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It's Time to Abolish North Carolina's Parent-Child Immunity, But Who's Going to Do It?—*Coffey v. Coffey* and North Carolina General Statutes Section 1-539.21

It is doubtful if any age promises a sweeter remembrance than that of a happy childhood, spent in the lovelight of kindly smiles and in the radiance of parental devotion. "Honor thy father and thy mother that thy days may be long upon the land which the Lord thy God giveth thee" is an injunction from on high, and it contains as much truth today as it did under the Mosaic dispensation. Verily, it is a command of Holy Writ—good for all time.¹

With this dreamy statement, Justice W.P. Stacy brought North Carolina into the mainstream of legal thought in 1923 by adopting for his state the parent-child immunity as a bar to suits between unemancipated minors and their parents. A creature of American common law, the immunity was created in 1891² to avoid the disruption of family harmony viewed by courts as necessary for a strong democratic society.³ A majority of states soon adopted the immunity, also formulating new justifications for the doctrine.⁴ As Justice Stacy's language suggests, preservation of family harmony was the main reason for the adoption of the parent-child immunity in North Carolina, although his opinion recognized and accepted other justifications for the immunity as well.⁵

Sixty-seven years later, however, it has become apparent that the immunity is not "good for all time." The immunity originally presented an absolute bar to a child's tort suit against his parents,⁶ but courts have narrowed the immunity over the years by exceptions⁷ and legal writers have so thoroughly criticized it⁸ that the time has come for North Carolina to jump once again into the mainstream of legal thought and abolish the immunity—as a substantial number of states have done already.⁹ While this step seems to be the proper one, neither the judiciary nor the legislature has been willing to strike the final blow. From

1. *Small v. Morrison*, 185 N.C. 577, 585, 118 S.E. 12, 16 (1923).

2. *Hewlett v. George*, 68 Miss. 703, 9 So. 885 (1891).

3. *Id.* at 711, 9 So. at 887.

4. *See, e.g., McKelvey v. McKelvey*, 111 Tenn. 388, 77 S.W. 664 (1903); *Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905); *Hollister, Parent-Child Immunity: A Doctrine In Search of Justification*, 50 FORDHAM L. REV. 489, 494 & nn.39-40 (1982).

5. *Morrison*, 185 N.C. at 580-82, 118 S.E. at 13-15. Other reasons offered to support the immunity included interference with parental discipline, analogy to the interspousal immunity, the possibility of a parent inheriting the child's recovery, and depletion of family assets otherwise available to other children. *See infra* notes 69-72 and accompanying text.

6. *Id.* at 586, 118 S.E. at 16.

7. *See infra* notes 110-19 and accompanying text.

8. *Lee v. Mowett Sales Co.*, 76 N.C. App. 556, 559-62, 334 S.E.2d 250, 252-54 (1985) (Becton, J., dissenting), *aff'd*, 316 N.C. 489, 342 S.E.2d 882 (1986); 3 R. LEE, NORTH CAROLINA FAMILY LAW § 248, at 298-99 (4th ed. 1981); *Hollister, supra* note 4, at 489 n.2.

9. *See R. LEE, supra* note 8, at 301; Annotation, *Liability of Parent for Injury to Unemancipated Child Caused by Parent's Negligence—Modern Cases*, 6 A.L.R. 4TH 1066, 1113-14 (1981) (It appears that the parent-child immunity is not supported in the following states: Alaska, Arizona, California, Hawaii, Kansas, Kentucky, Maine, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, South Carolina, Vermont, and Wisconsin.)

1972¹⁰ through the recent decision in *Coffey v. Coffey*,¹¹ when called upon to abolish the immunity, the courts continually have deferred the task to the legislature in order to avoid “[p]iecemeal abrogation of established law by judicial decree.”¹² The legislature’s response in North Carolina General Statutes section 1.539-21 in 1975¹³ and its recent amendment,¹⁴ passed only 11 days after the *Coffey* decision, failed to abolish the immunity, providing instead little more than the “piecemeal abrogation” the courts originally feared.

This Note examines the origin of the parent-child immunity and its growth and decline in North Carolina. It analyzes the justifications offered as support for the doctrine and presents the criticisms calling for its abrogation. The Note concludes that North Carolina should no longer retain the immunity as a bar to compensation of injured victims. Accordingly, this Note calls upon both the courts and the legislature to abolish the antiquated doctrine, with the exception of special provisions for actions relating to the exercise of parental authority.

In *Coffey* an unemancipated minor was driving the family automobile when he lost control of the vehicle and crashed into a utility pole.¹⁵ As a result, his mother, a passenger in the car, was injured.¹⁶ The accident occurred on August 17, 1985, while the son was sixteen years old;¹⁷ thus, the parent-child immunity precluded any suit for recovery. The statute of limitations for the mother’s action was three years, so she waited until her son turned nineteen and filed suit against him as an emancipated child.¹⁸ The trial court granted summary judgment for the defendant because the son was only sixteen years old at the time of the accident.¹⁹ The North Carolina Court of Appeals recognized that the son was an adult at the time of suit, but affirmed the trial court’s holding that “[t]he right to sue must exist at the time of the injury and the subsequent emancipation or majority of the minor is of no consequence.”²⁰ The court noted the criticisms and the suggestions calling for abrogation of the immunity, but cited the supreme court’s decision in *Lee v. Mowett Sales Co.* that such action “should be

10. *Skinner v. Whitley*, 281 N.C. 476, 189 S.E.2d 230 (1972). *Skinner* marked the first time that the court deferred abolition of the immunity to the legislature, having decided in previous cases calling for its abrogation that the immunity would be maintained.

11. 94 N.C. App. 717, 381 S.E.2d 467.

12. *Skinner*, 281 N.C. at 484, 189 S.E.2d at 235.

13. N.C. GEN. STAT. § 1-539.21 (1975) (allowing suits by children against their parents for negligent operation of a vehicle), amended by N.C. GEN. STAT. § 1-539.21 (Supp. 1989), see *supra* notes 46-48 and accompanying text.

14. Section 1-539.21, which only allowed suits by an unemancipated minor against his parents, was amended to allow parents the right to sue their children for negligent operation of a motor vehicle. N.C. GEN. STAT. § 1-539.21 (Supp. 1989) (amending N.C. GEN. STAT. § 1-536.21 (1975)). The amended statute states, “The relationship of parent and child shall not bar the right of action by a person or his estate against his parent or child for wrongful death, personal injury, or property damage arising out of operation of a motor vehicle owned or operated by the parent or child.” *Id.*

15. Record at 9, *Coffey* (No. 88CVS27).

16. *Coffey*, 94 N.C. App. at 718, 381 S.E.2d at 468.

17. *Id.*

18. Brief for Appellee at 10-11, *Coffey* (No. 88CVS27).

19. *Coffey*, 94 N.C. App. at 718, 381 S.E.2d at 468.

20. *Id.* at 719, 381 S.E.2d at 469.

done by legislation and not by the Court."²¹

The court of appeals noted the statutory exception to the immunity created by General Statutes section 1-529.21 in 1975 to allow a child to sue his parents for injuries resulting from a parent's negligent operation of a motor vehicle,²² but concluded that this exception provided no help for the plaintiff in *Coffey* because it "is limited and did not abolish the unemancipated minor's immunity from suits by his parents."²³ Eleven days after the *Coffey* decision, the general assembly amended the statute to allow parents to sue their unemancipated children for negligent operation of an automobile.²⁴ Although the amended statute would have allowed the plaintiff in *Coffey* to recover, it failed to abrogate fully the parent-child immunity in North Carolina.

In 1923 the North Carolina Supreme Court judicially adopted the parent-child immunity in *Small v. Morrison*²⁵ in which an unemancipated minor sued her father for injuries sustained in an automobile accident.²⁶ Relying on a trilogy of cases²⁷ generally credited with the creation of the parent-child immunity and its supporting policies²⁸ and noting the absence of any common law expressly allowing a suit between parent and child, the majority adopted wholeheartedly the immunity and its justifications.²⁹ Chief Justice Clark dissented, criticizing the majority for accepting a rule whose only basis was a Mississippi decision from 1891, made with neither supporting precedent from English common law nor any foundation in statutory law.³⁰

Thus adopted, the immunity denied unemancipated children recovery for injuries caused by their parents. The courts applied the immunity in children's suits against their parents,³¹ but no case arose until 1965 in which the supreme court addressed a parent bringing a tort action against a minor child for personal injuries. In *Gillikin v. Burbage*³² the mother of a nineteen-year-old child sued her daughter for injuries sustained when she was struck by the car her daughter was driving.³³ The court's decision, which provided an extensive defi-

21. *Id.* at 720-21, 381 S.E.2d at 470 (quoting *Lee v. Mowett Sales Co.*, 316 N.C. 489, 494, 342 S.E.2d 882, 885 (1986)).

22. *Id.* at 719, 381 S.E.2d at 469.

23. *Id.*

24. *See supra* note 14.

25. 185 N.C. 577, 118 S.E. 12 (1923).

26. *Id.* at 578, 118 S.E. at 12.

27. *Id.* at 580-81, 118 S.E. at 13-14 (citing *Hewlett v. George*, 68 Miss. 703, 9 So. 885 (1891); *McKeivey v. McKeivey*, 111 Tenn. 388, 77 S.W. 664 (1903); *Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905)).

28. *See Hollister, supra* note 4, at 495 & n.41.

29. *Morrison*, 185 N.C. at 586, 118 S.E. at 16.

30. *Id.* at 599, 118 S.E. at 23 (Clark, C.J., dissenting).

31. The immunity survived a challenge in 1952 that called for abolition of "the harshness of the common law" embodied in the parent-child immunity. *Redding v. Redding*, 235 N.C. 638, 639, 70 S.E.2d 676, 677 (1952). The *Redding* court refused to abolish the immunity, stating that no statute had abrogated or changed *Small v. Morrison* and no other state in the country had abrogated the immunity for acts of negligence. *Id.* at 639-40, 70 S.E.2d at 677.

32. 263 N.C. 317, 139 S.E.2d 753 (1965).

33. *Id.* at 318-19, 139 S.E.2d at 755.

dition of "emancipation,"³⁴ held that the policies supporting the parent's immunity from suit also supported the child's reciprocal immunity.³⁵ Accordingly, the court followed "an overwhelming majority of jurisdictions . . . [to] hold that neither a parent nor his personal representative can sue an unemancipated minor child for a personal tort."³⁶

The supreme court was called upon again to abolish the immunity in *Skinner v. Whitley*,³⁷ in which the administrator for the estate of two deceased daughters sued the estate of their father for wrongful death following an automobile accident that occurred while the father was driving.³⁸ The plaintiff pleaded for complete abrogation of the immunity, or in the alternative, for partial abolition when either the parent or the unemancipated minor was dead³⁹ or the injury arose out of the negligent operation of a motor vehicle.⁴⁰ The court reviewed the justifications for the immunity, the criticisms of the doctrine, and the modifications undertaken by "a growing minority of states,"⁴¹ but concluded that a complete abrogation was not appropriate. Noting that "no state has totally abrogated parental immunity,"⁴² the court found that the considerations supporting the immunity still outweighed the arguments for change.⁴³ In addition, because of the number of alternatives available for partial abrogation, the court refused "piecemeal abrogation of established law by judicial decree,"⁴⁴ deferring to the legislature any innovations in the parent-child immunity.⁴⁵

In 1975 the General Assembly answered the call with General Statutes section 1-539.21, which provided: "The relationship of parent and child shall not bar the right of action by a minor child against a parent for personal injury or property damage arising out of the operation of a motor vehicle owned or operated by such parent."⁴⁶ Far short of total abrogation, this enactment only incorporated one modification out of the many exceptions enumerated in *Skinner*: the abrogation of immunity for negligent operation of an automobile.⁴⁷ The cases that followed interpreted the act as removing only the parent's immu-

34. *Id.* at 321-24, 139 S.E.2d at 757-59.

Complete emancipation occurs *by act of the parent* when he surrenders all right to the services and earnings of the child, as well as the right to the custody and control of his person. . . . Complete emancipation arises *by operation of law* irrespective of the parent's consent when a child marries, . . . when the child becomes twenty-one years old, . . . [or] when the parent abandons or fails to support the child

Id. at 322, 139 S.E.2d at 757-58 (citations omitted).

35. *Id.* at 321, 139 S.E.2d at 757 (citing R. LEE, *supra* note 8, at 176).

36. *Id.*

37. 281 N.C. 476, 189 S.E.2d 230 (1972).

38. *Id.* at 476-77, 189 S.E.2d at 230.

39. *Id.* at 479, 189 S.E.2d at 232.

40. *Id.* at 483, 189 S.E.2d at 234.

41. *Id.* at 480-82, 189 S.E.2d at 232-34.

42. *Id.* at 480, 189 S.E.2d at 233.

43. *Id.* at 484, 189 S.E.2d at 235.

44. *Id.* at 483-84, 189 S.E.2d at 235.

45. *Id.* at 484, 189 S.E.2d at 235.

46. N.C. GEN. STAT. § 1-539.21 (1975), amended by N.C. GEN. STAT. § 1-539.21 (Supp. 1989).

47. *Skinner v. Whitley*, 281 N.C. 476, 482, 189 S.E.2d 230, 234 (1972).

nity,⁴⁸ thus allowing an unemancipated child's suit, but still barring a parent's action against the child.

This narrow action taken by the legislature resulted in nothing more than the piecemeal abrogation the *Skinner* court sought to avoid. Nevertheless, the supreme court maintained its position by again deferring to the legislature when next asked to abolish the immunity. In *Lee v. Mowett Sales Co.*⁴⁹ a father injured his young daughter when he backed over her foot with a riding lawnmower.⁵⁰ The girl brought suit against the manufacturer, who then filed a third-party claim for contribution against the father.⁵¹ After the court of appeals affirmed the dismissal of the third-party complaint⁵² over a strenuous dissent by Judge Becton,⁵³ the manufacturer called upon the supreme court to abolish the immunity. After noting the then-existing exceptions to the immunity⁵⁴ and the growing trend in other states to abolish or modify it,⁵⁵ the supreme court interpreted the legislature's limited action as a conscious decision to retain the doctrine. Accordingly, the court refused to abrogate it, explaining that "[t]o judicially abolish the parent-child immunity doctrine after the legislature has considered and retained the doctrine would be to engage in impermissible judicial legislation. If the doctrine is to be abolished at this late date, it should be done by legislation and not by the Court."⁵⁶

Before the court of appeals' decision in *Coffey*, the parent-child immunity barred actions between unemancipated children and their parents for ordinary negligence,⁵⁷ with the exception of suits by children against their parents for negligent operation of a motor vehicle.⁵⁸ The immunity extended to actions by third parties seeking contribution,⁵⁹ but did not apply to willful and malicious acts, contract or property rights, or torts committed after emancipation.⁶⁰

The court of appeals' decision in *Coffey* maintained the position of the North Carolina courts by refusing either to abolish or modify the immunity.⁶¹ The court's holding actually reaffirmed the immunity by refusing to allow actions after emancipation of the minor for injuries arising during minority.⁶²

48. *Camp v. Camp*, 89 N.C. App. 347, 348, 365 S.E.2d 675, 676 (1988); *Allen v. Allen*, 76 N.C. App. 504, 506, 333 S.E.2d 530, 532, *disc. rev. denied*, 315 N.C. 182, 337 S.E.2d 855 (1985).

The *Allen* court also held that the statute violated neither the parents' substantive due process nor equal protection rights. *Allen*, 76 N.C. App. at 506-07, 333 S.E.2d at 532-33.

49. 316 N.C. 489, 342 S.E.2d 882 (1986).

50. *Id.* at 490, 342 S.E.2d at 883.

51. *Id.*

52. *Lee v. Mowett Sales Co.*, 76 N.C. App. 556, 558, 334 S.E.2d 250, 252 (1985), *aff'd*, 316 N.C. 489, 342 S.E.2d 882 (1986).

53. *Id.* at 559, 334 S.E.2d at 252 (Becton, J. dissenting).

54. *Mowett Sales*, 316 N.C. at 492, 342 S.E.2d at 884.

55. *Id.* at 494, 342 S.E.2d at 885.

56. *Id.*

57. R. LEE, *supra* note 8, at 289-91.

58. *Coffey*, 94 N.C. App. at 719, 381 S.E.2d at 469.

59. *Mowett Sales*, 316 N.C. at 490, 342 S.E.2d at 883.

60. *Coffey*, 94 N.C. App. at 719, 381 S.E.2d at 469.

61. *Id.* at 720-21, 381 S.E.2d at 470.

62. *Id.* at 719-20, 381 S.E.2d at 469. The defendant claimed that the allowance of suits after

This decision to require that the right of action exist at the time of the injury is correct if the immunity is to be retained. Otherwise, plaintiffs could easily avoid the immunity when the unemancipated minor would reach majority within the time allowed by the statute of limitations. The more important issue, however, is the propriety of the immunity itself.

The virtually immediate action of the general assembly in amending General Statute section 1-539.21 clearly abolished the immunity's application to the negligent operation of automobiles, but the legislature's position on the immunity for ordinary negligence in nonautomobile cases remains unclear. Undoubtedly the courts will interpret this latest enactment as a decision by the legislature to maintain what is left of the immunity. An examination of the justifications offered to support the parent-child immunity, however, proves the doctrine is a judicial anachronism that should not outweigh an innocent injured party's right to recover for his injuries.

All but one of the rationales offered in support of the immunity date back to the "great trilogy"⁶³ of cases that formulated the doctrine: *Hewlett v. George*,⁶⁴ *McKelvey v. McKelvey*,⁶⁵ and *Roller v. Roller*.⁶⁶ These cases⁶⁷ stated the following reasons as necessitating the doctrine:

- 1) disturbance of family harmony;⁶⁸
- 2) interference with parental care, control, and discipline;⁶⁹
- 3) analogy of parent-child immunity to interspousal immunity;⁷⁰
- 4) the possibility that the parent might reacquire the child's tort damages through inheritance;⁷¹
- 5) payment to the injured child would deplete the parents' assets to the detriment of plaintiff's siblings;⁷² and
- 6) the possibility of fraud and collusion in the presence of liability insurance.⁷³

emancipation for injuries occurring before emancipation would effectively abolish the immunity for any child over fourteen years old. Brief for Appellee at 11, *Coffey* (No. 88CVS27).

63. Hollister, *supra* note 4, at 495 & n.41.

64. 68 Miss. 703, 9 So. 885 (1891).

65. 111 Tenn. 388, 77 S.W. 664 (1903).

66. 37 Wash. 242, 79 P. 788 (1905).

67. A number of judicial opinions, law review articles, and notes have analyzed and reviewed these well-known cases. See *Skinner v. Whitley*, 281 N.C. 476, 479-80, 189 S.E.2d 230, 232 (1972); *Small v. Morrison*, 185 N.C. 577, 580-83, 118 S.E. 12, 13-15 (1923); Hollister, *supra* note 4, at 493-96; Wyatt, *The Last Pangs of Parent-Child Immunity in North Carolina: Lee v. Mowett Sales Co. and Allen v. Allen*, 22 WAKE FOREST L. REV. 607, 611-13 (1987); Note, *Lee v. Mowett Sales Co.: North Carolina Retains Its Partial Parent-Child Immunity Doctrine*, 65 N.C.L. REV. 1457, 1459-60 (1987).

68. See *George*, 68 Miss. at 711, 9 So. at 887.

69. *McKelvey*, 111 Tenn. at 390, 77 S.W. at 664.

70. *Id.* at 391, 77 S.W. at 665.

71. *Roller v. Roller*, 37 Wash. 242, 245, 79 P. 788, 789 (1905).

72. *Id.*

73. *Lee v. Mowett Sales Co.*, 76 N.C. App. 556, 562, 334 S.E.2d 250, 254 (1985) (Becton, J., dissenting), *aff'd*, 316 N.C. 489, 342 S.E.2d 882 (1986); R. LEE, *supra* note 8, at 298-99; Hollister, *supra* note 4, at 500 & n.81 (collecting cases).

The maintenance of family harmony, the main reason in Justice Stacy's eloquent argument for adopting the immunity in North Carolina,⁷⁴ is a convincing rationale that draws upon fundamental desires for a peaceful and loving family atmosphere. Although a laudable goal, the immunity fails to achieve this purpose. Disallowing recovery for injuries by judicial action does little to maintain or protect family harmony. If family harmony exists, family members presumably would not bring suit against each other.⁷⁵ Where it is absent, the injury alone causes disruption, as evidenced by the action of bringing a suit.⁷⁶ Barring the action only requires the injured party to bear the loss and assumes "that an uncompensated tort makes for peace in the family."⁷⁷ With the presence of liability insurance, however, the suit is between the child and the parent's insurance company.⁷⁸ Because the child does not look to a parent for recovery, the parent and child are not adversaries and the suit does not disrupt family harmony. Payment by a third party may "actually alleviate family disharmony by removing the financial burden caused by an unexpected injury"⁷⁹ while allowing the injured victim to recover.

In addition, this rationale falters in light of the several forms of intrafamily liability presently recognized in North Carolina. The immunity does not prevent emancipated children from suing their parents.⁸⁰ Unemancipated siblings apparently can sue one another.⁸¹ Spouses may now sue one another following the abolition of the interspousal immunity.⁸² The traditional allowance of suits between unemancipated minors and their parents for contract and property rights,⁸³ as well as suits for intentional torts,⁸⁴ further discredits the rationale. Finally, the abolition of the immunity for negligent operation of a vehicle by General Statutes section 1-539.21 virtually renders the family harmony rationale inapplicable because the majority of parent-child suits arise from automobile accidents.⁸⁵ Although this exception to the immunity may not cause disharmony in the presence of insurance, the legislature evidently was not concerned about family harmony because recovery is not limited to the amount of insurance coverage.⁸⁶

74. See *supra* text accompanying note 1.

75. *Mowett Sales*, 76 N.C. App. at 561-62, 334 S.E.2d at 254 (Becton, J., dissenting).

76. Hollister, *supra* note 4, at 502 ("[I]t is the injury itself which is the disruptive act.") (quoting *Falco v. Pados*, 444 Pa. 372, 380, 282 A.2d 351, 355 (1971)).

77. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS § 122, at 905 (W. Keeton, 5th ed. 1984) [hereinafter PROSSER].

78. Hollister, *supra* note 4, at 503 (citing *Streenz v. Streenz*, 106 Ariz. 86, 88, 471 P.2d 282, 284 (1970) (en banc)).

79. *Id.*

80. "The complete emancipation of a child . . . removes the bar to actions between parent and child for personal torts." *Gillikin v. Burbage*, 263 N.C. 317, 321, 139 S.E.2d 753, 757 (1965).

81. R. LEE, *supra* note 8, at 298.

82. N.C. GEN. STAT. § 52-5 (1984).

83. *Lee v. Mowett Sales Co.*, 316 N.C. 489, 492, 342 S.E.2d 882, 884 (1986); R. LEE, *supra* note 8, at 294 & 301.

84. *Mowett Sales*, 316 N.C. at 492, 342 S.E.2d at 884.

85. R. LEE, *supra* note 8, at 298 ("Most of the cases have arisen in connection with automobile accidents.").

86. *Lee v. Mowett Sales Co.*, 76 N.C. App. 556, 561, 334 S.E.2d 250, 253-54 (1985) (Becton, J.,

The rationale of parental care, control, and discipline is the strongest justification for the immunity⁸⁷ and it has presented the most difficulty for states that have modified or abolished the immunity. The admitted significance of this rationale, however, does not justify barring all suits for negligent injury between parent and child. When the injury does not result from an exercise or failure to exercise parental authority or control, this rationale should not bar recovery.⁸⁸ The exceptions to the immunity recognize this by allowing recovery for intentional torts, property and contract actions, and negligent operation of a motor vehicle,⁸⁹ when parental authority is not an issue.

Rather than barring all suits between parent and child, a better solution would be to abolish the immunity with a narrow exception providing immunity for injuries arising out of the exercise of parental authority or discretion. Most states abolishing or modifying the immunity have accepted this logic⁹⁰ by adopting one of two standards that have provisions for parental authority. The standard adopted in California⁹¹ allows the suit and judges the parent on what "an ordinarily reasonable and prudent *parent* [would] have done in similar circumstances."⁹² The other standard, which is followed by "a substantial minority of jurisdictions,"⁹³ is known as the *Goller*⁹⁴ approach. This standard abolishes the immunity except: "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."⁹⁵ These two alternatives to the immunity allow suits by innocent victims while maintaining respect for a parent's constitutional right⁹⁶ to be free from interference by the state. Accordingly, these standards practically nullify the fear of interference with parental discretion as a justification for maintaining the immunity as a complete bar to suits between parent and child.

The analogy between parent-child immunity and interspousal immunity was misplaced from the beginning; the legal fiction at common law viewing the husband and wife as one entity that could not sue and recover from itself⁹⁷

dissenting) ("[N]othing in the statute limits recovery against a parent to the limits of the parent's insurance coverage."), *aff'd*, 316 N.C. 489, 342 S.E.2d 882 (1986).

87. "The parental right has been afforded constitutional protection . . ." Hollister, *supra* note 4, at 505 (citing *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (recognizing parent's right to be free of undue interference by the state in matters of child-rearing); *Quillon v. Wallcott*, 434 U.S. 246, 255 (1978) (recognizing that parent-child relationship is constitutionally protected)).

88. "The reluctance to undermine parental authority should be a factor only when the injury results from an exercise of that authority." *Id.*

89. See *infra* notes 111-19 and accompanying text.

90. *Lee v. Mowett Sales Co.*, 76 N.C. App. 556, 562-64, 334 S.E.2d 250, 254-55 (1985) (Becton, J., dissenting), *aff'd*, 316 N.C. 489, 342 S.E.2d 882 (1986).

91. *Gibson v. Gibson*, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971).

92. *Id.* at 921, 479 P.2d at 653, 92 Cal. Rptr. at 293.

93. *Mowett Sales*, 76 N.C. App. at 563, 334 S.E.2d at 255 (Becton, J., dissenting).

94. *Goller v. White*, 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

95. *Id.* at 413, 122 N.W.2d at 198.

96. See *supra* note 87.

97. PROSSER, *supra* note 77, § 102, at 901-02.

never existed between parent and child.⁹⁸ In addition, this rationale completely fails in light of the general assembly's abrogation of the interspousal immunity.⁹⁹

The chance that the parent may inherit the child's recovery is a remote possibility. The child would have to predecease the parent and the parent would have to take from the child's estate through intestacy or by bequest. Most unlikely of all, the award would have to be present in the child's estate, the child not having spent it during her lifetime.¹⁰⁰ The improbability of this combination of events proves this justification an unfair bar to the claims of all unemancipated minors. If the legislature finds this a legitimate concern,¹⁰¹ it should simply prohibit the parent from inheriting any portion of the award.¹⁰² Finally, this policy by itself provides very little justification for barring ordinary negligence suits in light of actions allowed for intentional torts, property and contract damages, and negligent operation of a motor vehicle.¹⁰³

The policy of preventing recovery that would deplete the resources available to other siblings is likewise unsound. In many cases the injured minor will have no siblings, making this justification inapplicable. Nonetheless, the immunity still bars an only child from recovery.¹⁰⁴ Even if there are other children whose resources may be depleted, the injured child should still receive compensation rather than bear the burden of the injury so that his siblings' standard of living does not decrease. The presence of insurance weakens this policy because the compensation comes from a third party and does not deplete the family resources.¹⁰⁵ The exceptions to the immunity also undermine this supporting rationale. Recovery is allowed for property and contract damages, injury from intentional torts, and for negligent operation of a vehicle. These actions, as well as all actions allowing third parties to recover for their injuries, deplete the resources of the family, but the strong policy of allowing recovery by innocent victims receives priority. That one is in a family relation still covered by the immunity does not make him any less worthy of compensation.

Finally, the argument that the presence of insurance provides an incentive for family members to conspire to obtain fraudulently an unjustified recovery "is, at best, a secondary concern. The potential for fraud and collusion exists in all litigation and does not justify precluding the cause of action for an injured child."¹⁰⁶ The case should go to court where "rules for impeachment by cross examination"¹⁰⁷ will deal with the possibility of fraud. Evidently, the courts feel

98. *Id.* § 102, at 904.

99. *See supra* note 82 and accompanying text.

100. *See Hollister, supra* note 4, at 497.

101. Only when an insurance company pays the child would the parent profit from his own wrongdoing. If the parent paid the damages the inheritance would constitute a return, not a profit. *See id.*

102. *See id.* at 498; Wyatt, *supra* note 67, at 616.

103. *See infra* notes 111-19 and accompanying text.

104. *See Hollister, supra* note 4, at 500.

105. *Id.*

106. *Lee v. Mowett Sales Co.*, 76 N.C. App. 556, 562, 334 S.E.2d 250, 254 (1985) (Becton, J., dissenting), *aff'd*, 316 N.C. 489, 342 S.E.2d 882 (1986).

107. *Id.* (Becton, J., dissenting).

competent to handle the possibility of fraud in other family relations, such as husband and wife and parent and child for the exceptions allowed to the parent-child immunity.¹⁰⁸ Regardless of the ability of courts to detect fraud, seeking to avoid the possible fraudulent behavior of a few does not justify barring recovery to all claimants, the great majority of whom are innocent victims with actual injuries. "Indeed, some courts have held that a state may not constitutionally rely solely on the danger of collusion to deny an entire class of people the right to bring suit."¹⁰⁹

Dissatisfaction with the inequities resulting from application of the immunity has led to the creation of so many exceptions that it is unclear what remains of the immunity. "Constant criticism of the immunity has led to its erosion by the development of numerous exceptions to it, which have been more or less sporadically recognized by many courts, until there are now very few jurisdictions, if any, in which the immunity exists in any complete form."¹¹⁰ The North Carolina Supreme Court noted these exceptions in *Skinner v. Whitley*.¹¹¹ Courts have applied exceptions to allow suits between parents and unemancipated children¹¹² when: death of the parent or child has terminated the parent-child relationship;¹¹³ injury results from conduct so outrageous as to destroy family harmony itself;¹¹⁴ the injury is willful and intentional;¹¹⁵ a dual relationship exists, such as master-servant, that makes the parent-child relationship incidental;¹¹⁶ the child is injured while the parent is acting within the scope of his employment (the child can recover under respondeat superior and the employer cannot raise the immunity, which is personal to the parent);¹¹⁷ the action involves property or contract rights;¹¹⁸ or the injury results from the negligent

108. See *infra* notes 111-19 and accompanying text.

109. Hollister, *supra* note 4, at 501 (citing *Henry v. Bauder*, 213 Kan. 751, 761-62, 518 P.2d 362, 370-71 (1974); *Brown v. Merlo*, 8 Cal. 3d 855, 859-60, 506 P.2d 212, 215, 106 Cal. Rptr. 388, 391 (1973) (en banc)).

110. *Lee v. Mowett Sales Co.*, 76 N.C. App. 556, 563, 334 S.E.2d 250, 255 (Becton, J., dissenting) (quoting RESTATEMENT (SECOND) OF TORTS § 895G, at 428 (1979)), *aff'd*, 316 N.C. 489, 342 S.E.2d 882 (1986).

111. 281 N.C. 476, 480-82, 189 S.E.2d 230, 233-34 (1972).

112. The supreme court recognized the validity of suits by emancipated children for actions arising after emancipation in *Lee v. Mowett Sales Co.*, 316 N.C. 489, 492, 342 S.E.2d 882, 884 (1986).

113. *Skinner*, 281 N.C. at 480-81, 189 S.E.2d at 233 (citing cases from jurisdictions that have adopted this modification). The supreme court refused the exception for death of parent or child in *Skinner*, 281 N.C. at 479, 189 S.E.2d at 233.

114. *Id.* at 481, 189 S.E.2d at 233 (citing cases from jurisdictions adopting this exception). The exception for outrageous conduct apparently has not been at issue in any North Carolina case.

115. *Id.* (citing cases from jurisdictions adopting this modification). North Carolina adopted this exception in *Lee v. Mowett Sales Co.*, 316 N.C. 489, 492, 342 S.E.2d 882, 884 (1986).

116. *Skinner*, 281 N.C. at 481, 189 S.E.2d at 233 (citing cases from jurisdictions adopting this modification). This exception apparently has not been at issue in a North Carolina case.

117. *Id.* North Carolina recognizes this exception. See R. LEE, *supra* note 8, at 302-03 (quoting *Wright v. Wright*, 229 N.C. 503, 507-08, 50 S.E.2d 540, 544 (1948) ("The personal immunity from suit because of the domestic relation does not extend to the employer so as to cancel his liability or defeat recovery on the principle *respondeat superior* when the injury was inflicted by the servant acting as such.")).

118. *Mowett Sales*, 316 N.C. at 492, 342 S.E.2d at 884.

operation of a motor vehicle.¹¹⁹ These exceptions, most resulting from dissatisfaction with the immunity, have weakened the justifications supporting the immunity. While North Carolina has not adopted all of the above exceptions,¹²⁰ those that do apply in this state confirm the absence of justification for the parent-child immunity as a complete bar to recovery by innocent victims. This is especially true in light of the recent amendment of General Statute section 1-539.21 which effectively cripples all but the parental authority rationale.

Today the immunity bars suits between parents and their children for injuries due to negligent acts arising out of the parent-child relationship, with the exception of injuries resulting from negligent operation of an automobile. As discussed above, the reasons for allowing this immunity are outdated and severely weakened because of the exceptions North Carolina recognizes. Accordingly, the logical course of action is to reject the immunity as a complete bar and allow recovery for injured victims.¹²¹

This Note suggests that North Carolina should abolish the parent-child immunity. The courts or the legislature, however, should provide cases involving parental authority with an exception similar to that presented by the *Goller* standard, disallowing recovery only when the alleged injury arises from negligence involving the exercise of parental authority or discretion with respect to necessities. The exception should be narrowly prescribed with the goal of allowing recovery for innocent victims while affording adequate protection to the parent's right to raise her child as she sees fit. The reasonableness standard adopted in California infringes upon this right by allowing a jury to second-guess parental decisions or activities that may be viewed as unorthodox.¹²² An exception similar to the *Goller* standard would protect the parent from suits for negligent injury when the jury decides the activity was within the parent's authority or discretion, thus respecting the parent's decision to raise her child as she chooses. Because gross negligence or intentional injury would result in the parent's liability, even if the activity was within the parent's authority or discretion, the standard protects the child from abuse in the disguise of unorthodox discipline.

Although legislative action may be the simplest route to the much needed abrogation of the immunity, the courts are free to act when legislative action falls short. "After all, courts, not legislatures, created the doctrine. And most states that have abolished parental immunity have done so by court decision, not

119. N.C. GEN. STAT. § 1-539.21 (1989); see *supra* note 14.

120. See *supra* notes 111-19.

121. In the light of the ever-increasing criticism of the general rule that an action for personal injuries cannot be maintained between parent and child, and the growing number of exceptions to the rule, it seems that the time has arrived for its abolishment. We should frankly recognize that the earlier cases were wrongly decided. The reasons therein stated are no longer convincing. . . . The rules of law should be founded on reason; and when the reason for a rule has ceased to exist, the rule should cease to exist. Any reason that seems to sustain the continuation of the rule is outweighed by the general consideration that where there is a wrong there should be a remedy.

R. LEE, *supra* note 8, at 298-99.

122. See Hollister, *supra* note 4, at 516.

by statute."¹²³ The North Carolina courts repeatedly have deferred the abolition of the immunity to the legislature, but "[i]t is appropriate for courts to modify or abolish doctrines that they have created that no longer serve the interests of justice."¹²⁴ Perhaps the North Carolina Supreme Court will soon heed these words of Judge Becton and take appropriate action. In light of its past decisions, however, the court will probably see the recent action by the legislature in General Statutes section 1-539.21 as a conscious decision to retain what is left of the immunity rather than recognize it as the "piecemeal abrogation" the supreme court has sought to avoid. The legislature's amendment to General Statute section 1-539.21 was a step in the right direction, but fell short of taking North Carolina where it should be regarding the parent-child immunity. The proper destination is abrogation of the immunity and both the judiciary and the legislature are free to take the appropriate step. The only remaining question

123. *Lee v. Mowett Sales Co.*, 76 N.C. App. 556, 564-65, 334 S.E.2d 250, 255 (1985) (Becton, J., dissenting), *aff'd*, 316 N.C. 489, 342 S.E.2d 882 (1986).

The following states have partially or completely abolished or refused to adopt the immunity by judicial decision: Alaska, *Hebel v. Hebel*, 435 P.2d 8, 15 (Alaska 1967) (no immunity for accidents resulting from parent's negligent driving); Arizona, *Sandoval v. Sandoval*, 128 Ariz. 11, 12-14, 623 P.2d 800, 801-03 (1981) (immunity abrogated except where injury resulted from breach of duty owed child within the family sphere); California, *Gibson v. Gibson*, 3 Cal. 3d 914, 921, 479 P.2d 648, 653, 92 Cal. Rptr. 288, 293 (1971) (en banc) (immunity abrogated and parent judged by "reasonable parent" standard); Delaware, *Williams v. Williams*, 369 A.2d 669, 673 (Del. 1976) (no immunity where injury caused by automobile accident, to the extent that there is liability insurance); Hawaii, *Petersen v. City of Honolulu*, 51 Haw. 484, 486, 462 P.2d 1007, 1008 (1970) (no parent-child immunity); Iowa, *Turner v. Turner*, 304 N.W.2d 786, 789 (Iowa 1981) (immunity abrogated where tortious conduct is outside area of parental authority and discretion); Kansas, *Nocktonick v. Nocktonick*, 227 Kan. 758, 765, 611 P.2d 135, 141 (1980) (immunity abrogated for injuries sustained in automobile accidents); Kentucky, *Rigdon v. Rigdon*, 465 S.W.2d 921, 923 (Ky. 1970) (immunity only for reasonable exercise of parental authority or discretion); Maine, *Black v. Solnitz*, 409 A.2d 634, 639-40 (Me. 1979) (immunity abrogated in automobile cases, but court stated that the abrogation was not limited to automobile accidents); Massachusetts, *Sorenson v. Sorenson*, 369 Mass. 350, 351-54, 339 N.E.2d 907, 911-16 (1975) (immunity abrogated for negligent operation of automobile, but a later case suggested that immunity may be abrogated in other instances); Lewis v. Lewis, 370 Mass. 619, 629-30, 351 N.E.2d 526, 532-33 (1976); Michigan, *Plumley v. Klein*, 388 Mich. 1, 8, 199 N.W.2d 169, 172-73 (1972) (immunity only if negligence involved reasonable exercise of parental authority or discretion); Minnesota, *Anderson v. Stream*, 295 N.W.2d 595, 599-601 (Minn. 1980) (no immunity—parent judged on "reasonable parent" standard); Nevada, *Rupert v. Stienne*, 90 Nev. 397, 404-05, 528 P.2d 1013, 1017-18 (1974) (no immunity); New Hampshire, *Briere v. Briere*, 107 N.H. 432, 434-35, 224 A.2d 588, 590-91 (1966) (no immunity); New Jersey, *Small v. Rockfield*, 66 N.J. 231, 244, 330 A.2d 335, 343 (1974) (immunity abrogated where neither the exercise of parental authority nor the adequacy of child care is in issue); New York, *Gelbman v. Gelbman*, 23 N.Y.2d 434, 437-39, 245 N.E.2d 192, 193-94, 297 N.Y.S.2d 529, 530-32 (1969) (parent-child immunity abrogated for non-willful torts); North Dakota, *Nuelle v. Wells*, 154 N.W.2d 364, 366-67 (N.D. 1967) (no parent-child immunity for negligence); Oklahoma, *Unah v. Martin*, 676 P.2d 1366, 1369-70 (Okla. 1984) (no immunity where injury resulted from negligent operation of an automobile, to the extent of parent's liability insurance); Pennsylvania, *Falco v. Pados*, 444 Pa. 372, 375-76, 282 A.2d 351, 353 (1971) (no parent-child immunity); South Carolina, *Elam v. Elam*, 275 S.C. 132, 137, 268 S.E.2d 109, 111-12 (1980) (no parent-child immunity); Vermont, *Wood v. Wood*, 135 Vt. 119, 121-22, 370 A.2d 191, 193 (1977) (refused to recognize immunity, but indicated that limitations might be placed on parent-child actions); Virginia, *Smith v. Kauffman*, 212 Va. 181, 182-86, 183 S.E.2d 190, 192-94 (1971) (child may recover for injuries resulting from automobile accident); Washington, *Merrick v. Sutterlin*, 93 Wash. 2d 411, 416, 610 P.2d 891, 893 (1980) (en banc) (immunity abrogated where child injured in automobile accident due to parent's negligence); West Virginia, *Lee v. Comer*, 224 S.E.2d 721, 723-25 (W. Va. 1976) (no immunity where child injured in automobile accident due to parent's negligence); and Wisconsin, *Goller v. White*, 20 Wis. 2d 402, 413, 122 N.W.2d 193, 198 (1963) (no immunity except where negligence involved exercise of parental authority or discretion). See Hollister, *supra* note 4, at 528-532; see also Annotation, *supra* note 9, at 1114-22.

124. *Mowett Sales*, 76 N.C. App. at 565, 334 S.E.2d at 256 (Becton, J., dissenting).

concerning the abolition of the parent-child immunity in North Carolina is who is going to do it.

HARLIN RAY DEAN, JNR.