that sexual abuse by the other parent was taking place within the home, yet they failed to take remedial action or if the parent's supervision was grossly inadequate to the point that it represented a deliberate indifference to the offensive acts of the abusive parent. Once one of the above two situations has occurred, the non-abusive parent has breached the duty owed to the child and can be held liable for failing to act.

After proving the existence of a duty and a breach of that duty, a child must prove that they have suffered an injury from the alleged negligent conduct. This last element can be divided into two parts: the injury[274] and the fact that it was proximately caused[275] by the parent's breach. To prove the injury prong, the child must establish that the non-abusive parent's failure to act resulted in an injury to the child. The child will assert that the injury sustained is the abuse that resulted following the non-abusive parent's refusal to act to curtail the abuse.[276] It is well documented that sexual abuse constitutes both a physical and emotional injury.[277] As long as the child can prove the abuse occurred subsequent to the time that the parent knew, or should have known of the abuse, Indiana courts should recognize the sexual abuse as an injury resulting from the parent's failure to act.

Once the child has established an injury, the last step is to prove that the injury was proximately caused[278] by the parent's failure to act. The basis of the child's argument is that the non-abusive parent proximately caused the

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273. Liability may be imposed on a school supervisor if the official "knew or should have known" that abuse was taking place within a school, yet they failed to take remedial action; or if supervision was grossly inadequate, and represented purposeful indifference to the offensive acts. Stoneking v. Bradford Area School Dist., 882 F.2d 720 (3rd Cir. 1989).

274. *See supra* note 204 (listing injury as an element of a standard negligence cause of action).

275. *Id.* (listing proximate cause as an element of a standard negligence cause of action).

276. *Hansen, supra* note 11, at 16.

277. Carol W. Napier, *Civil Incest Suits: Getting Beyond the Statute of Limitations*, 68 WASH. U. L.Q. 995 (1982). Abuse inflicted by a family member is even more severe than that inflicted by a stranger. *Id.* at 1003 (citing C. COURTOIS, HEALING THE INCEST WOUND: ADULT SURVIVORS IN THERAPY 89, 94 (1988)). The immediate emotional problems associated with child sexual abuse by a family member include "low self-esteem, anxiety, fear, confusion, guilt, anger, and depression." *Id.* (citing Adams-Tucker, *Defense Mechanisms Used by Sexually Abused Children*, in OUT OF HARM'S WAY: READINGS ON CHILD SEXUAL ABUSE, ITS PREVENTION AND TREATMENT 72, 74 (Haden ed. 1986)). Physical effects include migraine headaches, high blood pressure, frozen joints, ringing in the ears, hyperalertness, and hypervigilance. *See* COURTOIS, *supra*, at 106-07.

278. Proximate cause has been defined as "that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the result complained of and without which the result would not have occurred." Orville Milk Co. v. Beller, 486 N.E.2d 555, 559 (Ind. Ct. App. 1985).

continued abuse by failing to take action to stop the existing abuse.[279] This argument has already received recognition, and at least one court has even hesitated to break the causal connection with the existence of an intervening cause.[280]

Furthermore, courts in criminal cases have found that a parent's failure to protect his or her child from the other parent's sexual abuse can constitute the proximate cause of further abuse.[281] These courts have based their conclusions on the fact that a parent's failure to protect his or her child is a contributing factor to any injuries that occur as a result of the failure to protect.[282] However, just because the failure to protect or report is the proximate cause of further abuse, is not meant to say that forcing a parent to protect against and report is the final solution to the problem. The goal of encouraging parents to protect their children by reporting sexual abuse is to encourage additional affirmative and prohibitive actions which will make the continued abuse less likely.[283] Consequently, the child's best interests are always at the forefront.

V. CONCLUSION

Just recently, the passive parent action has begun to enter courtrooms. When presented in Indiana, this cause of action will raise substantial questions concerning the parental immunity doctrine and the traditional rule which states that no general duty exists to aid others. The justifications that support parental immunity are inapplicable in a passive parent action and should not act as a barrier to recovery. Courts should reconsider whether these outdated justifications are sufficient to deny redress to defenseless children who are being sexually exploited by one parent while the other parent passively refuses to take

279. J.A.W. v. Roberts, 627 N.E.2d 802, 811 (Ind. Ct. App. 1994) (acknowledging the causal connection between continued sexual abuse and a person's failure to report the abuse to the proper authorities).

280. *Id.* at 811-12. The court in *J.A.W.* refused to say as a matter of law that the child's denial of the abuse to authorities broke the causal connection between the continued sexual abuse and one's failure to report the abuse to the authorities. *Id.*

281. State v. Fabritz, 348 A.2d 275 (Md. 1975) (holding that a mother who failed to seek medical attention for her child was liable because her inaction furthered the injuries); State v. Williquette, 385 N.W.2d 145 (Wis. 1986) (holding that a mother was a contributing factor to the further abuse of her child when she had been told of the sexual acts and had seen the bruises on her child but failed to take action to prevent further abuse by the father).

282. State v. Williquette, 385 N.W.2d 145 (Wis. 1986).

283. Some of the actions which may be set in motion by a sexual abuse report are the immediate removal of the child from the home, IND. CODE ANN. § 31-6-7-14 (West Supp. 1993), appointment of a guardian *ad litem* to protect the best interests of the child, IND. CODE ANN. § 31-6-11-9 (West 1979), the availability of counseling and rehabilitation to the child and the child's family, IND. CODE ANN. § 31-6-11-11(p) (West Supp. 1993), and possible criminal charges against the parent, IND. CODE ANN. § 31-6-11-11(q) (West Supp. 1993).

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action to stop the abuse. By adopting the reasonable parent standard of conduct, Indiana would give parents an adequate amount of authority in disciplining their child while giving children an opportunity to recover from the parent who negligently caused their injury.

A child's opportunity for recovery depends on his or her ability to establish a standard negligence suit against the non-abusive parent. The most problematic element of this suit is maintaining that the non-abusive parent has a duty to protect the child. However, the high level of interaction and dependency between parents and children dictates that parents have a duty to protect their children from known dangers. By abrogating parental immunity and recognizing the passive parent action, Indiana would be acknowledging the importance of parental duties while insuring that children are compensated for their injuries, just like other members of society.

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