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THE UNSUPERVISED CHILD: PARENTAL NEGLIGENCE OR NECESSITY?

INTRODUCTION

The parent-child tort immunity rule denies a minor child a cause of action against his parents for intentional or negligent torts.[1] This rule, created by the American courts, was founded on several policy considerations.[2] However, recent judicial attacks on these underlying policy considerations have resulted in a trend toward abrogation of the rule.[3] Although several states have been reluctant to abolish parental immunity in negligence actions,[4] a growing number of states have recognized a child's cause of action against the parent for negligence.[5]

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1. *See* PROSSER, LAW OF TORTS 865 (4th ed. 1971). Examples of court holdings which prohibited a child's action against the parent for intentional torts are: Miller v. Pelzer, 159 Minn. 375, 199 N.W. 97 (1924) (deceit); Cook v. Cook, 232 Mo. App. 994, 124 S.W.2d 675 (1939) (assault); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903) (cruel and inhuman treatment); Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905) (rape). Examples of holdings which prohibited a child's negligence actions are: Villaret v. Villaret, 169 F.2d 677 (D.C. Cir. 1948); Hastings v. Hastings, 33 N.J. 247, 163 A.2d 147 (1961); Chaffin v. Chaffin, 239 Or. 374, 397 P.2d 771 (1964); Ownby v. Kleyhammer, 194 Tenn. 109, 250 S.W.2d 37 (1952); Stevens v. Murphy, 69 Wash. 2d 939, 421 P.2d 668 (1966).

2. *See* notes 24-29 *infra* and accompanying text.

3. *See* notes 48-78 *infra* and accompanying text.

4. Jurisdictions which have abrogated parent-child tort immunity for intentional torts are: Horton v. Reeves, 186 Colo. 149, 526 P.2d 304 (1974); Sanford v. Sanford, 15 Md. App. 390, 290 A.2d 812 (1972); Felderhoff v. Felderhoff, 473 S.W.2d 928 (Tex. 1971).

It would appear that the Arkansas courts might also recognize a child's actions against his parent for an intentional tort. One court stated: "We therefore hold that an unemancipated minor may not maintain an action for an *involuntary* tort against his parent. . . ." Rambo v. Rambo, 195 Ark. 832, 837, 114 S.W.2d 468, 470 (1938) (emphasis added). *See also* Brown v. Cole, 198 Ark. 417, 129 S.W.2d 245 (1939), where the court permitted a deceased child's estate to sue an adoptive parent for pain and suffering resulting from an intentional poisoning. However, it is difficult to determine whether the court permitted the action since the parent was only an adoptive parent or because the tort was intentional.

5. Jurisdictions which have abrogated parent-child tort immunity in all areas of negligence are: Xaphes v. Mossey, 224 F. Supp. 578 (D. Vt. 1963); Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); Petersen v. City & County of Honolulu, 51 Hawaii 484, 462 P.2d 1007 (1969); Plumley v. Klein, 388 Mich. 1, 199 N.W.2d 631 (1968); Rupert v. Stienne, 90 Nev. 397, 528 P.2d 1013 (1974); Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966); Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 912, 297 N.Y.S.2d 529 (1969); Nuelle v. Wells, 154 N.W.2d 364 (N.D. 1967); Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963). For jurisdictions which have abrogated parent-child tort immunity in car accidents only, see Hebel v. Hebel, 435

Those states which recognize a child's right to sue his parents for negligence face the serious problem of interfering with certain duties inherent in the family relationship.[6] Among these is the parental duty to rear a child.[7] Recognizing the potential for judicial interference with a parent's duty to rear a child, some jurisdictions have granted parental immunity where an act of parental discretion results in injury to the child.[8] However, when a child suffers injury resulting from a parent's failure to adequately protect the child, the courts should determine whether this failure constitutes an abuse of parental discretion resulting in an actionable tort for the injured child.

While a few jurisdictions apparently would recognize an actionable tort for negligent parental supervision,[9] several courts have denied the action reasoning that the parental duty to supervise is inseparable from the parental duty to rear a child.[10] Consequently,

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P.2d 8 (Alaska 1967); Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970); Ooms v. Ooms, 164 Conn. 48, 316 A.2d 783 (1972) (abrogated by statute); Williams v. Williams, 369 A.2d 669 (Del. Super. Ct. 1976); Sorensen v. Sorensen, 369 Mass. 350, 339 N.E.2d 907 (1975); France v. A.P.A. Transp. Corp., 56 N.J. 500, 267 A.2d 490 (1970); Smith v. Kauffman, 212 Va. 181, 183 S.E.2d 190 (1971).

6. In Paige v. Bing Const. Co., 61 Mich. App. 480, 233 N.W.2d 46 (1975), the court stated:

> Each parent has unique and inimitable methods and attitudes on how children should be supervised. Likewise, each child requires individualized guidance depending on the intuitive concerns which only a parent can understand. Also different cultural, educational and financial conditions affect the manner in which different parents supervise their children. Allowing a cause of action for negligent supervision would enable others, ignorant of a case's peculiar familiar distinctions and bereft of any standards to second guess a parent's management of family affairs considerably beyond these statutory protections.

Id. at 482, 233 N.W.2d at 49.

7. McCurdy, *Torts Between Persons in a Domestic Relation*, 43 HARV. L. REV. 1030 (1930). McCurdy stated:

> Although since he is charged with the duty of rearing and disciplining his child, a parent has the right to inflict bodily injury, and is therefore privileged, and although in the performance of this duty and also of his duty to support he is necessarily given wide latitude of judgment, he does not enjoy complete immunity from accountability. Excessive, willful or negligent conduct may forfeit the right of custody or may constitute a crime.

Id. at 1059.

8. *See* notes 30-46 *infra* and accompanying text.

9. *See* note 5 *supra*.

10. *E.g.*, in Holodook v. Spencer, 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974), the court stated: "a parent's duty to protect his child from injury [is] a duty which not only rises from the family relation but goes to its very heart." *Id.* at 51, 324 N.E.2d at 346, 364 N.Y.S.2d at 871.

a child, who because of his age and inexperience cannot appreciate surrounding dangers,[11] must suffer his injuries uncompensated. Additionally, if a third party negligently causes injury to the child, liability rests solely upon the third party,[12] as third-party recovery of a judgment against the parent for contribution is barred.[13] These results arguably are inequitable in light of the fact that the parent is in the better position to recognize foreseeable dangers and exercise control over the child.[14]

Considering these inequities, this note discusses the policies underlying parent-child tort immunity and examines the various judicial approaches used to determine whether a parental duty to supervise exists. Finally, the "reasonable parent"[15] is proferred as an equitable standard to determine the parental duty to supervise a child.

THE PARENT-CHILD IMMUNITY RULE: ORIGIN, JUDICIALLY CREATED EXCEPTIONS AND SUBSEQUENT ABROGATION

The parent-child tort immunity rule had its origin in early American court decisions.[16] These courts reasoned that parental immunity was a necessary means for preserving family integrity and enabling a parent to properly rear his child.[17] Recent court decisions, however, have abandoned this reasoning and have permitted a child's cause of action in exceptional situations.[18] This trend away from strict adherence to the parent-child tort immunity rule has influenced courts of several jurisdictions to modify[19] and even abrogate[20] the rule.

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11. Paige v. Bing Const. Co., 61 Mich. App. at 482, 233 N.W.2d at 48.

12. *See* PROSSER, *supra* note 1, at 297.

13. The third party cannot recover a judgment for contribution against the parent in absence of a duty owed by the parent to the child. *See* Barry v. Niagra Frontier Transit Sys., Inc., 35 N.Y.2d 629, 324 N.E.2d 312, 364 N.Y.S.2d 823 (1975); Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). Since the parent owes the child no duty to supervise, a third party's claim for contribution against the parents cannot stand. Holodook v. Spencer, 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974).

14. Responsibility for a child's safety lies primarily with the parents whose duty it is to see that the child's behavior does not invoke damage to himself or others. Kay v. Ludwick, 87 Ind. App. 114, 230 N.E.2d 494 (1967).

15. California is the only jurisdiction that has adopted a "reasonable parent" standard. *See*, Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971).

16. *See* notes 30-69 *infra* and accompanying text.

17. *See* notes 24-28 *infra* and accompanying text.

18. *See* text accompanying notes 80-105 *infra*.

19. *See* notes 4 and 5 *supra*.

20. *See* note 5 *supra*.

Policy Considerations Underlying The Parent-Child Tort Immunity Rule

At common law, a parent or his minor child could maintain an action against the other in matters of property law.[21] Although there are no common law cases involving personal torts between a parent and a child, Dean Prosser suggests that "there is no good reason to think the English laws would not permit actions for personal torts as well, subject always to the parent's privilege to enforce reasonable discipline against his child."[22] However, in a series of cases referred to as the "great trilogy,"[23] the American courts adopted the parent-child tort immunity rule. This action by the courts was a response to several public policy considerations which included the preservation of family peace,[24] the maintenance of a family fund rather than permitting a single child to appropriate money needed to support the other members of the family,[25] the fear of fraudulent and frivolous claims,[26] and the avoidance of the absurdity which would result if the child predeceased the parent thereby allowing the parent to recover the child's tort damages through intestate succession.[27] Additionally, the courts in reaching their decisions analogized parent-child tort immunity to the common law immunity which existed between a husband and his wife.[28] While adherents to the trilogy deemed these policy considerations valid, several jurisdictions apparently adopted Dean Prosser's rationale which would provide a child with an actionable tort against his parents.[29]

The first case of the trilogy which denied a child an actionable tort was *Hewellette v. George.*[30] In *Hewellette* a mother had

21. *See* Preston v. Preston, 102 Conn. 96, 128 A. 292 (1925) (deed of trust set aside on a finding of undue influence); Crowley v. Crowley, 72 N.H. 241, 56 A. 190 (1903) (trust in favor of the minor not the parent if paid for with the minor's money); Lamb v. Lamb, 146 N.Y. 317, 41 N.E. 26 (1895) (mother could be held liable to a child for rent).

22. PROSSER *supra* note 1, at 865.

23. The three cases constituting the "great trilogy" are Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905). For a thorough discussion of the parent-child tort immunity rule, see Akers & Drummond, *Tort Actions Between Members of the Family-Husband and Wife-Parent and Child*, 26 MO. L. REV. 152, 182 (1961).

24. *See* Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891).

25. Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905).

26. Hastings v. Hastings, 33 N.J. 247, 163 A.2d 147 (1961).

27. Roller v. Roller, 37 Wash. at 245, 79 P. at 789.

28. *Id. Accord,* McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903).

29. *See* note 5 *supra.*

30. 68 Miss. 703, 9 So. 885 (1891). In this action for wrongful commitment to

wrongfully committed her child to an insane asylum.[31] Citing no authority, the Mississippi Supreme Court denied the cause of action reasoning that no civil action could be maintained as long as the parent was under the obligation to care for, guide and control, and the child was under the reciprocal obligation to aid, comfort and obey.[32] Additionally, the court believed that it was in the best interest of society to deny the cause of action in order to preserve peace in the family and society as well.[33] Thus, a child's only protection from parental violence and wrongdoing was found in the criminal law.[34] Apparently the court in *Hewellette* saw no reason for providing an additional civil remedy.

The decision reached in *Hewellette* was soon followed in other jurisdictions. Relying heavily on the rationale advanced in *Hewellette*, the Supreme Court of Tennessee denied a minor child's action against her father and stepmother for cruel and inhuman punishment.[35] Since common law recognized a parent's right to control and chastise the child, the court held that these rights could only be forfeited by gross misconduct on the parent's part.[36] According to the court, even if the parent's actions constituted gross misconduct, the child would have no civil remedy.[37] Rather, the child's only redress was through the criminal law and in the remedy furnished by a writ of habeas corpus.[38]

The court analogized this civil parent-child immunity to intraspousal immunity.[39] The latter immunity rested upon the unity of legal identity by virtue of marriage and upon the respective rights and duties existing between a husband and his wife.[40] These rights included the husband's right to control the wife and her subsequent duty to obey.[41] Similarly, a child was also subject to the parent's con-

an insane asylum, the minor daughter was married but had been living away from her husband. However, the court suggested that an action could be maintained if the marital relationship had eliminated those duties inherent in a parent-child relationship. These include the parent's duty to protect, care for and control the child, and the child's duty to aid, comfort and obey the parent.

31. *Id.*
32. *Id.* at 705, 9 So. at 887.
33. *Id.*
34. *Id.*
35. McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903).
36. *Id.*
37. *See* note 7 *supra.*
38. McKelvey v. McKelvey, 111 Tenn. at 388, 77 S.W. at 664.
39. *Id.* at 389, 77 S.W. at 665.
40. *Id.*
41. *Id.* At common law, the husband had reasonable superiority and control over the wife's person authorizing him to put gentle restraints on her liberty if her conduct was such to require it. Obviously, such legal dominance no longer exists.

trol and had the subsequent duty to obey.[42] Although no unity of legal identity existed between the parent and the child,[43] the court concluded that the respective rights and duties common to both relationships justified extending immunity to the parent-child relationship.[44]

This parent-child immunity was further extended in the final case of the trilogy, *Roller v. Roller*.[45] In *Roller*, a daughter sought damages from her father for raping her.[46] Due to the heinous nature of the crime, the court recognized that the policy consideration relating to the preservation of the family peace was inapplicable.[47] In spite of this, the court denied the daughter's cause of action advancing other policy considerations which supported parent-child tort immunity.

One of the considerations advanced by the *Roller* court was the parent's potential reacquisition of the child's tort damages through intestate succession should the child predecease the parent.[48] While this consideration was equally applicable to a child's cause of action in property matters, several courts considered it too remote to bar

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42. *Id.*

43. *See* notes 63-67 *infra* and accompanying text.

44. 111 Tenn. at 389, 77 S.W. at 665. The court referred to the fact that a wife could divorce her husband. But even after a divorce, a wife was not permitted to maintain an action against her husband as he had a right to restrain her liberty. *See* Abbot v. Abbot, 67 Me. 304 (1877). The court analogized the parent-child relationship to that of a divorced husband and wife and concluded that each relation should be treated the same.

45. 37 Wash. 242, 79 P. 788 (1905).

46. *Id.*

47. *Id.* Although there was no purpose for preserving the peace in this particular case, the court recognized preservation of the peace as a valid policy consideration by declaring:

> The rule of law prohibiting suits between a parent and a child is based upon the interest that society has in preserving harmony in the domestic relations, an interest which has been manifested since the earliest organization of civilized government, an interest inspired by the universally recognized fact that the maintenance of harmonious and proper family relations is conducive to good citizenship and therefore works to the welfare of the state.

Id. at 243-44, 79 P. at 788.

48. *Id.* at 245, 79 P. at 789. This argument suggests that if a parent is compelled to pay damages to a child, he might reacquire the damages paid in the event that the child should predecease him since the parent would take by intestacy. Therefore, the parent should not have to pay damages which he might recover later. However, such a conclusion should not be based on a remote possibility. *See* McCurdy, *supra* note 7. *Accord*, Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930).

the child's action in property.[49] Arguably, since this consideration does not bar a child's property action against his parent, there is no logical reason for utilizing the same consideration to bar a child's tort action.[50] Such inconsistent treatment of a child's rights weakens the rationale used by the *Roller* court to deny the child's cause of action.

Another consideration utilized by the *Roller* court was that each family should maintain sufficient funds to be used to provide all members of the family with the necessities of life, rather than permit one child to appropriate the funds for his own use.[51] According to the *Roller* court, permitting the child to appropriate the family funds would deprive other family members of their necessities for life,[52] resulting in unequal treatment of the family members. This unequal treatment could cause additional family strife.[53]

Although the *Roller* court's concern for other members of the family was admirable, it ignored other factors which warrant a parent's payment of damages to a child where the parent's tortious conduct causes a child's injuries. One such factor is the necessity to preserve the property of a child.[54] While in most cases a child's capital does not consist of property in the usual sense, a child does have capital in the nature of physical and mental abilities which give rise to potential earning power.[55] Since an injury to a child could impair these abilities and thereby reduce his potential earning power, effectively the child's property has been damaged.[56] Applying common law which recognized a child's action against the parent to recover property,[57] it would follow that common law would also recognize a child's right to recover damages in tort as a means of

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49. *See* note 21 *supra*.

50. Such a consideration is absurd. Assume a father violently tears a shirt from his child. As a result the child suffers a severe sprain. If the child brings an action for his damaged shirt, the court will sustain the action since it concerns property. However, if the child brings a tort action for the physical injuries suffered, the court will deny the action even though the physical injury and property damages arose from the same transaction.

51. 37 Wash. at 245, 79 P. at 789.

52. *Id.*

53. There is always a possibility of jealousy and disharmony between the enriched child and other members of the family.

54. *See* McCurdy, *supra* note 7, at 1073.

55. *Id.*

56. *Id.*

57. *See* note 21 *supra*.

returning the child to the status quo.[58] Awarding a child damages in tort does not constitute unequal treatment of family members, but rather it represents equitable treatment as it returns the child to his status quo.

Additionally, no child has a legally recognizable claim to a parent's property nor to equality of treatment.[59] Since members of the family cannot demand that the parent distribute his property in a particular manner, a parent has the right to divert his property to a particular child.[60] Consequently, where a parent's tortious conduct results in a child's injuries, the parent may recompense the child without violating the rights of the other members of the family. Because a parent's payment of damages to a child does not violate the rights of other family members, but instead, results in equitable treatment in that it compensates an injured child,[61] the maintenance of a family fund is an inappropriate consideration in denying a child's cause of action against his parent in tort.

Paralleling the rationale of the Supreme Court of Tennessee,[62] the *Roller* court drew an analogy to the common law immunity which existed between a husband and his wife.[63] However, intraspousal immunity is not based solely on the existence of a family relationship; rather, it has resulted from the common law concept of unity of identity.[64] This concept merged the separate identities of a man and a woman into a single legal identity by virtue of their mar-

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58. McCurdy suggests that it is the policy of the law to protect the property of the minor child, to the end that his property is unimpaired when he reaches majority. While the child's property referred to here is not capital in the usual sense, but his physical and mental well-being, it seems there is an equally strong policy to keep these things unimpaired. A payment of damages is compensation for this impairment by way of money substitution and therefore, it is not unequal treatment of a child. McCurdy, *supra* note 7, at 1073. "The minor child has the same right to redress for wrongs as any other individual." Dunlap v. Dunlap, 84 N.H. at 353, 150 A. at 906.

59. In Rice v. Andrews, 127 Misc. 826, 217 N.Y.S. 528 (Sup. Ct. 1926), the court stated:

> One has a legal right . . . to disinherit any natural heir or next of kin, and if he chooses to cut off his child and will his property to others, such child has no claim against his father's estate for his support and maintenance, but must shift for himself or be dependent on others for his support.

Id. at 827-28, 217 N.Y.S. at 530.

60. *Id.*

61. *See* McCurdy, *supra* note 7, at 1073.

62. McKelvey v. McKelvey, 111 Tenn. at 338, 77 S.W. at 664.

63. 37 Wash. at 245, 79 P. at 789.

64. *See* PROSSER, *supra* note 1, at 859.

riage.[65] Because a husband and his wife had the same legal identity, common law required that the husband be joined as a party in any suit defended or prosecuted by his wife.[66] As a result of this joinder, if one spouse brought an action against the other, he would effectively be suing himself. Such an action lacked adversity and was therefore impermissible.[67] But unlike the merger which occurred between a husband and a wife, the common law had no similar concept which merged the separate identities of a parent and a child into one legal identity.[68] Inferably, a child's cause of action against a parent would be permissible at common law since adversity in the lawsuit would exist.[69] Hence, the *Roller* court's analogy to the common law immunity which existed between a husband and a wife fails and should not serve to bar a child's cause of action against a parent.

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65. The merger occurred as a result of several common law considerations. At common law a woman's capacity to hold title to property was not destroyed by marriage; nevertheless, marriage had important consequences. The husband had the right to use and enjoy whatever his wife owned at the time of marriage or that which she acquired afterwards. Although the fee remained in the wife a husband could possess the land and was entitled to its rents and profits. Additionally the husband had the right to use the wife's choses in action and to this end to reduce them to possession, whereby, they become chattels personal. Due to the perishable nature of the chattels and the common law denial of estates therein, his right to use these involved such complete dominion as to amount to ownership. Therefore he had legal title by operation of law.

Furthermore, a married woman could not contract for herself but only as an agent of others. She could not convey her fee to real property without joining her husband as a party to the conveyance. Neither the husband nor the wife could contract for or convey property to the other. The husband also was entitled to his wife's services and earnings.

Since the husband exercised such control over his wife's property he became liable for her actions. A married woman had the capacity to commit torts but her liability was in a sense suspended during marriage, and the husband was subjected to liability. However, the action had to be brought against both the husband and the wife. A combination of all these incidents made it impossible at common law for one spouse ever to be civilly liable to the other for an act which would constitute a tort but for the marital relationship. *See* McCurdy, *supra* note 7, at 1031-35.

66. *Id. Accord,* PROSSER, *supra* note 1, at 859.

67. Bandfield v. Bandfield, 117 Mich. 80, 75 N.W. 287 (1898) (wife sued her husband for infecting her with a venereal disease).

68. *See* McCurdy, *supra* note 7, at 1056.

69. *See* PROSSER, *supra* note 1, at 865. *Accord,* Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930), which states that "[t]here has never been a common law rule that a child could not sue his parent. It is a misapprehension of the situation to start with that idea and to treat the suits which have been allowed as exceptions to a general rule." *Id.* at 353, 150 A. at 906.

In addition to the considerations advanced by the *Roller* court, recent decisions barring the child's action suggest that the child may prosecute frivolous and fraudulent claims in order to milk funds from an insurer.[70] Such possibility stems from the collusive nature inherent in the family relationship. Since a child has only limited knowledge concerning legal duties and remedies, the decision to litigate a tort action against the parent tortfeasor often will be made within the family circle, particularly by the parents.[71] As a practical matter, the action will be prosecuted only if the parent tortfeasor has adequate liability insurance.[72] According to several courts, this consensual litigation violates the basic legal concept of adversity.[73] Therefore, the courts have reasoned that fraud and collusion are valid policy considerations for denying the child a tort action against his parents.[74]

Although these courts seem to advance logical reasons for barring a child's tort action against his parents, they have ignored the practical boundaries inherent in the litigation process which serve to curb such abuse. Rather than deny the child's cause of action because of the possibility of fraud and collusion, the courts should instruct the jury to exercise caution in assessing the facts of each case.[75] Arguably, fraud and collusion might be possibilities in any action where liability insurance is present.[76] Therefore, if fraud and collusion are valid considerations in barring a child's tort action against a parent, then they should be valid considerations in barring all tort claims.[77] Since no great influx of fraudulent cases has resulted where courts have permitted tort action between others in intimate relationships, it is illogical to assume such an influx will occur if the courts permit a child to sue his parent.[78] Thus, the mere

70. *See* Villaret v. Villaret, 169 F.2d 677 (D.C. Cir. 1948); Treschman v. Treschman, 28 Ind. App. 206, 61 N.E. 961 (1901); Luster v. Luster, 299 Mass. 488, 13 N.E.2d 438 (1938); Hastings v. Hastings, 33 N.J. 247, 163 A.2d 147 (1960), *overruled in* France v. A.P.A. Transp. Corp. 56 N.J. 500, 267 A.2d 490 (1970); Parks v. Parks, 390 Pa. 287, 135 A.2d 65 (1957).

71. Hastings v. Hastings, 33 N.J. at 252, 163 A.2d at 150.

72. *Id.*

73. *Id.*

74. *See* note 70 *supra.*

75. Rozell v. Rozell, 281 N.Y. 106, 22 N.E.2d 254 (1939) (brother suing a sister).

76. Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962). *Accord,* Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955).

77. Klein v. Klein, 58 Cal. 2d at 696, 376 P.2d at 73, 26 Cal. Rptr. at 105.

78. Rozell v. Rozell, 281 N.Y. at 113, 22 N.E.2d at 257. *Accord,* Leach v. Leach, 227 Ark. 599, 300 S.W.2d 15 (1957) (husband suing wife); Burdick v. Nawrocki,

possibility of fraud and collusion is a relatively insignificant consideration in denying a child a cause of action against his parent in tort.

The parent-child tort immunity rule, as promulgated by the great trilogy presented an absolute bar to a child's action in tort against a parent. Founded on several policy considerations, the rule was susceptible to change when these policy considerations became inapplicable.[79] As a result, several jurisdictions carved out exceptions to the parent-child tort immunity rule where public policy no longer mandated the imposition of immunity.

Exceptions To The Parent-Child Tort Immunity Rule Resulting In Abrogation

A retreat from the parent-child tort immunity rule has lagged behind the retreat from intraspousal immunity due to the failure of state legislatures to enact statutes permitting a child's cause of action against the parent.[80] However, courts have modified the parent-child tort immunity rule to include exceptional circumstances where a child's cause of action will lie against the parent.[81] These exceptions are evidence of the increasing disapproval of the ab-

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21 Conn. Supp. 272, 154 A.2d 242 (1959) (stepson suing stepfather); Hamburger v. Katz, 10 La. App. 215, 120 So. 391 (1928) (father suing son-in-law); Spaulding v. Mineah, 239 A.D. 460, 268 N.Y.S. 772 (1948) (child suing grandmother); Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1938) (wife suing husband); Bielke v. Knaack, 207 Wis. 490, 242 N.W. 176 (1932) (brother suing brother); Potter v. Potter, 229 Wis. 251, 272 N.W. 34 (1937) (brother-in-law suing brother-in-law).

79. In abrogating parent-child tort immunity the court in Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966), stated:

> [T]he law of torts itself is not, as sometimes erroneously considered, 'a law of wrongs.' Rather it is a means 'for the creation and protection of rights'—a method for providing compensation for harm caused another. (Citation omitted). In the field of torts also, conditions are not static but dynamic, as the law grows and changes to meet new social and economic conditions.

Id. at 434, 224 A.2d at 590.

80. *See* PROSSER, *supra* note 1, at 866. In the nineteenth century several states adopted the Married Women's Property Acts or Emancipation Acts which secured to the married woman the right to a separate legal estate. As a result, woman's property was free of her husband's control. The various statutes permitted the woman to contract for herself and also gave her the right to transfer her property. Some statutes allowed her to secure her own earnings. Finally several statutes removed the common law concept of unity of legal identity. Consequently, a wife could sue and be sued without joining her husband as a party, thereby permitting a cause of action between a husband and his wife. *See* McCurdy, *supra* note 7, at 1036-56.

81. *See* text accompanying notes 83-96 *infra*.

soluteness of the parent-child tort immunity rule. In providing a child with a cause of action against his parents under exceptional circumstances, courts have reasoned that the parent often temporarily abandons the parental relationship.[82]

Such abandonment of the parental relationship occurs when a child is injured while in the parent's employ.[83] By assuming the role of an employer, the parent necessarily accepts all the responsibilities of an employer.[84] Included in these responsibilities is the duty to provide reasonably safe working conditions.[85] A breach of this duty results in an employer's liability for the employee's injuries. Therefore, although the existence of a parental relationship warrants the imposition of immunity in familial transactions, a child injured while in the employ of a parent has a cause of action against the parent arising from the separate and distinct employer-employee relationship.[86] In effect, the parent, while pursuing his business endeavors, must temporarily abandon the parental relationship and is no longer entitled to the immunity it provides.[87]

Abandonment of the parental relationship also occurs when a parent's malicious and willful misconduct results in injury to a child.[88] Such conduct is not consistent with the duties and obligations inherent in the parental relationship but rather it destroys that relationship by creating dissention among the family members.[89] Due to its destructive nature, a parent's malicious and

82. Courts often are unwilling to overrule precedent. Rather than totally abrogate the parent-child tort immunity rule, the court creates various exceptions which "whittle the immunity down." *See* PROSSER, *supra* note 1, at 866.

83. Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930). In *Dunlap*, a child was injured while acting as an employee of the father. However, other courts have allowed a cause of action even where a child is not serving as an employee of the parent, so long as the parent is performing a business transaction when he causes injury to the child. *See* Signs v. Signs, 156 Ohio St. 592, 103 N.E.2d 743 (1952) (child burned when father's gasoline pump exploded); Borst v. Borst, 41 Wash. 2d 149, 251 P.2d 149 (1952) (father driving business vehicle ran over his son who was playing in the street).

84. Dunlap v. Dunlap, 84 N.H. at 362, 150 A. at 915.

85. *Id.*

86. *Id.*

87. *Id.*

88. *See* Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955) (parent's reckless driving); Wright v. Wright, 85 Ga. App. 721, 70 S.E.2d 152 (1952) (parent driving while intoxicated); Nudd v. Matsoukas, 7 Ill. 2d 608, 131 N.E.2d 525 (1956) (parent's reckless driving); Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951) (father's murder of mother and his suicide considered malicious and willful misconduct causing mental distress); Harbin v. Harbin, 16 A.D.2d 696, 227 N.Y.S.2d 1023 (1961) (parent's reckless driving); Cowgill v. Boock, 189 Or. 282, 218 P.2d 445 (1950) (parent's reckless driving).

89. Mahnke v. Moore, 197 Md. at 64, 77 A.2d at 926.

willful misconduct constitutes a complete abandonment of the parental relationship.[90] Since immunity is a qualified privilege of the parental relationship,[91] it is illogical to provide immunity where a parent has abandoned the parental relationship by acting in a malicious manner. As a result several courts permit a child's action in tort against a parent whose actions constitute malicious and willful misconduct.[92]

Additionally, several courts permit a child's tort action against a deceased parent's estate[93] as there is no practical reason for granting the deceased parent immunity. Since immunity from suit is only a procedural bar to a child's cause of action based on public policy and not on a lack of a violated duty,[94] the procedural bar should no longer operate to preclude the child's action in absence of the underlying policy. Obviously, a parent's death eliminates reason for preserving that particular parental relationship;[95] hence, in absence of this underlying policy, immunity is no longer mandated.

Furthermore, the need to preserve the family peace is arguably an insufficient policy consideration for granting a parent immunity from the tort claims of his child. If preserving the family peace is a valid consideration to deny the child a tort action against his parents, it should also serve to bar similar actions in property and contract law. However, courts have permitted a child to sue his parents in property and contract actions.[96] Such inconsistent treatment of a child is illogical and thereby weakens the rationale used in preserving the parent-child tort immunity rule.

Those situations where courts have held a parent liable to his child for tortious conduct have been referred to as exceptions to the parent-child tort immunity rule. However, such classification is a misnomer since a common law rule prohibiting a child's tort action against his parent did not exist.[97] Rather, common law apparently would permit a child's tort action against the parent for the same

90. *Id.*

91. *Id.*

92. *See* cases cited in note 88 *supra.*

93. The typical action involves an automobile collision in which the parent-driver dies and the child receives injuries. *See* Davis v. Smith, 126 F. Supp. 497 (E.D. Pa. 1954); Brennecke v. Kilpatrick, 336 S.W.2d 68 (Mo. 1960); Bahr v. Bahr, 478 S.W.2d 400 (Mo. 1972); Palcsey v. Tepper, 71 N.J. Super. 294, 176 A.2d 818 (1962).

94. Brennecke v. Kilpatrick, 336 S.W.2d at 73.

95. *Id.*

96. *See* cases cited in note 21 *supra.*

97. Streenz v. Streenz, 106 Ariz. 86, 88, 471 P.2d 282, 284 (1970).

reasons it permitted similar actions in property and contract.[98] Accordingly, the parent-child tort immunity rule represents the real exception to common law.[99] Those situations where immunity from suit was removed to provide a child with a tort action against the parent represent a return to common law. Recognizing this return to common law, several jurisdictions have chosen to abrogate the parent-child tort immunity rule,[100] reasoning that the prevalence of liability insurance no longer necessitates immunity.[101]

While various courts have abolished parent-child tort immunity, each court grants immunity to the parent in certain circumstances to alleviate the parent's burden of rearing the child.[102] However, to determine the granting of immunity under certain circumstances, the courts have diverged utilizing three different methods: explicit provisions of immunity,[103] implicit provisions of im-

98. *See* cases cited in note 21 *supra*.

99. *See* note 69 *supra* and accompanying text.

100. *See* cases cited in note 5 *supra*.

101. Streenz v. Streenz, 106 Ariz. at 88, 471 P.2d at 284. While insurance is not to be considered in determining the outcome of a particular cause of action, it is a valid consideration in making a general policy decision to abolish parent-child tort immunity. *Accord*, Hebel v. Hebel, 435 P.2d 8 (Alaska 1967); Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); Petersen v. City & County of Honolulu, 51 Hawaii 484, 462 P.2d 1007 (1970); Briere v. Briere, 107 N.H. 432, 234 A.2d 588 (1966); Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

In Davis v. Smith, 126 F. Supp. 497 (E.D. Pa. 1956), which permitted a child to sue the deceased parent's estate, the court stated:

> In reviewing the foregoing decisions a policy and trend in the law become clear. Basically there is a feeling that injustice results from a broad and complete application of the doctrine of parental immunity as a bar to any suit against a parent for personal injury to the child. Confronted with a large body of law based on the authority of Hewelett [sic], McKelvey and Roller cases, the court must face with reluctance a decision to overrule this heretofore established law. On the other hand, where right and equity compel, it should not assist in perpetuating a doctrine which is, in large part inhumane and unjust in our changing mode of life.

Id. at 503.

102. *See* notes 106-10 *infra* and accompanying text.

103. In Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963), the court explicitly abolished parent-child tort immunity except in two situations: (1) where the alleged negligent act involves an exercise of parental authority over the child; and (2) where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services and other care. *Id.* at 407, 122 N.W.2d at 198. Minnesota adopted the same provisions with one modification. The court inserted the word "reasonable" into the first exception. Silesky v. Kelman, 281 Minn. 431, 161 N.W.2d 631 (1968). Similarily, Michigan also adopted these provisions but inserted the word "reasonable" into both exceptions. Plumley v. Klein, 388 Mich. 1, 199 N.W.2d 169 (1972).

munity[104] and the reasonable parent standard.[105] As a result, the determination of what parental action or inaction constitutes negligence is often difficult. This is especially true when the courts are faced with the question of whether or not parents can be held liable for negligent supervision.

NEGLIGENT PARENTAL SUPERVISION: METHODS OF DETERMINATION

Whether a parent should have a legally recognizable duty to adequately supervise a child is a problem which has confused those courts which recognize a child's cause of action against a parent for negligence. Since a parent is charged with the duty to rear a child, the parent must afford a child the opportunities to gain independence and accept responsibility.[106] To accomplish this duty a parent will permit a child to stray from his immediate physical presence.[107] Additionally, as the child grows older, a parent may permit the child to ride a bicycle, or use various power tools, or drive motorcycles or automobiles, all of which might be considered dangerous instruments in the hands of a child.[108] When a child is injured while adventuring into this realm of independence and responsibility, a court often must decide whether a child can maintain an action against the parent for negligent supervision. Such a decision requires that the court distinguish a parent's duty to rear a child, for which immunity is granted,[109] from the parent's legal duty to protect a child from injury.[110] As a practical matter, the child's age, experience and education and the parent's ability to foresee potential dangers are factors which may be useful in determining the parent's

104. For examples of jurisdictions granting immunity implicitly, see Xaphes v. Mossey, 224 F. Supp. 578 (D. Vt. 1963) (interpreting Vermont law); Petersen v. City & County of Honolulu, 51 Hawaii 484, 462 P.2d. 1007 (1969); Schenk v. Schenk, 100 Ind. App. 199, 241 N.E.2d 12 (1968); Nuelles v. Wells, 154 N.W.2d 364 (N.D. 1967); Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966); Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969).

105. Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971). California is the only jurisdiction to adopt the "reasonable parent" standard.

106. *See* Nolechek v. Gesuale, 46 N.Y.2d 332, 338, 385 N.E.2d 1268, 1272, 413 N.Y.S.2d 340, 344 (1978).

107. *Id.*

108. *Id.*

109. *See* note 103 *supra.*

110. The primary legal responsibility for the protection of children rests upon the parent. Gabel v. Koba, 1 Wash. App. 684, 463 P.2d 237 (1969). *But see* Holodook v. Spencer, 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974), where the court refused to recognize a legal duty to protect the child.

liability for the child's injuries.[111] While these factors may be useful in making such a determination, courts often use an inflexible standard which precludes the consideration of the special circumstances of each case. As a result, courts often reach inconsistent and inequitable decisions when confronted with a child's action against a parent for negligent supervision.

Negligent Supervision and The Explicit Provision of Immunity

Courts have explicitly provided a parent with immunity from a child's cause of action "where he is exercising parental authority or where he is exercising ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services and other care."[112] While several courts have concluded that this wording includes a parental duty to supervise, thereby warranting immunity, these courts have done so by classifying supervision as parental authority[113] on the one hand or as parental discretion[114] on the other. Through the inconsistent application of these provisions to the problem of negligent parental supervision, courts have failed to provide a sufficient method for determining parental immunity in those situations involving inadequate parental supervision.

Faced with the question of parental liability for inadequate parental supervision, the Supreme Court of Michigan in *Paige v. Bing Construction Co.*, granted the parent immunity reasoning that supervision was an element of parental authority.[115] According to the court, parental authority was not limited to disciplinary matters, but rather, it included providing instruction and education so that a child may become aware of the surrounding dangers for his or her well-being.[116] To provide this education a parent must permit the

111. *See* Convery v. Maczka, 163 N.J. Super. 411, 394 A.2d 1250 (1978).

112. Goller v. White, 20 Wis. 2d at 407, 122 N.W.2d at 198.

113. *See* notes 115-18 *infra* and accompanying text.

114. *See* notes 119-29 *infra* and accompanying text.

115. 61 Mich. App. at 482, 233 N.W.2d at 49. The case involved a two-and-one-half-year-old child who died as a result of her injuries when she fell into a hole on the third party's construction site. The parents filed a wrongful death action against the third party. The third party counterclaimed against the parents for negligent supervision. The court dismissed the claim, denying an actionable tort for negligent supervision. *Accord*, Fritz v. Anderson, 148 N.J. Super. 68, 371 A.2d 833 (1977) (child falls into excavation). *But see* Macey v. United States 454 F. Supp. 684 (D. Alaska 1978) (where the court found the parents liable for negligent supervision when their four-year-old child drowned in a partially excavated ditch even though a babysitter was watching the child at the time).

116. 61 Mich. App. at 484, 233 N.W.2d at 48.

child to adventure into the world without constant supervision.[117] Since the absence of constant supervision is a means of providing education, the *Paige* court reasoned that it was impossible to distinguish between such general phenomena as authority and supervision.[118] Hence, the Supreme Court of Michigan refused to recognize a child's action against the parent for negligent supervision.

The Supreme Court of Minnesota also refused to recognize a child's action against the parent in *Cherry v. Cherry*,[119] where an unattended infant incurred injury when she gnawed through an electrical cord. However, unlike the *Paige* court which held that parental supervision was an element of parental authority,[120] the court in *Cherry* concluded that the use of an extension cord was an exercise of ordinary parental discretion with respect to housing and other care.[121] Since a parent was accorded immunity while exercising ordinary parental discretion with respect to housing and other care,[122] the injured infant suffered uncompensated injuries.

In a like manner, the Wisconsin Supreme Court in *Lemmen v. Servais* has interpreted the term "other care" to include the parental duty to supervise a child.[123] In *Lemmen*, a six-year-old child was

117. Nolechek v. Gesuale, 46 N.Y.2d at 338, 385 N.E.2d at 1268, 413 N.Y.S.2d at 344.

118. 61 Mich. App. at 482, 233 N.W.2d at 49. Despite the changing nature of society, a parent must still exercise parental discipline and control over the child. "[T]o take a step which could unduly disturb and further erode the harmony of the family is unwarranted considering the practical impossibility of logically distinguishing between authority and supervision." *Id.*

119. 295 Minn. 93, 203 N.W.2d 352 (1972). In *Cherry* the mother witnessed the eight-month-old infant chewing on the electrical cord. Rather than remove the cord from the child's reach, the mother slapped the child on her hands and placed her back onto the floor where she resumed gnawing on the cord.

120. *See* note 115 *supra* and accompanying text.

121. Cherry v. Cherry, 295 Minn. at 94, 203 N.W.2d at 353. Concededly, the use of an extension cord is household apparatus and therefore related to housing. However it is difficult to perceive how the use of an extension cord directly relates to a parent's duty to provide a child with housing. Rather, it seems the court should have considered whether the parent exercised ordinary discretion with respect to caring for the child. It might be argued that placing a child into a foreseeably dangerous situation is not an act of ordinary parental discretion. *See* note 119 *supra.*

122. *See* note 103 *supra.*

123. 39 Wis. 2d 75, 158 N.W.2d 341 (1968). Although the court did not mention negligent supervision, the facts are analogous to those of other cases where the court considered the issue to be one of negligent supervision. *See* Holodook v. Spencer, 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974); Thoreson v. Milwaukee & Suburban Transp. Co., 56 Wis. 2d 231, 201 N.W.2d 745 (1972).

struck by an automobile when she attempted to cross the street.[124] Broadly interpreting the term "other care" to include a parent's duty to instruct the child as to the proper manner of crossing a street, the *Lemmen* court granted immunity to the parent.[125] Furthermore, the court suggested that a parent might be liable for a child's injuries if it could be established that the parent was in immediate control of a child who was too young to care for his own safety.[126] However, a parent is not required to do the impossible to protect a child;[127] rather, the parent must provide reasonable care and protection as an ordinary prudent person would deem necessary.[128] Since the parent was exercising ordinary discretion with respect to the provision of other care, the *Lemmen* court concluded that no action could be maintained between the parent and the child.[129]

Contrary to the holding in *Lemmen*,[130] the Supreme Court of Wisconsin in *Thoreson v. Milwaukee & Suburban Transport Co.*,[131] recognized an actionable tort for negligent supervision. While the *Lemmen* court interpreted broadly the term "other care" to include the parent's duty to supervise,[132] the court in *Thoreson* limited "other care" to include only those acts which constitued exercises of ordinary parental discretion with respect to providing a child with the necessities of life.[133] Acts of upbringing, whether in the nature of supervision or education, are not acts which involve providing a child with the necessities of life.[134] Additionally, the court in *Thoreson* rejected the rationale of the *Paige* court[135] by limiting the exercise of parental authority to include only the parent's right to discipline the child.[136] According to the *Thoreson* court, parental

124. 39 Wis. 2d 75, 158 N.W.2d 341.

125. *Id.* at 77, 158 N.W. 2d at 343 (quoting 39 AM. JUR. *Parent and Child* § 46 (1942)).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 77, 158 N.W.2d at 344.

130. *See* note 123 *supra* and accompanying text.

131. 56 Wis. 2d 231, 201 N.W.2d 745 (1972). In *Thoreson* a three-year-old boy was struck by a bus when he ran into the street from between two parked cars. The parents sued. The jury found the bus company sixty percent negligent and the parents forty percent negligent for failing to adequately supervise their child. Damages were apportioned according to the jury's determination of negligence.

132. *See* notes 115-18 *supra* and accompanying text.

133. 56 Wis. 2d at 239, 201 N.W.2d at 753.

134. *Id.*

135. *See* notes 115-18 *supra* and accompanying text.

136. 56 Wis. 2d at 239, 201 N.W.2d at 753.

supervision is not an exercise of parental authority, nor is it an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care.[137] Therefore, the court held that a child may maintain an action against a parent for negligent supervision.[138]

Those jurisdictions which provide immunity to the parent where his act constitutes an exercise of parental authority or an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care, have inconsistently responded to the question of negligent supervision.[139] Such inconsistency may be explained by the courts' inability to interpret the ambiguous immunity provisions.[140] While the *Thoreson* court has salvaged these provisions through narrow interpretation,[141] several courts remain perplexed in determining whether or not a child's action for negligence should be recognized.

Negligent Supervision: Implied Immunity

While some jurisdictions have adopted express provisions of immunity,[142] others have implicitly granted immunity to the parent where this duty arises exclusively from the family relationship.[143] Those jurisdictions which implicitly grant immunity to the parent

137. *Id.* The *Thoreson* court utilized the statutory construction rule of *ejusdem generis*. This rule provides that "where general words follow words of particular and specific meaning, the general words should not be construed to their widest extent but should be held to apply to the same general kind of things specifically mentioned." Schmidt v. United States, 369 F. Supp. 64 (E.D. Wis. 1974) (the court recognized negligent supervision as a tort). *Accord*, Cole v. Sears Roebuck & Co., 47 Wis. 2d 629, 177 N.W.2d 866 (1970).

138. Thoreson v. Milwaukee & Suburban Transp. Co., 56 Wis. 2d at 239, 201 N.W.2d at 753.

139. In *Paige* the court denied an action for negligent supervision reasoning that negligent supervision is an element of parental authority, thereby warranting immunity. 61 Mich. App. at 482, 233 N.W.2d at 49. Denying the same cause of action, the court in *Cherry* concluded that the parent was exercising ordinary parental discretion with respect to the provision of housing and other care. 295 Minn. at 94, 203 N.W.2d at 353. While the *Lemmen* court does not specifically mention negligent supervision it too would deny the action reasoning that negligent supervision is included in the term other care. *See* note 123 *supra* and accompanying text. Finally, the *Thoreson* court permitted an action for negligent supervision. 56 Wis. 2d at 239, 201 N.W.2d at 753. These inconsistencies indicate that the explicit provisions adopted by these courts are inappropriate guidelines for determining whether or not negligent supervision should constitute an actionable tort.

140. *See* note 139 *supra*.

141. *See* notes 135-38 *supra* and accompanying text.

142. *See* note 103 *supra*.

143. *See* note 104 *supra*.

where it has been alleged that the parent failed to adequately supervise his child have done so inconsistently. New York is representative of a jurisdiction which inconsistently grants immunity to the parent in actions alleging negligent supervision.

Illustrative of New York's refusal to recognize a child's action for negligent supervision is *Holodook v. Spencer.*[144] In *Holodook* a four-and-one-half-year-old child was struck by an automobile driven by a third party.[145] Although this case is factually similar to *Thoreson,*[146] the court in *Holodook* rejected the *Thoreson* court's narrow application of an immunity provision.[147] Instead, the *Holodook* court liberally granted immunity to the parent reasoning that the law should not venture into the realm of duties which arise exclusively from the family relationship.[148] Comparing *Thoreson*[149] and *Holodook*[150] it is clear that the state of the law regarding a legally recognizable parental duty to supervise a child is in conflict. Thus, an examination of the policy considerations advanced by the *Holodook* court might be useful in determining whether an actionable tort for negligent parental supervision should exist.

One consideration advanced by the *Holodook* court to deny an actionable tort for negligent supervision is that such an action would place an unreasonable burden upon the parent.[151] Indeed, a child could probably avoid most injuries were he under a parent's constant supervision.[152] Thus, the court in *Holodook* suggested that each

144. 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974). *Holodook* is a consolidation of three cases: Holodook v. Spencer, 43 A.D.2d 129, 350 N.Y.S.2d 199 (1974) (child struck by a car); Ryan v. Fahey, 43 A.D.2d 429, 352 N.Y.S.2d 283 (1974) (child run over by a lawn mower); Graney v. Graney, 43 A.D.2d 207, 350 N.Y.S.2d 207 (1973) (child fell from a slide).

145. 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859.

146. *See* note 131 *supra.* In each case a child darted out into the street from between two parked cars and was struck by an on-coming vehicle driven by a third party. Both actions were brought against the third party for negligence. While the court in *Thoreson* allowed the third party to recover a judgment against the parent for contribution, as the parents were negligent in supervising their child, the court in *Holodook* refused to recognize an actionable tort for negligent supervision whereby the court denied the claim for contribution.

147. *See* notes 136-37 *supra* and accompanying text.

148. 36 N.Y.2d at 45, 324 N.E.2d at 343, 364 N.Y.S.2d at 867.

149. *See* note 131 *supra.*

150. *See* note 144 *supra.*

151. 36 N.Y.2d at 45, 324 N.E.2d at 343, 364 N.Y.S.2d at 867. *See* note 154 *infra.*

152. Holodook v. Spencer, 36 N.Y.2d at 45, 324 N.E.2d at 343, 364 N.Y.S.2d at 867.

time a child is injured, there is a strong possibility that the parent will be called into court either by the child or by a third party who is seeking to recover a judgment against the parent for contribution.[153] According to the court, calling a parent into court each time a child sustains injuries would hinder a parent's ability to effectively rear his child and would require a parent to unreasonably waste his time answering frivolous claims.[154] Since an actionable tort for negligent supervision would provide a claim whereby an injured child or a third party could automatically require a parent to appear in court, the *Holodook* court denied the tort action.[155]

As a practical matter, a parent will not be called into court each time his child is injured. Rather, a child will be reluctant to bring a cause of action against his parent for negligent supervision due to the natural ties of affection that bind the family unit.[156] Also, because a child is subject to parental control, the parent has the power to hinder the child's action.[157] Since the characteristics inherent in a cohesive family relationship will provide sufficient controls on the number of direct actions brought by a child against his parent for negligent supervision, it is unlikely that a parent will be required to appear in court each time his child is injured.

Additionally, where a third party injures a child, a court will often appoint the parent as guardian ad litem to prosecute the child's action against the third party.[158] Consequently, when the third party files a complaint against the parent alleging negligent supervision, no unreasonable burden is placed on the parent as it is likely that they have initiated the prosecution of the child's claim.[159]

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153. *Id.*

154. If each time a child was injured a parent could be held liable for his injuries due to a failure to supervise, then a parent might be coerced into providing excessive supervision. The overall effect of this tort action would be to suppress the parents' ability to rear the child. *See* Cannon v. Cannon, 287 N.Y. 425, 40 N.E.2d 236 (1942). Failure to adequately supervise a child does not mean a parent would be held liable each time his child is injured since negligence would have to be proven. Surely the court recognized this. Therefore, by implication the court probably did not want a parent to be called into court each time a child is injured as this would unreasonably waste his time.

155. 36 N.Y.2d 51, 324 N.E.2d 346, 364 N.Y.S.2d 871.

156. *Id.* at 52, 324 N.E.2d at 347, 364 N.Y.S.2d at 872 (Jasen, J., dissenting). *Accord*, Lastowski v. Norge Coin-O-Matic, Inc., 44 A.D.2d 127, 141, 355 N.Y.S.2d 432, 446 (1974) (Hopkins, J., dissenting).

157. *See* note 146 *supra.*

158. *E.g.*, Petersen v. City & County of Honolulu, 51 Hawaii 484, 462 P.2d 1007 (1969); Stasky v. Bernardon, 81 Misc. 2d 1067, 367 N.Y.S.2d 449 (Sup. Ct. 1975); Hairston v. Broadwater, 73 Misc. 2d 523, 342 N.Y.S.2d 787 (Sup. Ct. 1973).

159. *See* note 158 *supra* for a few, of many, examples.

Instead, an unreasonable burden is placed on the third party who cannot recover a judgment against the parents for contribution.[160] This financial burden is even more unreasonable if the third party is only slightly negligent as he may be held totally liable for the child's injuries.[161] Such a result runs counter to the evolution in our law toward a system of comparative fault.[162] Thus, courts should recognize an actionable tort for negligent supervision, rather than deny the tort as creating an unreasonable burden on the parent.

Besides the unreasonable burden on the parent, the *Holodook* court denied the child's action since a claim for negligent supervision could result in the parent's failure to prosecute a child's cause of action against a third party.[163] Since creating an action for negligent supervision would provide a third party with a means to recover a judgment against the parent for contribution, the court determined that an uninsured parent might be reluctant to assert

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160. Where two tortfeasors cause a single injury the plaintiff can sue either tortfeasor for the total amount of damages.

> There is obviously a lack of sense and justice in rule which permits the entire burden of a loss to be shouldered onto one alone according to the accident of a successful levy of execution, the existence of liability, the plaintiff's whim or spite or this collusion with the other wrongdoer, while the latter goes scot-free.

PROSSER, *supra* note 1, at 307.

161. *Id.*

162. Twenty-nine states have enacted some form of a comparative negligence statute. ARK STAT. ANN. §§ 27-1763 to 27-1765 (1979); COLO. REV. STAT. § 23-21-111 (Supp. 1979); CONN. GEN. STAT. ANN. § 52-572h (West Supp. 1980); GA. CODE ANN. § 105-603 (Supp. 1980); HAWAII REV. STAT. § 663-31 (1976); IDAHO CODE §§ 6-801, 6-802 (1979); KAN. STAT. ANN. § 60-258a (1976); ME. REV. STAT. ANN. tit. 14 § 156 (1980); MASS. GEN. LAWS ANN. ch. 231 § 185 (West Supp. 1980-81); MINN. STAT. ANN. § 604.01 (West Supp. 1980); MISS. CODE ANN. § 11-7-15 (1972); MONT. REV. CODES ANN. § 58-607.1 (Supp. 1977); NEB. REV. STAT. § 25-1151 (1979); NEV. REV. STAT. 41.141 (1979); N.H. REV. STAT. ANN. § 507:7a (Supp. 1977); N.J. STAT. ANN. 2A: 15-5.1 to 2A: 15-5.3 (West Supp. 1980-81; N.Y. CIV. PRAC. LAW. § 1411 (McKinney 1976); N.D. CENT. CODE § 9-10-07 (1975); OKLA. STAT. ANN. tit. 23 § 13 (West Supp. 1979-80); OR. REV. STAT. § 18.470 (1979); PA. CONS. STAT. ANN. tit. 42 § 7102 (Purdon 1980); R.I. GEN. LAWS § 9-20-4 (Supp. 1978); S.D. CODIFIED LAWS ANN. § 20-9-2 (1979); TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1980); UTAH CODE ANN. § 78-27-37 (1977); VT. STAT. ANN. tit. 12 § 1036 (Supp. 1980); WASH. REV. CODE ANN. § 4.22-010 (Supp. 1980-81); WIS. STAT. ANN. § 895.045 (West. Supp. 1979-80); and WYO. STAT. § 1-1-109 (West 1977).

In addition five states have adopted comparative negligence through judicial action. They are Alaska, Kaatz v. State, 540 P.2d 1037 (Alaska 1975); California, Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Florida, Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Michigan, Placek v. City of Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979); and West Virginia, Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979).

163. 36 N.Y.2d at 46, 324 N.E.2d at 344, 364 N.Y.S.2d at 868.

his child's right to collect damages from the third party.[164] This reluctance to prosecute a child's claim results from the uninsured parent's fear of a third party's retaliatory claim for contribution which could result in an out of pocket payment by the uninsured parent.[165] Ultimately, the net effect of allowing a contribution claim for negligent supervision could result in a detriment to the child, as he might suffer his injuries uncompensated.[166] Recognizing this potential detriment to the child, the *Holodook* court refused to provide a third party with a retaliatory action against the parent for negligent supervision.[167]

Concededly, an uninsured parent might be reluctant to assert a child's claim against the third party fearing a potential claim for contribution. However, such an occurrence is credible only if it is assumed that the third party is more likely to be insured than the parent.[168] Although the third party is likely to have liability insurance, it is equally probable that the parent might have an insurance policy which would protect him from potential financial harm resulting from the third party's claim for contribution.[169] Due to the prevalence of liability insurance, it is illogical to assume that a third party is more likely to have insurance than the parent of an injured child. As a result, it is likely that most parents will eagerly prosecute their child's claims regardless of the possibility of a third party's retaliatory claim for contribution.

The court in *Holodook* also argued that a tort for negligent supervision could ultimately reduce the amount of damages a child might recover from a third-party tortfeasor.[170] Normally when a child recovers money damages from a third party, the court will appoint a guardian of the property for the child.[171] This guardian will

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 51, 324 N.E.2d at 346, 364 N.Y.S.2d at 872.

168. The court in *Holodook* stated that "the net effect of allowing . . . apportionment could well be the parent's failure to seek legal redress on the child's behalf against third parties who are more likely than the parent in these cases to have appropriate liability coverage." *Id.* at 46, 324 N.E.2d at 344, 364 N.Y.S.2d at 868.

169. *Id.* at 53, 324 N.E.2d at 348, 364 N.Y.S.2d at 873 (Jasen, J., dissenting). *Accord*, Lastowski v. Norge Coin-O-Matic, Inc., 44 A.D.2d at 145, 355 N.Y.S.2d at 449 (Hopkins, J., dissenting).

170. Holodook v. Spencer, 36 N.Y.S.2d at 47, 324 N.E.2d at 344, 364 N.Y.S.2d at 868.

171. *See, e.g.*, N.Y. SURR. CT. PROC. ACT. § 1701 (McKinney Supp. 1978-79), which provides: "The court has power over the property of an infant and is authorized and empowered to appoint a guardian of the person or of the property or of both of the infant whether or not the parent or parents of the infant are living."

usually be the parent, as he is the child's natural guardian.[172] While it is illegal for the parent to appropriate the child's damage award for his own use,[173] it is conceivable that the parent could divert funds from the child's damage award in order to satisfy a third-party's judgment for contribution. In effect, the child's damage award would be reduced.

However, courts have the power to prevent a parent's diversion of funds from the child's damage award by placing the award in a trust and appointing a non-parental trustee.[174] This procedural action creates a separate economic identity for the child. As such, the corpus of the trust is protected from parental encroachment.[175] Creating a trust with a non-parental trustee not only would secure full compensation for an injured child, but it would also provide an effective means whereby courts could apportion damages between the negligent third party and the negligent parent.

Finally, the *Holodook* court analogized its denial of an actionable tort for negligent supervision to New York's General Obligations Law,[176] the statute abolishing the old rule of imputed negligence.[177] Pursuant to the imputed negligence rule, a child could not maintain an action against a third-party tortfeasor where the third party could prove the parent was contributorily negligent in

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172. *Id.*

173. While a parent may be the natural legal guardian of the child, that does not make him the legal guardian of the child's property. Damages for injury to a child's person belong to the child and it is illegal for a parent to divert them to his own use. *See* Weiand v. City of Akron, 13 Ohio App. 2d 73, 233 N.E.2d 880 (1968).

174. "Separate guardianship and trust accounts under judicial scrutiny are the legal protection for infants so that damages awarded for their pain and suffering are not invaded to pay the parents' debt." Hairston v. Broadwater, 73 Misc. 2d at 531, 342 N.Y.S.2d at 794-95 ("[A]ny property to which an infant or a person judicially declared to be incompetent is entitled, after deducting any expenses allowed by the court, shall be distributed to the guardian of his property . . . to be held for the use and benefit of such infant or incompetent.") (construing N.Y. CIV. PRAC. LAW § 1206 (McKinney 1976)).

175. Hairston v. Broadwater, 73 Misc. 2d at 531, 342 N.Y.S.2d at 794-95.

176. N.Y. GEN. OBLIG. LAW § 3-111 (McKinney 1978), provides that: "In an action brought by an infant to recover damages for personal injury the contributory negligence of the infant's parent or other custodian shall not be imputed to the infant."

177. The rule of imputed negligence had its origin in Hartfield v. Roper, 21 Wend. 615 (N.Y. 1839). In *Hartfield*, a two year old was injured when she was run over by a sleigh driven by the defendant. The court found the parents negligent for failing to look after their child. Such action on the part of the parents constituted contributory negligence. Since the parents' negligence was imputed to the child, the child could not recover for her damages.

failing to adequately supervise a child.[178] The court in *Holodook* determined that by abrogating the imputed negligence rule, the legislature intended to discard the actionable tort for negligent supervision.[179] In accordance with its determination of the legislature's intent, the *Holodook* court refused to recognize an actionable tort for negligent parental supervision.[180]

In its determination of the legislative intent underlying the New York General Obligations Law,[181] the *Holodook* court ignored other practical considerations for abrogating the imputed negligence rule. The old rule which imputed a parent's contributory negligence to the injured child thus barring his cause of action coexisted with the parent-child tort immunity rule.[182] Accordingly, if a child's claim against a negligent third party was barred where the parent was contributorily negligent, the child would go uncompensated as the parent-child tort immunity rule barred the child's subsequent claim against the parent.[183] Since parent-child tort immunity already precluded a child's action for negligent supervision, it is illogical to assume that the legislature abolished imputed negligence to further deny a cause of action for negligent supervision. Rather, it would appear that the legislature abolished the imputed negligence rule to permit a child to recover damages for injuries previously denied by the parent-child tort immunity rule.[184] Ultimately, abrogation of the

178. *Id.*

179. 36 N.Y.2d at 48, 324 N.E.2d at 345, 364 N.Y.S.2d at 869.

180. *Id.* at 51, 324 N.E.2d at 346, 364 N.Y.S.2d at 872.

181. *See* note 176 *supra.*

182. Imputed negligence originated in the year 1839 and lasted until 1935. *See* Novak v. State, 199 Misc. 588, 99 N.Y.S.2d 962 (Ct. Cl. 1950). Parent-child tort immunity existed in New York until its abrogation in 1969. *See* Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969).

183. In rejecting the imputed negligence rule, the court in Neff v. City of Cameron, 213 Mo. 350, 111 S.W. 1139 (1908), stated:

> Imputed negligence is an attempt to incorporate into the law of this land as legal precepts the sayings that the sins of the fathers are visited upon their children, and that the child's teeth must be set on edge because the father has eaten sour grapes. But the whole doctrine of imputed negligence has been thoroughly exploded as heresy ever was. It was originally founded on . . . fiction of the law that one in whose care the infant is, is its keeper and agent and in respect to third persons his act must be deemed that of the infant, his negligence the infant's negligence. But the theory of agency is flatly unsound . . . . It is elementary in the common law that one who has suffered wrong may have his amends, indemnity or reparation from anyone participating in that wrong.

Id. at 360, 111 S.W. at 1141.

184. *See* note 185 *supra* and accompanying text.

imputed negligence rule enables a child to collect damages for his injuries.[185] Thus, if the *Holodook* court wanted to act in accordance with the legislative intent underlying the New York General Obligations Law, which arguably enables a child to recover damages for his injuries,[186] the court should have promulgated an actionable tort for negligent supervision.

While the *Holodook* court absolutely barred a child's direct cause of action against the parent for negligent supervision,[187] recent New York court decisions apparently have recognized an action for negligent supervision in order to provide an assertable claim to a third-party tortfeasor.[188] These recent New York decisions are based upon certain judicially created distinctions designed to disguise the claim for negligent supervision which *Holodook* prohibited. As a result, the New York courts have arbitrarily determined parental liability depending upon whether a child directly brings the action, or whether a third-party tortfeasor is seeking contribution from the parent.[189] These arbitrary determinations have further confused the issue of what parental inaction amounts to negligent supervision.

Illustrative of a court's arbitrary determination of a parent's liability for his child's injuries is *Goedkoop v. Ward Pavement Co.*[190] In *Goedkoop*, the defendant, a third party engaged in construction, allowed explosives to remain on the construction site.[191] A child found some of these explosives and removed them to his home.[192] Upon the child's arrival, the father immediately confiscated the explosives and placed them in a jar in the basement.[193] Two years later, the child found the explosives and was injured when he attempted to puncture them with a sharp instrument.[194] The court sustained a counterclaim by the third party reasoning that the duty not to negligently maintain explosives is a duty which is owed to the whole world.[195] Since the duty not to negligently maintain explosives

185. *See* note 176 *supra.*
186. *Id.*
187. 36 N.Y.2d 51, 324 N.E.2d 346, 364 N.Y.S.2d 872.
188. *See* notes 190-211 *infra* and accompanying text.
189. *See* text at note 218 *infra.*
190. 51 A.D.2d 542, 378 N.Y.S.2d 417 (1976).
191. *Id.* at 543, 378 N.Y.S.2d at 418.
192. *Id.*
193. *Id.* at 543, 378 N.Y.S.2d at 418-19.
194. *Id.* at 543, 378 N.Y.S.2d at 419.
195. *Id.* The court apparently adopted the language used by Justice Andrews in his famous dissenting opinion in Palsgraf v. Long Island Ry. Co., 248 N.Y. 339, 162 N.E. 99 (1928):

Everyone owes to the world at large, the duty of refraining from those

was a duty owed to the whole world and not simply arising from the family relationship, the court concluded an actionable tort existed between the child and the parent. Thus, the court in *Goedkoop* sustained the counterclaim.[196]

Although the court in *Goedkoop* recognized an actionable tort between the parent and the child to permit the third party's counterclaim, it is conceivable that the court could have denied a child's direct cause of action against the parent absent a parental duty to supervise a child. The real distinction between a "beyond the family duty" approach and the *Holodook* "failure to supervise" exception is whether the parent is directly responsible for the child's injuries, or whether he simply permits the child to be in a position to harm himself or others.[197] If the parent actively starts the forces in motion which directly cause injury to the child, then the court should impose liability upon the parent on the basis that the duty was owed to the whole world and beyond the family duty.[198] On the other hand, if the parent simply permits the child to be in a position to do harm to himself and the child's own conduct causes his injury, then the court should refuse to impose liability as there is no parental duty to supervise the child.[199]

Applying this distinction to the facts of *Goedkoop* it is possible that the court could have denied the child's direct action against the parent utilizing a *Holodook* rationale.[200] Since the child removed the

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> acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone.

Id. at 350, 162 N.E. at 103.

196. 51 A.D.2d at 543, 378 N.Y.S.2d at 419.

197. Hurst v. Titus, 99 Misc. 2d 205, 415 N.Y.S.2d 770 (Sup. Ct. 1979). In *Hurst* the court sets out the guidelines for determining what actions are negligent supervision as opposed to those which involve a duty owed to the whole world. The court attaches liability only if the duty is one owed to the whole world. *See* notes 198-99 *infra* and accompanying text.

198. *Id.* at 210, 415 N.Y.S.2d at 774.

199. Holodook v. Spencer, 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859.

200. *See* notes 201-02 *infra* and accompanying text. The court in *Hurst* set up the following hypothetical as exemplifying what parental action constitutes supervision:

> [I]n this case the child's burns had been caused because the mother had carelessly allowed the child to play with matches or unthinkedly had left the matches so close to the playpen that the child could reach and ignite them, then clearly there would be a failure to supervise situation which would fall within the *Holodook* law.

99 Misc. 2d at 209-10, 415 N.Y.S.2d at 773.

This hypothetical situation is analogous to the facts of *Goedkoop*. In both situa-

explosives to his home, it was the child who started the injurious forces in motion.[201] Moreover, the father merely permitted the child to be in a position of danger by allowing him to enter the basement where the explosives were stored. By attempting to puncture the explosives, the child directly caused his own injury.[202] In effect, the parent was passive while the child acted causing his own injuries. Accordingly, if the court applied the *Holodook* "failure to adequately supervise" exception,[203] it might have denied a child's direct action against the parent.

The *Goedkoop* decision is illustrative of the court's ability to arbitrarily determine liability. In determining liability, a court can arrive at opposite conclusions depending upon whether it uses the "beyond the family duty" approach or the *Holodook* "failure to supervise" exception.[204] By recognizing an actionable tort between the parent and the child in order to provide the third party with an assertible claim, the *Goedkoop* court demonstrated its disapproval of an absolute bar to actions for negligent supervision.

Consistent with the *Goedkoop* court's disapproval of the absolute bar on actions for negligent supervision is the court's decision in *Nolechek v. Gesuale.*[205] In *Nolechek* a parent entrusted his partially blinded child with a motorcycle.[206] While riding the motorcycle, the child ran into a steel cable which had been placed across a private road by the defendant, a third party.[207] As a result of the accident, the child died.[208] The court refused to recognize a parental duty owed to the child,[209] but nevertheless, it recognized that a

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tions the parent acted passively while the child actively produced his own injury. Unlike *Goedkoop*, *Hurst* would grant immunity in the hypothetical situation since the parent's action constituted a failure to supervise.

201. *See* notes 191-94 *supra* and accompanying text.

202. Rather than directly causing the child's injury the father acted to protect the child. Even if the court considered his actions an intervening cause, thereby setting the injurious forces in motion, the father could not be liable unless his conduct created or increased an unreasonable risk of harm. *See* PROSSER, *supra* note 1, at 275.

203. *See* notes 197-99 *supra*. The *Holodook* failure to adequately supervise exception means that the court will grant immunity to the parent where a child injures himself, even though the parent permitted him to be in a dangerous position.

204. *See* notes 197-99 *supra*.

205. 46 N.Y.2d 332, 385 N.E.2d 1268, 413 N.Y.S.2d 340 (1978).

206. *Id.* at 337, 385 N.E.2d at 1271, 413 N.Y.S.2d at 343.

207. *Id.*

208. *Id.*

209. The court reasoned that *Holodook* bars a child's cause of action against the parent where a child is injured when his parent negligently entrusts him with a dangerous instrument. "[D]eciding whether to permit a minor to use a dangerous instrument whether it be a motorcycle, bow and arrow, a knife, a hammer or even a pen-

parent who entrusts a child with a dangerous instrumentality owes a duty to third parties to protect them from injury.[210] According to the *Nolechek* court, although the third party suffered no direct physical injury, he did suffer financial harm resulting from potential liability for the child's death.[211] Since the parent caused this potential financial harm by entrusting his child with a dangerous instrument, the *Nolechek* court concluded that the parent was liable to the third party.[212]

By finding liability in the absence of an actual injury, an essential element of any negligence action,[213] the *Nolechek* court has created a new tort. In order to maintain an action for negligence, one must show a legally recognizable duty and a breach of that duty which results in actual loss or damage.[214] The mere threat of finan-

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cil is as much an element of parental supervision as is the decision to monitor a child's play activity more or less closely." *Id.* at 337, 385 N.E.2d at 1271, 413 N.Y.S.2d at 344. *Accord*, Lampman v. Cairo Cent. School Dist. 81 Misc. 2d 395, 366 N.Y.S.2d 579 (1975).

But see RESTATEMENT (SECOND) OF TORTS § 390 (1965), which provides:

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise to use it in a manner involving unreasonable risk of physical harm to himself and others when the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

Comment C of this section suggests that the supplier might be liable to the incompetent to whom he entrusted the chattel.

210. The court reasoned that a motorcyle is a dangerous instrument in the hands of a partially blind child. 46 N.Y.2d at 341, 385 N.E.2d at 1274, 413 N.Y.S.2d at 346.

211. *Id.* at 339, 385 N.E.2d at 1272, 413 N.Y.S.2d at 345.

212. The court drew an analogy to workmen's compensation "where a third party tortfeasor may implead for contribution or indemnity the employer of an insured employee, despite the employee's inability to recover from the employer directly." *Id.* at 339, 385 N.E.2d at 1273, 413 N.Y.S.2d at 345. However, the analogy fails in that workmen's compensation is a statutorily created exclusive remedy. *Id.* at 349, 385 N.E.2d at 1278, 413 N.Y.S.2d at 351 (Cooke, J., dissenting).

Another situation in which the courts apparently have recognized a duty of the parents to supervise the child occurs when a parent files a derivative lawsuit to recover medical expenses and damages for loss of consortium resulting from his child's injuries. The courts have held that while a child has no direct cause of action against the parent since there is no duty to supervise, a failure to adequately supervise a child may bar the parent's derivative lawsuit. *See* Juszczak v. City of New York, 32 A.D.2d 824, 302 N.Y.S.2d 375 (1969). *Accord*, Dean v. Holland, 76 Misc. 2d 517, 350 N.Y.S.2d 859 (Sup. Ct. 1973); Hairston v. Broadwater, 73 Misc. 2d 523, 342 N.Y.S.2d 787 (Sup. Ct. 1973).

213. *See* PROSSER, *supra* note 1, at 143. *Accord*, RESTATEMENT (SECOND) OF TORTS § 218 (1965).

214. *See* PROSSER, *supra* note 1, at 143. *Accord*, Northern Pacific R.R. v. Lewis, 162 U.S. 366 (1896).

cial harm not yet realized is insufficient to constitute an actual injury.[215] While the parent in *Nolechek* may have breached a legally recognizable duty by entrusting his son with a dangerous instrument, the third party suffered no actual injury. In accordance with basic tort law which requires actual injury in all negligence actions, the *Nolechek* court should have dismissed the third party's counterclaim.

The decisions reached by the courts in *Nolechek* and *Goedkoop* are illustrative of methods utilized by the courts to circumvent the absolute bar to a claim for negligent supervision as promulgated by the *Holodook* court. While the *Goedkoop* court sustained a third-party counterclaim, reasoning that an actionable tort existed between a parent and his child,[216] the court in *Nolechek* sustained the counterclaim reasoning that the third party could have maintained a direct action against the parent.[217] Regardless of their reasoning, both courts demonstrated their disapproval of the *Holodook* court's absolute bar to a claim for negligent supervision. Perhaps the *Nolechek* court was a bit ironic when it stated that "the sound rule of the *Holodook* case survives only if accompanied by sound exceptions."[218] Nevertheless, the *Holodook* bar to an action survives, but the courts should not be loathe to find the parent independently liable to a third party who becomes the victim of admittedly negligent conduct between a parent and child.[219]

Courts have denied a child a direct cause of action against his parent for negligent supervision reasoning that such a duty arises exclusively from the family relationship.[220] The objective of supervising a child is "the fostering of physical, emotional, and intellectual development."[221] Considering the unique characteristics of each family,

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215. *See* Lincoln First Bank of Rochester v. Barstro & Assoc. Contracting, Inc., 49 A.D.2d 1025, 374 N.Y.S.2d 485 (1975), which states:

> The law does not fasten liability on mere threats, annoyances, or petty oppressions or other trivial incidents which must necessarily be expected and are incidental to modern life no matter how upsetting. It is only where the conduct complained of is of such a character as to exceed all reasonable bounds of decency that the law will recognize it as an actionable tort.

Id. at 1026, 374 N.Y.S.2d at 487.

216. *See* note 196 *supra* and accompanying text.

217. *See* note 212 *supra* and accompanying text.

218. 46 N.Y.2d at 341, 385 N.E.2d at 1274, 413 N.Y.S.2d at 346.

219. Hurst v. Titus, 99 Misc.2d at 208, 415 N.Y.S.2d at 773.

220. Holodook v. Spencer, 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974).

221. *Id.* at 50, 324 N.E.2d at 346, 364 N.Y.S.2d at 871.

courts are reluctant to interfere with the parental means to achieve the objective of supervision.[222] However, a parent does have the duty to see that the child does not behave in a manner which ultimately might result in his injury.[223] Accordingly, when a parent permits a child to face dangers which he cannot appreciate, the parent has effectively negligently supervised the child and should be held liable for his child's injuries.[224]

Recognizing an action for negligent supervision does not mean that a parent will be liable to the child for each injury he sustains.[225] Rather, liability should be imposed only if it can be determined that the parent breached his duty to adequately supervise his child. In determining whether a duty to supervise exists, the jury should consider the child's age, experience, training, judgment, the likelihood of the child recognizing the risk of injury to himself, and its obviousness or reasonable foreseeability to the parent.[226]

The Reasonable Parent Standard

It must be conceded that a parent needs a wide range of discretion in rearing his children. Obviously a parent must be able to impose reasonable discipline on a misbehaving child and must be allowed discretion to provide a child with food, clothing, housing, medical and dental care.[227] Meanwhile, a child should be allowed to assume various responsibilities so that he may gain independence and

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222. Kay v. Ludwick, 87 Ill. App. 2d 114, 230 N.E.2d 494 (1967).

223. *Id.*

224. In Convery v. Maczka, 163 N.J. Super. 411, 394 A.2d 1250 (1978), a child broke his arm when he jumped off a chair while playing in a neighbor's basement. Both his mother and the neighbor were upstairs at the time of the injury. The child brought an action against the neighbor and his mother. The court sustained the action against both defendants reasoning that the child's action against the mother paralleled the action against the neighbor. According to the court, each defendant stood in a special relationship to the child arising out of a duty to exercise reasonable care for the child's protection against unreasonable risk of injury. Each defendant breached that duty by failing to warn or otherwise protect the child.

The special relationship referred to by the court has been recognized in other situations where a person is charged with custody of a minor child. People standing in this relationship include: schoolmasters, *see* Ballard v. Polly, 387 F. Supp. 895 (D.D.C. 1975); Hoyen v. Manhattan Beach City School Dist., 22 Cal. 3d 508, 585 P.2d 851, 150 Cal. Rptr. 1 (1978); Miller v. Griesel, 261 Ind. 604, 308 N.E.2d 701 (1974); grandparents, *see* Barrera v. General Elec. Co., 84 Misc. 2d 901, 378 N.Y.S.2d 239 (Sup. Ct. 1975); Broome v. Horton, 83 Misc. 2d 1002, 372 N.Y.S.2d 909 (Sup. Ct. 1975); summer school proprietor, *see* Brown v. Knight, 362 Mass. 350, 285 N.E.2d 790 (1972).

225. *See* notes 156-57 *supra* and accompanying text.

226. Convery v. Maczka, 163 N.J. Super. at 413, 394 A.2d at 1253-54.

227. *See* note 103 *supra* and accompanying text.

develop his intellectual capacities.[228] Yet, the responsibility for a child's safety lies primarily with his parents whose duty is to protect the child.[229] Accordingly, where a child is unable to appreciate the risk of injury to himself, and such a risk is in the realm of reasonable foreseeability to the parent, the parent has a legal duty to adequately supervise his child to protect him from injury.[230]

Although a parent might have a legal duty to supervise a child, the parent's duty to supervise should not render him strictly liable for a child's injuries, nor should it serve as an absolute bar to a child's cause of action. A legal duty of a parent to adequately supervise his child should be recognized only in those situations where the parent can reasonably foresee certain dangers to the child's well-being. To determine the duty under these circumstances, the most equitable standard is that of the reasonable parent.[231] Furthermore it is most adaptable to the individual factual and legal patterns implicit in the family structure.[232]

Like the reasonable man[233] test, the reasonable parent test would allow the jury to consider the special circumstances of each case.[234] The reasonable parent could take on the qualities of the real

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228. Nolechek v. Gesuale, 46 N.Y.2d at 338, 385 N.E.2d at 1272, 413 N.Y.S.2d at 344.

229. Gabel v. Koba, 1 Wash. App. 684, 463 P.2d 237 (1969).

230. Convery v. Maczka, 163 N.J. Super. at 416, 394 A.2d at 1253.

231. *See* Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971). In *Gibson*, the court rejected the implicit provision of immunity cited in note 103 *supra* reasoning that:

> The *Goller* view will inevitably result in the drawing of arbitrary distinctions about when particular parental conduct falls within or without the immunity guidelines. Second, we find intolerable the notion that if a parent can succeed in bringing himself within the "safety" of parental immunity, he may act negligently with impunity.

Id. at 922, 479 P.2d at 653, 92 Cal. Rptr. at 293.

232. *See* Lastowski v. Norge Coin-O-Matic, Inc., 44 A.D.2d 127, 142, 335 N.Y.S.2d 432, 442 (1975) (Hopkins, J., dissenting).

233. *See generally* PROSSER, *supra* note 1, at 149-69. One of the earliest cases utilizing the "reasonable man" test was Vaughn v. Menlove, 132 Eng. Rep. 490 (1837). The court stated "[t]he care taken by a prudent man has always been the rule laid down; and as to the supposed difficulty of applying it a jury has always been able to say, whether, taking that rule as their guide, there has been negligence on the occasion in question." *Id.* at 493.

234. Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971). Several New York decisions apparently would find liability for negligent supervision if special circumstances were alleged. *See* Fake v. Terminal Hardware, Inc., 73 Misc. 2d 39, 341 N.Y.S.2d 272 (Sup. Ct. 1973) (child hit by car while in street); *accord*, Collazo v. Manhattan Bronx Surface Transit Operating Authority, 72 Misc. 2d 946, 339 N.Y.S.2d

parent, including his physical attributes as well as his intellectual powers.[235] Also, the jury would be allowed to consider the age, training, experience and judgment of the child in determining whether the child should have recognized the risk of injury.[236] Furthermore, the cultural, educational, and financial conditions which affect the manner in which different parents supervise their children are possible factors in determining liability.[237] Although several courts have not explicitly adopted this rationale, its application is evidenced by inconsistent results in similar circumstances.[238]

Finally, the reasonable parent standard parallels the trend toward a system of comparative fault.[239] Since a parent is aware of his child's various tendencies, a parent is better able to anticipate and control the conduct of his child. A third party, however, is free to proceed under the assumption that other people will exercise due care.[240] Accordingly, if a parent fails to adequately supervise his child, and a third party causes injury to the child, the entire responsibility should not be thrust upon the third party. This is especially true as the third party is often guilty of only the slightest degree of negligence. Of all the various approaches, the reasonable parent standard offers the most equitable resolution of the interests at stake.

CONCLUSION

At one time, the parent-child tort immunity rule insulated the parent from liability for any tortious acts committed against his children. Erosion of the policy considerations underlying this absolute rule influenced several courts to modify and even abrogate the rule. However, even in those jurisdictions the courts continue to

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809 (Sup. Ct. 1972); Marrero v. Just Cab Corp., 71 Misc. 2d 474, 336 N.Y.S.2d 301 (Sup. Ct. 1972).

235. Virtually the "reasonable parent" standard is analogous to the "reasonable man" standard and therefore could take on the same qualities. *See* PROSSER, *supra* note 1, at 172.

236. *Id.*

237. *Id. But see* notes 115-18 *supra* and accompanying text.

238. *See* notes 123-38 *supra.* Wisconsin has adopted express provisions of immunity cited in note 103 *supra.* However, two Wisconsin cases, *Lemmen* and *Thoreson* reached different results in similar fact situations. The only significant differences in the two cases was the age of the child and the parent's ability to exercise immediate control over his child. These differences explain the different conclusions the courts reached.

239. *See* note 162 *supra.*

240. *See* PROSSER, *supra* note 1, at 171-76.

grant immunity where a parent is exercising discretion in rearing his child.

In determining whether immunity should be granted, several courts have adopted inflexible standards which serve to protect the parent from a suit by his child. This is particularly true in those situations where a parent has abused his discretion by permitting an unwary child to encounter dangerous situations. By characterizing the parental duty to supervise a child as an element of parental discretion which absolutely warrants parental immunity, courts have allowed injured children to go uncompensated and have denied third-party tortfeasors the means to recover contribution from the derelict parent. Rather than utilizing inflexible standards which produce these inequities, courts should adopt the reasonable parent standard as it is the most adaptable to the individual factual and legal patterns implicit in the family structure.

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