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# A JOB HALF-DONE: FLORIDA'S JUDICIAL MODIFICATION OF THE INTRAFAMILIAL TORT IMMUNITIES

MICHAEL A. YOUNG

## I. INTRODUCTION

American legal systems have long recognized the crucial role that the family plays in maintaining a healthy and ordered society. The Supreme Court of Florida recently reaffirmed its belief that the family unit is important to society and worthy of judicial protection. Justice Overton, writing for the court in *Hill v. Hill* stated: "The family continues to be an unofficial sociological governmental structure necessary and vital to our free, independent society. . . . Protection of the family unit is a significant public policy and we are greatly concerned by any intrusion that adversely affects the family relationship or the family resources."<sup>1</sup>

Along with *Hill*, the court recently has decided five other cases involving the family unit.<sup>2</sup> All of these cases questioned Florida's use of intrafamilial tort immunities, which prevent certain family members from suing other family members in tort. In deciding these cases, the court desired not only to protect the family unit, but also to make the intrafamilial immunities more consistent with Florida's comparative negligence theory of tort liability.<sup>3</sup>

This comment will analyze Florida's current use of the intrafamilial immunities, as established by the six recent decisions. It will examine whether the immunities actually do protect the family unit or only prevent valid legal claims from being brought to court. Florida's use of both parental immunity, which prevents an unemancipated minor from suing his parents in tort, and interspousal immunity, which prevents a person from suing his or her spouse in tort, will be analyzed. Florida's rationale for using these immunities will then be compared to other states' rationales for not using immunities or for only partially using the immunities. Finally, this comment will evaluate whether the court has successfully modified the immunities to make them compatible with Florida's comparative negligence theory of tort liability.

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1. *Hill v. Hill*, 415 So. 2d 20, 23 (Fla. 1982).

2. *Woods v. Withrow*, 413 So. 2d 1179 (Fla. 1982); *West v. West*, 414 So. 2d 189 (Fla. 1982); *Roberts v. Roberts*, 414 So. 2d 190 (Fla. 1982); *Joseph v. Quest*, 414 So. 2d 1063 (Fla. 1982); *Ard v. Ard*, 414 So. 2d 1066, 1070 (Fla. 1982). All six cases were decided on April 29, 1982.

3. See *Woods v. Withrow*, 413 So. 2d 1179. Florida adopted comparative negligence in *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

The court's recent decisions modified Florida's position on parental immunity, but continued Florida's historic position on interspousal immunity. The court waived parental immunity to the extent of the parent's liability insurance coverage.<sup>4</sup> This gives children of insured parents the right to sue their parents' insurance company, up to the amount of the policy, for injury caused by their parents' negligence.<sup>5</sup> If the parents' policy has an exclusion clause for family members, or the parent is uninsured, the immunity is not waived and the child may not sue.<sup>6</sup>

The court further held that a negligent parent is liable via contribution to a joint tortfeasor, but only to the extent of liability coverage.<sup>7</sup> This gives negligent tortfeasors the right to recoup a percentage of money they paid out in damages to the child from the parents who also acted negligently towards the child.<sup>8</sup> The court did not change the doctrine of interspousal immunity.<sup>9</sup>

These decisions significantly increased a child's ability to seek a tort remedy against a parent without damaging family relations. Yet the court should significantly increase a person's ability to seek a tort remedy against his spouse for exactly the same reasons it increased a child's right to sue. Waiving interspousal immunity to the extent of liability insurance is appropriate. Florida can do this without injuring the family unit, and can make its use of the intrafamilial immunities more compatible with its theory of comparative negligence.

## II. PARENTAL IMMUNITY

### A. History

Although this comment advocates treating interspousal immunity and parental immunity similarly, the immunities have different histories and different reasons prompting their usage. Parental immunity was judicially created in the 1891 Mississippi case of *Hewellette v. George*,<sup>10</sup> in which a minor daughter was suing her

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4. *Ard*, 414 So. 2d at 1067.

5. *Id.*

6. *Id.*

7. *Quest*, 414 So. 2d at 1063.

8. *Id.* Insurance companies, not individuals, usually recoup money through contribution. This notion of "contribution" fits in well with Florida's theory of comparative negligence and will be discussed more thoroughly in the Comment.

9. See *Hill*, 415 So. 2d 20; *West*, 414 So. 2d 189; *Roberts*, 414 So. 2d 190.

10. 9 So. 885 (Miss. 1891). Although the first parental immunity cases involved intentional torts, the immunity applies in negligence cases also.

father for wrongfully confining her to an insane asylum. The court responded on public policy grounds and with no legal precedent when it held:

[S]o long as the parent is under obligation to care for, guide, and control, and the child is under reciprocal obligation to aid and comfort and obey, no such action as this can be maintained. The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent.<sup>11</sup>

The reasons for creating the immunity were to protect parental discipline from being encroached upon by law suits, and to prevent the disruption of family relations.<sup>12</sup>

Other American jurisdictions began to judicially adopt this immunity,<sup>13</sup> and by 1905 in *Roller v. Roller*,<sup>14</sup> the Supreme Court of Washington went so far as to say: "At common law it is well established that a minor child cannot sue a parent for a tort."<sup>15</sup> This, however, was a misconception, as there existed at least one English common law case that allowed a minor to sue a parent for personal injuries caused by her mother.<sup>16</sup> Further, most of the jurisprudential authorities before 1891 believed that a child would have a cause of action for unreasonable chastisement by a parent.<sup>17</sup>

Common law gave children the right to sue family members in many situations. A child, through a guardian *ad litem* could sue his parents in property and contract disputes.<sup>18</sup> A minor child could sue a minor sibling in tort.<sup>19</sup> With this background, it is obvious that common law did not espouse the doctrine of parental

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11. *Id.* at 887.

12. *Id.*

13. The great trilogy of cases: *Hewellette v. George*, 9 So. 885 (Miss. 1891); *McKelvey v. McKelvey*, 77 S.W. 664 (Tenn. 1903); *Roller v. Roller*, 79 P. 788 (Wash. 1905), was responsible for indelibly engraving parental immunity upon American jurisprudence.

14. 79 P. 788 (Wash. 1905).

15. *Id.* at 789. The court must have thought parental immunity was the equivalent of interspousal immunity, which did exist at common law.

16. *Ash v. Ash*, Comb. 357, 90 Eng. 526 (1696) (where a child recovered 200 pounds in damages from her mother who intentionally injected the child with medicines and subsequently tortured the child).

17. McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1060 (1930).

18. *Id.* at 1057-58.

19. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS*, 866 (4th ed. 1971).

immunity.<sup>20</sup> American jurisdictions, however, continued to adopt the immunity, believing that parents who had tortiously injured their children would pay enough through a criminal action and making them pay in a civil action was unnecessary.<sup>21</sup>

Florida first considered adopting the immunity in 1961. In *Meehan v. Meehan*,<sup>22</sup> a father was suing one minor son for causing the death of his other minor son.<sup>23</sup> The older brother, Edward, had negligently failed to inform his younger brother, James, of a defective condition of an electrical buffing machine and, as a result, the younger brother was electrocuted. The Second District Court of Appeal held that a parent cannot maintain an action in tort against an unemancipated minor child<sup>24</sup> because of the "necessity for the encouragement of family unity and the maintenance of family discipline."<sup>25</sup>

The Supreme Court of Florida did not specifically adopt parental immunity until it decided *Orefice v. Albert*,<sup>26</sup> in 1970. Michael Betz, a minor, was killed along with his father in an airplane crash caused by his father's negligence. Orlo Betz, Michael's father, was co-owner of the airplane with Albert. Orefice, the administratrix of Michael's estate, sued Albert claiming him to be vicariously liable for Michael's death since he was co-owner of the airplane. The court held that Albert, as co-owner of the plane, might be liable to Michael's estate but that Orlo, as co-owner of the plane, could not be liable to Michael's estate because the doctrine of parental immunity protected him from suit by this minor child.<sup>27</sup> The court went on to say: "It is established policy, evidenced by many decisions, that suits will not be allowed in this state among members of a family unit for tort. Spouses may not sue each other, nor children their parents. The purpose of this policy is to protect family harmony and resources."<sup>28</sup>

20. Other nations of common law origin allow minors to sue their parents in tort. *E.g.*, *Deziel v. Deziel* [1953] 1 Dom. L. Rep. 651, (Canada) and *Young v. Rankin* [1934] Sess. Cass. 499 (Scotland).

21. 79 P. at 789.

22. 133 So. 2d 776 (Fla. 2d DCA 1961).

23. *Id.* at 777. The case illustrates that parental immunity operates symmetrically and bars a parent from suing a child, even though these suits are rare.

24. The court defined *minor* as anyone under 21 years of age, and *emancipation* as a complete severance of the filial tie. *Id.* 2d at 778-79.

25. *Id.* at 777.

26. 237 So. 2d 142 (Fla. 1970).

27. *Id.* at 145-46.

28. *Id.* at 145. It is worth noting that since the wife was the only family member left living, allowing the suit would not have destroyed family unity.

## B. Florida's Current Use of Parental Immunity

### 1. Reasons for Partially Retaining Immunity

In *Ard v. Ard*,<sup>29</sup> the Florida Supreme Court reaffirmed its adherence to the doctrine of parental immunity. It stated that the immunity would be waived to the extent of the parent's available liability insurance coverage and went on to explain its reasons for not totally abolishing the immunity.<sup>30</sup> Along with the historical reasons of preservation of domestic harmony and prevention of interference with parental care, discipline and control, the court also recognized as reasons for retaining the immunity "[d]epletion of the family assets in favor of the claimant at the expense of the other family members; . . . and the possibility of inheritance by the parent of the amount recovered by the child."<sup>31</sup> The court concluded that since *Finn v. Finn*<sup>32</sup> "[r]ecognized the duty of the parents to nurture, support, educate and protect minor children,"<sup>33</sup> a suit reducing family assets would hinder a parent's ability to perform this duty. The danger of fraud and collusion between the parent and child when insurance is involved is also a reason for the immunity, but one not accepted in Florida.<sup>34</sup>

Many American jurisdictions and legal scholars believe that the benefits which accrue to society through the use of parental immunity are insignificant compared to the harm done by denying an individual a civil remedy for an injury caused him by another.<sup>35</sup> Because of this policy determination, they do not accept as valid the reasons Florida offers for retaining the immunity. Professor Prosser contended that domestic tranquility and parental discipline are not maintained by the immunity.<sup>36</sup> He argued that leaving a tort uncompensated is not going to contribute to "peace in

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29. *Ard*, 414 So. 2d 1066. For a discussion of *Ard v. Ard*, as decided by the Florida First District Court of Appeal, see Note, *Parental Immunity*, 10 FLA. ST. U.L. REV. 185 (1982).

30. 414 So. 2d at 1067.

31. *Id.* at 1068. The court mentions that the possibility of parental inheritance is a reason frequently offered but doesn't elaborate as to whether Florida accepts this reason.

32. 312 So. 2d 726 (Fla. 1975).

33. *Ard*, 414 So. 2d at 1067, citing *Finn v. Finn*, 312 So. 2d 726 (Fla. 1975).

34. See *supra* text accompanying notes 64-74. Florida refutes this reason in *Ard*.

35. There are 20 states which have either partially waived parental immunity or have abrogated it. These states are: Alaska, Arizona, California, Florida, Hawaii, Kansas, Kentucky, Maine, Michigan, Minnesota, North Carolina, Nevada, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, South Carolina, Vermont and Wisconsin.

36. PROSSER, *supra* note 19, at 866.

the family and respect for the parent."<sup>37</sup> Some cases in which parental immunity is recognized involve parents raping or brutally beating their children. One may question whether denying a civil remedy is likely to restore domestic harmony in such cases.<sup>38</sup> Further, Prosser questioned why this family harmony rationale is not applied to unemancipated minors who sue their parents for a tort against their property or who sue their minor brothers or sisters in tort.<sup>39</sup>

Florida's other reasons for recognizing the immunity, asset depletion in favor of the claimant at the expense of other family members and the possibility that the parent might inherit the amount recovered by the child, have also been described as ill-founded.<sup>40</sup> The asset-depletion argument has been discredited on the grounds that it "assumes an equality among the children and an intention on the part of parents to treat their children equally."<sup>41</sup> There is no legal duty to dispense funds to children equally.<sup>42</sup> Further, if one child has been injured while the others have not, there is a valid reason for using family assets in favor of the injured child.<sup>43</sup> Finally, it is argued that family assets will be depleted when an unrelated third party is injured by the negligence of a family member, so why not deplete them when a family member is injured.<sup>44</sup>

The possibility that a parent might inherit the amount recovered by the child is offered as a reason for retaining the immunity because if a parent ultimately receives what the child recovered, the parent would be profiting from his own wrongdoing.<sup>45</sup> This possibility was declared to be a remote contingency and one equally applicable to suits over property in the New Hampshire case of *Dun-*

37. *Id.*

38. This question was raised in *Small v. Morrison*, 118 S.E. 12 (N.C. 1923). Obviously denying a remedy is not going to restore family harmony in serious intentional cases, but many cases involve only accidental negligence and harmony may be restored by preventing a minor from taking his parents to court.

39. PROSSER, *supra* note 19, at 866.

40. Berman, *Time to Abolish Parent-Child Tort Immunity: A Call to Repudiate Mississippi's Gift to the American Family*, 4 *NOVA L.J.* 25, 38 (1980) (asset depletion argument). See also *Dunlap v. Dunlap*, 150 A. 905, 909 (N.H. 1930) (parental inheritance argument).

41. *Id.* at 38.

42. Note, *The Parent-Child Tort Immunity Law in Massachusetts*, 12 *NEW ENG. L. REV.* 309, 314 (1976).

43. Berman, *supra* note 40, at 38.

44. *Id.*

45. See, e.g., *Barlow v. Iblings*, 156 N.W. 2d 105 (Iowa 1968).

*lap v. Dunlap*.<sup>46</sup> It was therefore dismissed as an inadequate reason to support immunity. It and the unequal asset distribution argument should not be reasons for retaining the immunity in Florida.

## 2. *Reasons for Partial Abrogation*

While the court in *Ard* reaffirmed its adherence to the use of parental immunity, it also provided reasons why the immunity could be waived when insurance was involved.<sup>47</sup> Parental immunity was waived to the extent of liability insurance because insurance is capable of protecting family assets and harmony while allowing a cause of action to an injured minor. The court relied on the rationale used by the Supreme Judicial Court of Massachusetts in *Sorenson v. Sorenson*.<sup>48</sup> In waiving parental immunity to the extent of automobile liability insurance the *Sorenson* court stated:

When an action is brought against a parent, frequently it will be brought at the instance of, or with the approval of, the parent with an eye toward recovery from the parent's already purchased liability insurance. When there is no insurance coverage it is unlikely that the suit will be brought against the parent. . . . We should hold that the child is not to be denied the benefit of insurance that would be available for a stranger.<sup>49</sup>

Professor James noted this in a 1948 article, when he stated that, "virtually no such [intra-family] suits [for negligence] are brought except where there is insurance. And where there is, none of [the] threats to the family exists at all."<sup>50</sup> The Florida Supreme Court based its decision to waive the immunity on this rationale, and on the basis that "allowing a waiver of immunity where there is liability insurance is a recognized policy in this state."<sup>51</sup>

The court further states that depleting family assets in a suit where there is no insurance would interfere with a state's general

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46. 150 A. 905.

47. *Ard*, 414 So. 2d at 1067.

48. 339 N.E. 2d 907 (Mass. 1975).

49. *Id.* at 913-14.

50. James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 *YALE L.J.* 549, 553 (1948).

51. *Ard*, 414 So. 2d at 1069. Justice Boyd, dissenting in *Ard*, states that parents can insure against accidental injuries to their children in the form of hospitalization, casualty and disability insurance, and that it is "awkward" to use liability insurance covering the parents. 414 So. 2d at 1070. Liability coverage allows for a more extensive recovery.



interest in ensuring a parent's financial ability to care for and support her children.<sup>52</sup> Because Florida waived the immunity when insurance is involved, family resources are protected without having to deny an injured child a cause of action in tort.<sup>53</sup> The court again quoted the *Sorenson* court which stated: "[I]nsurance cannot create liability where no legal duty previously existed. . . . When insurance is involved . . . both parties seek recovery from the insurance carrier to create a fund for the child's medical care and support without depleting the family's other assets."<sup>54</sup> A minor need not sacrifice his cause of action to protect family resources. Rather, by granting him a right to pursue what the court called "[a]n otherwise valid action,"<sup>55</sup> family resources are better protected.

The *Ard* court also noted that the action between the parties is not truly adversary when insurance is involved.<sup>56</sup> In *Streenz v. Streenz*,<sup>57</sup> the Arizona Supreme Court stated: "Where such insurance exists, the domestic tranquility argument is hollow, for in reality the sought after litigation is not between child and parent but between child and parent's insurance carrier."<sup>58</sup> Justice Boyd, dissenting in *Ard*, claimed that just being on the opposite sides of a lawsuit is sufficient to put people in an adversary position, and that a liability insurance carrier is entitled to expect its insured to behave in an adversary manner towards the injured plaintiff.<sup>59</sup> Insurance attorneys claim that an intrafamily suit will be friendly and that the insurance carrier will only be able to expect minimal cooperation from the insured.<sup>60</sup> Professor Vance points out that the charge that the insured failed in his duty to assist the insurer frequently arises where the insured is sued by a member of his own family.<sup>61</sup>

Vance goes on to explain that a cooperation clause normally requires that one aid in the securing of witnesses, and in informing

52. 414 So. 2d at 1067.

53. *Id.* Children of uninsured parents are still denied the right to sue.

54. *Id.* at 1068 citing 339 N.E.2d at 914 (footnote omitted).

55. 414 So. 2d at 1070.

56. *Id.* at 1068.

57. 471 P.2d 282 (Ariz. 1970).

58. *Id.* at 284.

59. 414 So. 2d at 1070.

60. Casey, *The Trend of Interspousal and Parental Immunity — Cakewalk Liability*, 45 INS. COUNS. J. 321, 330 (1978).

61. W. VANCE, *LAW OF INSURANCE* 1003 (3d ed. 1951).

the insurer of all the facts connected with the accident.<sup>62</sup> The co-operation requirement does not force parties into an adversary position, especially if all it requires is that one help provide witnesses and information. Professor Vance explains: "Any sympathy which the assured may express in favor of the plaintiff's cause of action, or indeed aid given in securing evidence to support her cause, will not, in the absence of failure to perform the specific acts required by the co-operation clause, defeat recovery on the policy."<sup>63</sup>

The biggest fear when insurance is available is that family members will collude and bring fraudulent suits.<sup>64</sup> Some courts fear that the parent and child might fraudulently represent the circumstances of the accident or the extent of the injuries.<sup>65</sup> Moreover, it has also been argued that it is often difficult in a particular case to determine whether there has been collusion.<sup>66</sup>

The supreme court of Florida was not persuaded by these arguments. It agreed with the Indiana Supreme Court's reasoning in *Brooks v. Robinson*:<sup>67</sup>

The possibility of fraud and collusion exists in all litigation. However, we are not convinced that the danger is so great . . . that judicial relief should be summarily denied. Furthermore, it should not be overlooked that the testimony of both parties will be extremely vulnerable to impeachment at trial on the grounds of bias, interest and prejudice.<sup>68</sup>

This reasoning assumes that the triers of fact will be able to sufficiently weed out the fraudulent claims from the valid. Many states claim that the courts are quite adequate for the task.<sup>69</sup>

The court is not the only body armed with devices to discover collusive claims. The insurance company has its own resources.<sup>70</sup>

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62. *Id.*

63. *Id.*

64. Grilliot & Mishkind, *Emancipation From the Family Immunity Doctrine*, 15 *AM. BUS. L.J.* 305, 308-09 (1978).

65. *Id.*

66. Vance, *supra* note 61 at 1004.

67. 284 N.E.2d 794 (Ind. 1972).

68. *Id.* at 797.

69. See, e.g., *Klein v. Klein*, 376 P.2d 70, 73 (Cal. 1962), where the California Supreme Court stated:

It would be a sad commentary on the law if we were to admit that the judicial processes are so ineffective that we must deny relief to a person otherwise entitled simply because in some future case a litigant may be guilty of fraud or collusion.

Once that concept were accepted, then all causes of action should be abolished.

70. See Comment, *Lewis v. Lewis: Dissolving the "Metaphysical" Merger in Inter-*

The insurer can protect itself from collusive suits through prompt investigation,<sup>71</sup> disclaiming liability due to breach by the insured of the cooperation clause,<sup>72</sup> which occurs upon deliberate and willful falsification of material facts,<sup>73</sup> and by the threat of criminal action against the insured.<sup>74</sup>

Insurance companies in Florida have still another device to protect themselves from fraudulent claims—exemption clauses as to family members.<sup>75</sup> The court held in *Ard* that a policy containing an exclusion clause for household or family members would prevent children from suing.<sup>76</sup> The court stated that since liability insurance is optional as between the insured and the carrier, and since there are valid policy reasons for such clauses, such clauses in automobile policies are not void as against public policy.<sup>77</sup> The policy reasons referred to were stated in *Reid v. State Farm Fire & Casualty Co.*<sup>78</sup> The clauses were allowed because they protected “the insurer from over friendly or collusive lawsuits between family members.”<sup>79</sup> However, if the courts can expose collusive suits, one may wonder why such clauses are not void as against public policy.

In *Ard* the court was making the determination as to whether the fear of collusion should bar a cause of action and the court felt that due to the superior interest of the injured claimant, public policy would make the fear of collusion a secondary consideration.<sup>80</sup> In permitting insurance companies the right to use family exclusion clauses, the court was supporting a public policy not to hinder freedom of contract.<sup>81</sup> If an insurance company doesn't want to insure a policy holder's family out of fear of collusion, the state will not force it to do so.

In addition, the court is allowing insurance purchasers the opportunity to take advantage of lower premium rates. In *Florida Farm Bureau Insurance Co. v. Government Employees Insurance*

*spousal Torts*, 12 NEW ENG. L. REV. 333, 341 (1976).

71. *Id.*

72. *Id.*

73. *Sorenson v. Sorenson*, 339 N.E.2d 907, 915 (Mass. 1975).

74. Comment, *supra* note 70, at 341.

75. 414 So. 2d at 1069.

76. *Id.* at 1067.

77. *Id.* at 1069.

78. 352 So. 2d 1172 (Fla. 1977).

79. *Id.* at 1173.

80. *Ard*, 414 So. 2d at 1069.

81. See generally *Reid*, 352 So. 2d 1172.

Co. the court observed that "insurance premiums may be established in part by reference to potential exposure to liability by insurance companies and may be lower where those most likely to be passengers in the automobile are expressly excluded from coverage."<sup>82</sup>

Justice Boyd, dissenting in *Ard*, claimed that insurers will use this right to exclude family members preventing parental liability, and thus "families will have no greater opportunity for financial protection than they already have today."<sup>83</sup> It is true that a policy with an exclusion clause will prevent liability, but the degree to which insurance companies will exclude family members is a matter of conjecture. The majority of the *Ard* court seemed to believe that the effectiveness of waiving the immunity will not be undermined on such a wholesale basis.<sup>84</sup>

### 3. *Scope of Waiver and its Effect on Discretionary Parental Duties*

The *Ard* court felt that if liability insurance covered the child's injury, the insurance would protect the family unit and parental immunity could be waived.<sup>85</sup> The types of liability insurance available could then define the situations in which a parent will become liable to his children in tort.<sup>86</sup> Some policies, such as a personal liability plan, will pay any amount to which the insured becomes legally liable.<sup>87</sup>

The *Ard* court suggests situations in which a parent will become legally liable to his children in tort. It stated that the immunity barred "an otherwise valid action."<sup>88</sup> This implies that the parent

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82. 387 So. 2d 932, 934 (Fla. 1980).

83. 414 So. 2d at 1071. See also Note, *Intrafamilial Tort Immunity in New Jersey: Dismantling the Barrier to Personal Injury Litigation*, 10 RUT.-CAM. L. REV. 661, 681 n.152 (1979). (New York legislatively eliminated interspousal immunity and said there would be liability only if specifically assumed in the policy). As predicted, liability policies issued in New York do not customarily provide for the assumption of interspousal liability. The author went on to state that by waiving interspousal immunity but allowing exclusion clauses the court was giving with one hand and taking away with the other.

84. Though not explicitly stated in the opinion, the court appears to have considered the impact of allowing family exclusion clauses and believes such clauses will not destroy the effectiveness of waiving the immunity.

85. 414 So. 2d 1066, 1068.

86. No insurance covers intentional tortious conduct, and consequentially, no child in Florida can sue his parents for intentional torts.

87. A. MAYERSON, INTRODUCTION TO INSURANCE 123 (1962).

88. 414 So. 2d at 1070.

owes a duty to act reasonably when dealing with his children.<sup>89</sup> Because the court did not define the parental duty, it may be assumed that a parent can be found legally liable *anytime* he acts unreasonably toward his children. A parent may be liable for negligent performance of duties not uniquely parental, such as carelessly driving an automobile resulting in injury to the child or even for the negligent performance of his discretionary parental duties of care, education, and discipline.

While Florida courts apparently have the power to find parents negligent in "parenting," two factors may inhibit the courts from reaching this result. The first factor is that most child/parent suits will only involve automobile insurance.<sup>90</sup> The *Sorenson* court explained why an automobile accident does not constitute negligent parenting: "Neither parental authority and discipline nor parental discretion in child care is called into question by an automobile accident case."<sup>91</sup> The second factor is that some Florida courts have held that discretionary parental duties should not be subject to attack.<sup>92</sup> However, the fact that the Florida Supreme Court has declared a parent liable in contribution to a joint tortfeasor for negligent supervision of a child lends some support to extending liability into parental duties.<sup>93</sup>

Other jurisdictions have held that a parent's discretion in performing his parental duties should not be subject to a judicial stan-

89. Justice Boyd, dissenting in *Ard*, takes this view: "Under the doctrine, as we have traditionally adhered to it, the law simply does not recognize parental negligence causing injury to the child as an actionable tort." 414 So. 2d at 1070.

90. The court noted that most of the states' decisions limiting the application of the immunity involve the negligent operation of a motor vehicle. The court impliedly predicts that the most common child/parent suit will involve automobile accidents.

91. 339 N.E.2d 907, 916 (Mass. 1975). Further, most kinds of liability insurance will cover only non-parental types of duties (duties owed to everyone).

92. See *Rickard v. Rickard*, 203 So. 2d 7, 8 (Fla. 2d DCA 1967). New York abolished the parental immunity but held there was no liability directly or indirectly through contribution for negligent supervision, because the parent owed no duty to the child in this area. See *Holodook v. Spencer*, 364 N.Y.S. 2d 859 (1974). The Florida Third District Court of Appeal adopted this reasoning in *3-M Electric Corp. v. Vigoa*, 369 So. 2d 405 (Fla. 3d DCA 1979) (holding that there was no right to contribution when a parent had allegedly been negligent in supervising his child). The Third District has since changed its mind. See *Quest v. Joseph*, 392 So. 2d 256 (Fla. 3d DCA 1980), *rev'd*, 414 So. 2d 1063 (Fla. 1982).

93. The court, in permitting contribution to the extent of liability insurance, said, "we make no distinction between the type of negligence of the parent, whether active or passive, so long as it is a cause of the injury." 414 So. 2d at 1065. It is important to note that the effect of the intrafamilial immunities on contribution has received a totally different treatment from that of the immunities in *directly* barring actions between family members. See *infra*, text accompanying notes 106-123.

dard of reasonableness when a child sues a parent in tort.<sup>94</sup> New York has waived parental immunity, but held that a child did not gain the right to sue a parent in his uniquely parental role.<sup>95</sup> The New York court's reasons for this are typical of the reasons urged in other jurisdictions. In *Lastowski v. Norge Coin-O-Matic, Inc.*, the court noted that the idiosyncracies of each parent-child relationship may be so varied that no standard of conduct is ascertainable and that applying a reasonable man standard in situations where parents are economically unable to care properly for children would be unjust.<sup>96</sup> The *Holodook* court held that a "reasonable parent" standard would not be used to determine what constitutes adequate parental supervision. It stated that this standard might "circumscribe the wide range of discretion a parent ought to have in permitting his child to undertake responsibility and gain independence."<sup>97</sup> Florida must now decide whether partially waiving immunity has granted children the right to question their parents' performance of uniquely parental functions or whether Florida will follow the New York approach and prevent such suits.

#### 4. *The Impact of Comparative Negligence*

Now that parental immunity has been partially abrogated, it must be determined whether the current use of the immunity is consistent with Florida's comparative negligence theory of tort liability announced in *Hoffman v. Jones*.<sup>98</sup> In *Hoffman*, the Supreme Court of Florida stated that: "In the field of tort law, the most equitable result that can ever be reached by a court is the equation of liability with fault."<sup>99</sup> It is for this reason that juries in Florida apportion the total damages in proportion to the fault of each party.<sup>100</sup>

The court stated in *Ard* that waiving the immunity merely allowed recovery for a duty that parents have long owed their chil-

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94. See *infra*, text accompanying notes 133-140.

95. See 364 N.Y.S. 2d 859, where the New York Court of Appeals held that a child could not sue his parents for negligent supervision. It should be noted that a child can base parental liability on employer-employee relation, master-servant relation, or passenger-carrier relation. See 59 AM. JUR. 2d *Parent and Child* § 153 (1971).

96. *Lastowski v. Norge Coin-O-Matic, Inc.*, 355 N.Y.S.2d 432, 440 (App. Div. 1974).

97. 364 N.Y.S. 2d at 871. This approach makes much sense to those who believe that parents should have autonomy in determining how to raise their children.

98. 280 So. 2d 431 (Fla. 1973).

99. *Id.* at 438.

100. *Id.* at 439.

dren.<sup>101</sup> Children can now recover for a parent's breach of this duty,<sup>102</sup> and the court's decision in *Ard* is compatible with Florida's theory of comparative negligence. The negligent parent is now going to have to pay in proportion to his fault.<sup>103</sup>

The First District Court of Appeal, in *Mieure v. Moore*,<sup>104</sup> argued that an abrogation of family immunity "would be consistent with the recent development that a loss should be apportioned among those whose fault contributed to the event."<sup>105</sup> This is true, but fails to take into consideration the valid policy reasons behind partially retaining the immunity. The court in *Ard* was able to retain family harmony, parental discipline and family resources, while modifying parental immunity to be more consistent with Florida's comparative negligence theory of tort liability.

### 5. Contribution and Immunity

Another question is how family immunity is treated for purposes of contribution. In *Joseph v. Quest*,<sup>106</sup> the court held that contribution is available against a parent to the extent of existing liability insurance coverage for the parent's tort against their child.<sup>107</sup>

To see how this is consistent with comparative negligence we must first see how Florida has treated the doctrine of "contribution." In the case of *Lincenberg v. Issen*,<sup>108</sup> Florida discarded the precedent of not allowing contribution among joint tortfeasors. The court claimed that the precedent was inconsistent with the newly accepted doctrine of comparative negligence.<sup>109</sup> The supreme court explained why contribution would be allowed by stating:

[I]n light of *Hoffman* and public policy, as a matter of judicial policy, it would be undesirable for this Court to retain a rule that under a system based on fault, casts the entire burden of a loss

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101. 414 So. 2d at 1070.

102. *Id.* at 1067.

103. *Id.* But a parent will have to pay no more than the limits of his insurance coverage.

104. 330 So. 2d 546 (Fla. 1st DCA 1976), *rev'd on other grounds*, 353 So. 2d 825, 826 (Fla. 1977).

105. *Id.* at 547.

106. 414 So. 2d 1063.

107. *Id.* at 1065. Contribution is also discussed in *Woods v. Withrow*, 413 So. 2d 1179 (Fla. 1982), along with an elaborate discussion of the effect of a "release."

108. 318 So. 2d 386 (Fla. 1975).

109. *Id.* at 391. Contribution among joint tortfeasors is used in Florida because joint tortfeasors are jointly and severally liable for the whole amount of damages. *Id.* at 394.

for which several may be responsible upon only one of those at fault. . . .<sup>110</sup>

The legislature then passed the Uniform Contribution Among Joint Tortfeasors Act.<sup>111</sup> This act was amended and now mandates that joint tortfeasors' relative degrees of fault shall be the basis for allocation of liability.<sup>112</sup> Although this statute establishes that a tortfeasor could seek contribution in Florida, the family immunity doctrine can still bar his recovery.

Traditionally, any tortfeasor had to be directly liable to the plaintiff in order to be liable in contribution to another tortfeasor.<sup>113</sup> Thus, since a parent was immune from suit by his children, he could not be liable to a joint tortfeasor for contribution, even though he was negligent towards his children. The Florida Supreme Court changed this when it held, in *Shor v. Paoli*,<sup>114</sup> that the common law doctrine of interspousal immunity would not bar contribution from a wife who was a joint tortfeasor.<sup>115</sup> The court reasoned that the law of contribution was meant to apportion the responsibility to pay innocent, injured third parties among those causing the injury, and that by letting contribution control over interspousal immunity it would be possible to apportion responsibility among joint tortfeasors without interfering with interspousal immunity's function of preserving the family unit.<sup>116</sup> The court, in *Joseph v. Quest*, used the same rationale in letting contribution partially control over parental immunity.<sup>117</sup> Indeed, this rationale is consistent with comparative negligence, as it apportions liability among tortfeasors in relation to degrees of fault.

The question remains why the court made contribution contingent upon liability insurance in parental immunity situations when there is no such contingency for contribution in interspousal immunity. The court, in *Joseph v. Quest*, stated that it "recognize[s] a legal difference between the husband and wife relationship and

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110. *Id.* at 391.

111. FLA. STAT. § 768.31 (1975).

112. The statute was amended to allow for pro rata share of fault apportionment, and is now called Uniform Contribution Among Tortfeasors Act. FLA. STAT. § 768.31 (1981).

113. See Comment, *Right of Contribution Is Not Barred by Doctrine of Interspousal Immunity in Florida*, 7 FLA. ST. U.L. REV. 167, 172 (1979) (the author points out that even states using the Uniform Contribution Among Tortfeasors Act required that a tortfeasor be directly liable to the plaintiff before contribution would be allowed).

114. 353 So. 2d 825 (Fla. 1977).

115. *Id.* at 826.

116. *Id.*

117. 414 So. 2d at 1063.



that of parent-child."<sup>118</sup> The court explained that "adults [are] capable of bringing suit independently and with full knowledge of their financial relationship."<sup>119</sup> This allows the injured party to decide whether to bring suit against the non-spouse tortfeasor with the possibility of contribution by the other spouse.<sup>120</sup>

The situation is different, the court asserted, when minors have to bring suit through a representative, usually the parents.<sup>121</sup> The court observed: "If the parents feared possible liability through contribution then it would be their decision and not the child's to withhold suit."<sup>122</sup> Further, since any award the child receives is his alone, the parents will not be able to use this money to offset their liability. This will have a chilling effect on the parents' decision to bring suit when their own negligence has been a factor.<sup>123</sup> For these reasons, the court limited contribution to the extent of insurance in parental immunity cases.

### C. Jurisdictions with Different Approaches

Other jurisdictions have abrogated parental immunity either in whole or in part and have substituted approaches which they believe adequately protect the family unit without denying unemancipated minors a tort remedy. Two states which use differing approaches are Wisconsin<sup>124</sup> and California.<sup>125</sup> In *Goller v. White*,<sup>126</sup> the Supreme Court of Wisconsin dealt with a case in which a twelve-year-old plaintiff alleged that his foster father was negligent in permitting him to ride on the drawbar of a tractor and in not taking him to the hospital for treatment after he fell off the tractor. The court held that parental immunity would be abrogated 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,

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118. *Id.* at 1064.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* Justice Boyd dissented in *Joseph* claiming that *Shor* should be applied in parental immunity cases because, "[t]he recovery from the non-family tortfeasor can simply be reduced in proportion to the immune parent's percentage of causal responsibility." *Id.* at 1065.

124. *Goller v. White*, 122 N.W.2d 193 (Wis. 1963). Supplemental Opinion July 9, 1963.

125. *Gibson v. Gibson*, 479 P.2d 648 (Cal. 1971).

126. 122 N.W.2d at 193.

housing, medical and dental services, and other care."<sup>127</sup> The obvious intent of the court is to allow minors a cause of action for any injury caused by the parent acting in a nonparental capacity, thus not infringing upon the parent's discretion in performing their parental obligations. Florida's recent holding might well do the same, but the Wisconsin rule does not depend on the existence of insurance.<sup>128</sup>

In *Gibson v. Gibson* the California Supreme Court criticized Wisconsin's limited use of the immunity because it draws an arbitrary distinction as to when particular parental conduct falls within the immunity.<sup>129</sup> The court further stated, "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."<sup>130</sup> The Wisconsin approach also allows an uninsured parent to be sued, and thus disrupts family harmony and resources.

Another approach very similar to that in *Goller* was employed in *Schenk v. Schenk*.<sup>131</sup> In this case, the Illinois appellate court waived parental immunity for tortious conduct having no direct bearing on the family relationship. The court stated, however, that to abrogate the immunity rule would "inject into the courts a judicial supervision over everyday family conduct of parent and child, and invite endless litigation over what is or is not ordinary negligence in the operation of a household."<sup>132</sup> But the court felt that it should not bar recovery for tortious conduct wholly unrelated to the objectives or purposes of the family itself.

After deciding to abolish parental immunity, the California Supreme Court in *Gibson v. Gibson*<sup>133</sup> decided to use the "reasonable and prudent parent" standard to measure parental conduct. The court felt that a parent should be liable for the negligent exercise

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127. 122 N.W.2d at 198. Courts have been very willing to treat negligent supervision as falling within this exception. See Note, *Parental Immunity for Negligent Instruction Denied*, 6 WM. MITCHELL L. REV. 219, 224-25 (1980).

128. The court stated, "the mere fact that the particular defendant-parent is protected by liability insurance does not enable his minor child to maintain an action when, in the absence of such insurance, he could not otherwise maintain it." 122 N.W.2d at 197. The court admitted that widespread use of liability insurance was a factor in partially abrogating the immunity.

129. *Gibson v. Gibson*, 92 Cal. Rptr 288, 293 (1971).

130. *Id.* Of course this argument applies any time parental immunity is even partially used, as in Florida.

131. 241 N.E.2d 12 (Ill. App. Ct. 1968).

132. *Id.* at 15.

133. 479 P.2d 648.

of familial duties and powers and noted the practical effect that the prevalence of liability insurance had on intrafamilial suits.<sup>134</sup> Advocates of the California position state that in determining the reasonableness of the parent's conduct, the court can look to the capacity of the child, his intelligence and whether there were special conditions of the family which created any exigency justifying the parent's conduct.<sup>135</sup> They further claim that "the 'reasonableness' standard is not calculated to subject parents to liability for every mistake, but rather to subject parental conduct to judicial scrutiny in order that clearly unacceptable conduct give rise to tort liability."<sup>136</sup> The *Holodook* court attacked this approach stating that the necessary degree of discipline and supervision of a particular child cannot realistically be subjected to a judicial determination of reasonableness.<sup>137</sup> This determination of reasonableness severely undermines the discretionary role of parenting and requires that parents conform to a community standard that may be directly at odds with the parents' belief as to how to raise their children.

Other jurisdictions recognize parental immunity, but create exceptions for situations when the child brings the action against the estate of the deceased parent.<sup>138</sup> The logic here is that there will obviously be no disruption of family harmony or parental discipline. Another recognized exception exists when the parent's tort constitutes willful misconduct.<sup>139</sup> The reasoning for this exception is that family harmony is irretrievably disrupted by any intentional or willful tortious conduct and there is very little possibility of collusive claims when insurance is involved in these cases.

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134. *Id.* at 653.

135. Comment, *The "Reasonable Parent" Standard: An Alternative to Parent-Child Tort Immunity* 47 U. COLO. L. REV. 795, 810 (1976).

136. *Id.*

137. 364 N.Y.S. 2d at 871. It stated: "Considering the different economic, educational, cultural, ethnic and religious backgrounds which must prevail, there are so many combinations and permutations of parent-child relationships that may result that the search for a standard would necessarily be in vain—and properly so. *Id.* See also, Comment, 47 U. COLO. L. REV. 795, 810.

138. See, e.g., *Brennecke v. Kilpatrick*, 336 S.W.2d 68 (Mo. 1960); *Palcsey v. Tepper*, 176 A.2d 818 (N.J. Super. Ct. Law Div. 1962); *Dean v. Smith*, 211 A.2d 410 (N.H. 1965).

139. See, e.g., *Horton v. Reaves*, 526 P.2d 304 (Colo. 1974); *Wright v. Wright*, 70 S.E.2d 152 (Ga. Ct. App. 1952); *Cowgill v. Boock*, 218 P.2d 445 (Or. 1950).

## III. INTERSPOUSAL IMMUNITY

## A. History

Interspousal immunity has its origins in the common law,<sup>140</sup> and was adopted by Florida in 1829 when the legislature stated that the common law of England would be in force in this state.<sup>141</sup> The current reasons for recognizing the immunity are very similar to those associated with parental immunity: preserving family harmony, protecting family resources, and fear of collusive suits.<sup>142</sup> The historical basis for the immunity was the legal unity of husband and wife.<sup>143</sup> At common law the wife's personal and property rights were suspended for the duration of the marriage and were merged into those of the husband.<sup>144</sup> The husband became liable for the torts his wife committed either before or during the marriage and was also entitled to all of her choses in action.<sup>145</sup> Because of this, no spouse could sue the other. If the wife sued the husband he would have the right to reduce to possession her choses in action.<sup>146</sup> He would pay damages, but automatically get them back, circumventing any recovery to the wife. If the husband sued the wife, in effect, he would be suing himself, because he was liable for his wife's torts.<sup>147</sup>

This legal unity between husband and wife began to deteriorate when American jurisdictions began to pass statutes, known as Married Women's Acts, around the middle of the nineteenth century.<sup>148</sup> Shortly thereafter, every American jurisdiction had secured to a married woman the right to separately own and control property and the right to sue and be sued in her own name.<sup>149</sup> These acts also made the wife separately liable for her own torts.<sup>150</sup> These statutes have persuaded some states to abrogate interspousal im-

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140. W. PROSSER, *LAW OF TORTS* 859 (4th ed. 1971).

141. Act of Nov. 6, 1829, § 1 (current version at FLA. STAT. § 2.01 (1981)).

142. *But see* Hill v. Hill, 415 So. 2d 20 (Fla. 1980). Florida no longer accepts the fear of collusive suits as a reason for the immunity.

143. PROSSER, *supra* note 140, at 859.

144. *Id.*

145. *Id.* at 860.

146. *Id.*

147. *Id.*

148. *Id.* at 861.

149. *Id.*

150. *Id.* at 861. There were many different kinds of Married Women's Acts, and some of these expressly refused to authorize suits between husband and wife. For a complete classification of these statutes see McCurdy, *supra* note 17, at 1037.

munity for personal torts, but have been deemed irrelevant to the application of interspousal immunity by many other states,<sup>151</sup> including Florida.<sup>152</sup>

In the 1979 case *Raisen v. Raisen*,<sup>153</sup> the Florida Supreme Court refused to abrogate interspousal immunity for automobile accidents claiming that the Married Women's Property Act of 1943<sup>154</sup> did not affect the fundamental relationship between husband and wife or the unity of marriage.<sup>155</sup> Justice Alderman, writing for the majority, stated that it would be illogical for the court to hold that a property statute had implied a right permitting one spouse to sue the other for an automobile accident.<sup>156</sup> The court further stated that, because such suits "disturb domestic tranquility, cause marital discord and divorce, cause fictitious, collusive, and fraudulent claims; cause a rise in liability insurance; and promote trivial actions,"<sup>157</sup> interspousal immunity would be retained. Justice McDonald concurred specially, stating that the fear of collusive claims could be handled by the judicial system and that abrogating interspousal immunity to the extent of insurance would prevent disruption of domestic tranquility.<sup>158</sup> He felt, however, that the legislature should abrogate immunity, not the court.<sup>159</sup>

The dissenting justices in *Raisen* made three arguments.<sup>160</sup> First, they claimed that the Married Women's Property Act permitted interspousal suits in a wide range of cases and seriously eroded the legal unity concept that prohibited suits between spouses.<sup>161</sup> They were careful to point out that: "By rejecting the common law unity concept we do not disparage the spiritual and emotional unity which has been held to exist by virtue of the marriage bond."<sup>162</sup> This statement referred to the Washington Supreme Court's language in *Freehe v. Freehe*.<sup>163</sup> The *Freehe* court stated that the common law unity of husband and wife referred to the situation

151. See *supra* note 140 at 861-62.

152. The Florida Supreme Court held so most recently in *Hill v. Hill*, 415 So. 2d 20, 22.

153. 379 So. 2d 352 (Fla. 1979) (Justices England, Adkins and Sundberg dissenting).

154. FLA. STAT. § 708 (1981).

155. 379 So. 2d 352, 354 (Fla. 1979).

156. *Id.* citing *Corren v. Corren*, 47 So. 2d 774, 775 (Fla. 1950).

157. *Id.*

158. *Id.* at 355.

159. *Id.* It is ironic that Justice McDonald subsequently wrote the majority opinion in *Ard*, where the court abrogated parental immunity to the extent of insurance.

160. *Id.* at 356-59.

161. *Id.* at 357.

162. *Id.*

163. 500 P.2d 771 (Wash. 1972).

where a woman's marriage for most purposes rendered her a chattel of her husband and not to the common nature of loving oneness achieved in a marriage of two free individuals.<sup>164</sup>

The second argument raised by the dissenting justices in *Raisen* was that domestic harmony is not served by the immunity. In support of its position, the dissent quoted Dean Prosser's famous criticism of the doctrine:

[The doctrine of interspousal immunity is based] on the bald theory that after a husband has beaten his wife, there is a state of peace and harmony left to be disturbed; and that if she is sufficiently injured or angry to sue him for it, she will be soothed and deterred from reprisals by denying her the legal remedy—and this even though she has left him or divorced him for that very ground.<sup>165</sup>

The final argument by the dissent was that the danger of fraud and collusion was not well founded.<sup>166</sup> They cite sources to show that the judicial machinery is able to expose fraudulent claims.<sup>167</sup>

## B. Florida's Current Use of Interspousal Immunity

### 1. Reasons for Retaining Immunity

The Florida Supreme Court was presented with another opportunity to abrogate interspousal immunity in *Hill v. Hill*.<sup>168</sup> In this case, Mrs. Sheila Hill was suing her husband, Thomas Hill, for malicious prosecution, false imprisonment and abuse of process.<sup>169</sup> The First District Court of Appeal pointed out some important distinctions between this case and *Raisen*. It stated that the suit here was for an intentional tort rather than simple negligence, and as such, it was a poor candidate for a collusive claim. The court also noted that at the time of the alleged tort, the husband and wife were separated and that the parties' actions were themselves disruptive of marital harmony.<sup>170</sup>

The Florida Supreme Court was not persuaded by these distinc-

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164. *Id.* at 773.

165. Prosser, *supra* note 140 at 863. *But see* text accompanying note 178.

166. 379 So. 2d at 358.

167. *Id.* at 358-59. These same sources are later accepted as persuasive by the majority in the 1982 *Ard* case.

168. 415 So. 2d 20.

169. *Id.*

170. *Id.* at 22.

tions but went on to elaborate why interspousal immunity would not be modified.<sup>171</sup> The court stated that to allow a means of recovery under the present tort system would seriously affect the family unit, family financial resources and could result in multiple interrelated court proceedings. It stated: "We also point out that in this circumstance we are unable to modify our immunity doctrine as we did with parental immunity in *Ard v. Ard* . . . because insurance coverage is not available for intentional torts."<sup>172</sup> Finally, it again rejected the proposition that the Married Women's Property Act had abolished the doctrine of interspousal immunity.

## 2. *Reasons to Waive Immunity to the Extent of Insurance*

Analyzing each of the reasons behind the court's decision will illustrate how Florida can waive interspousal immunity to the extent of liability insurance to make its use of the immunity more compatible with parental immunity and its theory of comparative negligence. Although the reasons for accepting parental and interspousal immunities differed slightly in the past, the justifications are now identical. As a result, Florida should and can make its use of the intrafamilial immunities symmetric. To accomplish this, the court, in reviewing the next interspousal *negligence* case,<sup>173</sup> should waive interspousal immunity to the extent of liability insurance, making an exception for exclusion clauses, as it did in *Ard*.

The court's arguments that apply to intentional torts suits between spouses simply do not apply to negligence actions. The court's first premise is that allowing a suit between spouses will disrupt family harmony and may hinder reconciliation.<sup>174</sup> Yet, allowing negligence actions when insurance is involved will not make the parties adverse. This was the court's own reasoning in *Ard*.<sup>175</sup>

The court states that intentional tortious conduct by one spouse against the other is often followed by a dissolution proceeding and thus two courts would be required to solve the disputes: one to determine the tort damages and one to determine dissolution and child custody matters.<sup>176</sup> This problem will not arise in negligence actions, as dissolution proceedings are not likely to follow from

171. *Id.* at 22-24.

172. *Id.* at 21 (citation omitted).

173. The most recent decisions all dealt with intentional torts, which are not covered by insurance.

174. *Id.* at 23.

175. *See supra* notes 56-58 and accompanying text.

176. 415 So. 2d at 23.

suits involving negligent conduct.

Further, the court states that to allow a tort action would result in a contingent attorney fee being used in a domestic relations matter, which is unethical and not conducive to reconciliation. The tort dispute could, the court continues, be used as a legal tool to achieve a better settlement in a dissolution proceeding.<sup>177</sup> This might be the case for an intentional tort claim as in *Hill*, but in a negligence case there will be no peripheral dissolution proceeding and hence no fears of bargaining with claims or of disrupted reconciliation efforts. In the case of an intentional tort where interspousal immunity would still exist, the trial judge handling the dissolution proceeding, "has authority to require an abusive spouse to pay necessary medical expenses and the authority to consider any permanent injury or disfigurement or loss of earning capacity from such abuse when setting alimony."<sup>178</sup> In cases where dissolution usually results, an injured spouse may be able to circumvent the immunity and receive a civil remedy.

The court's final argument in *Hill* is that multiple proceedings could substantially erode family resources for spouses and their children, even if reconciliation occurs. Yet, as already noted, multiple proceedings are not likely to result in a negligence action. Moreover, the court's concern with protecting family resources would actually favor waiving the immunity when insurance is involved because insurance will protect the family resources. Indeed, the court must have realized in deciding *Hill* on the same day as *Ard* that while there may be reason not to waive the immunity for intentional torts, there is no reason to keep the immunity for torts committed by spouses but covered by insurance.

The Florida Supreme Court should have no problem in concluding that public policy requires it to disregard the antiquated legal unity concept in order to modify the common law doctrine of interspousal immunity. This modification would be supported by past Florida decisions and similar decisions in sister states. The important public policy consideration in Florida is that the use of the immunity should be compatible with Florida's theory of comparative negligence. Spouses should pay for the proportion of injury they caused. The court itself said in *Raisen* that it has only modi-

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177. *Id.* at 24. Of course, if the court felt that contingency fees were still unethical in such actions, it could easily restrict contingent fees in interspousal tort claims.

178. *Id.* at 21. The court is referring to FLA. STAT. § 61.08 (1982) (which states that the court in determining alimony may consider any other factor [not specifically listed] necessary to do equity and justice between the parties).



fied common law enacted by section 2.01 [encompassing interspousal immunity] where there was "a compelling need for change and the reason for the law no longer existed."<sup>179</sup> Justice Alderman then stated that the court modified common law to adopt the theory of comparative negligence because of compelling need for change. There is a compelling need now to change the common law doctrine of interspousal immunity in order to make it consistent with comparative negligence.

Other state high courts have paritally abrogated the immunity holding that their respective Married Women's Property Acts have defeated the common law immunity,<sup>180</sup> or have simply held that the common law immunity was not rigidly incorporated into their state's statutory law.<sup>181</sup> The Supreme Court of New Jersey, in *Immer v. Risko*,<sup>182</sup> waived interspousal immunity for torts arising out of negligent operation of automobiles. The court said that its common law incorporating statute "did not incorporate immunity, but rather [incorporated] the common law with its inherent capacity for change."<sup>183</sup> In Florida the reasons for the immunity no longer exist in negligence claims and the court must recognize that the common law's inherent capacity for change allows the court to modify the common law doctrine of interspousal immunity.

The Fifth District Court of Appeal has already waived interspousal immunity to the extent of the negligent spouse's available insurance coverage in *Tubbs v. Dressler*<sup>184</sup>, stating simply: "On the basis of *Ard* as it applies to the parental immunity, there is no reason in logic or public policy to conclude that the same principles do not also apply to interspousal immunity."<sup>185</sup> In *Tubbs* both spouses died in a plane crash, and the estate of Mrs. Tubbs sued the estate of Mr. Tubbs and his aircraft liability insurer.<sup>186</sup> The court allowed suit against the husband's estate solely on the

179. 379 So. 2d 352, 354 (Fla. 1979).

180. See, e.g., *Cramer v. Cramer*, 379 P.2d 95 (Alaska 1963); *Gilman v. Gilman*, 95 A. 657 (N.H. 1915).

181. See, e.g., *Digby v. Digby*, 388 A.2d 1 (R.I. 1978); *Immer v. Risko*, 267 A.2d 481 (N.J. 1970).

182. 267 A.2d 481 (N.J. 1970).

183. *Id.* at 483.

184. 7 Fla. L.W. 2094 (5th DCA, September 29, 1982).

185. *Id.* The court certified this question as being one of great public importance: *Is the doctrine of interspousal immunity, like the doctrine of parental immunity, waived to the extent of available liability insurance when the action is for a negligent tort causing injury or death?* *Id.* at 2095.

186. *Id.* at 2094.

grounds that insurance existed to cover the accident,<sup>187</sup> and as a result provided family members the right to sue deceased family members who are insured. Allowing such suits is logical, as, even in suits against a deceased family member, insurance protects the harmony and resources of the surviving family members.<sup>188</sup>

Finally, it must be noted that if the court should put the use of interspousal immunity on the same footing as that of parental immunity, one difference in the application of the immunities still would exist. Because of the court's decision in *Shor*, the right to contribution in interspousal suits will not depend on insurance while the right to contribution in suits between parent and child will depend on insurance because of the court's decision in *Ard*. This different treatment of the right to contribution may be inconsistent with Florida's theory of comparative negligence because the joint tortfeasor of a spouse always has a right to contribution, whereas the joint tortfeasor of a parent will have his right to contribution depend on the existence of insurance. Because there are valid reasons for this difference,<sup>189</sup> the small disparity in rights to contribution would be an insignificant price to pay for the court's successful realignment of the intrafamilial immunities with Florida's theory of comparative negligence.

The Florida Supreme Court's last two decisions on interspousal immunity reiterated that interspousal immunity bars claims for intentional torts committed during the marriage but sued upon either after dissolution of marriage or after the tortious spouse's death.<sup>190</sup> In *West v. West*,<sup>191</sup> the court held that a spouse cannot sue the other spouse for an intentional tort committed during the marriage after the marriage has been dissolved by divorce.<sup>192</sup> In *Roberts v. Roberts*,<sup>193</sup> the court held that a spouse cannot sue the decedent spouse's estate for an intentional tort committed during marriage, because to allow a claim against the estate "would only

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187. The court did not rule on whether the doctrine of interspousal immunity prevents a spouse's estate from recovery under Florida's wrongful death statute (FLA. STAT. § 768.19), as the *Ard* waiver of immunity was held determinative.

188. This is not inconsistent with the Florida Supreme Court's recent decision in *Roberts v. Roberts*, where the right to sue an intentional tortfeasor spouse who was deceased was barred. There was no insurance in that case.

189. See *supra* text accompanying notes 118-123.

190. See *West v. West*, 414 So. 2d 189 (Fla. 1982); *Roberts v. Roberts*, 414 So. 2d 190 (Fla. 1982).

191. 414 So. 2d 189.

192. The reason being that damages may be considered in deciding on alimony.

193. 414 So. 2d 190.

add a unique factor to probate of an estate . . . [and] could adversely affect dependent family beneficiaries, particularly minor children."<sup>194</sup>

### B. Jurisdictions with Different Approaches

A significant number of states have abolished interspousal immunity.<sup>195</sup> The Minnesota Supreme Court abolished the immunity in *Beaudette v. Frana*,<sup>196</sup> claiming that the same public policy considerations that prompted it to abrogate parental immunity required abrogation of interspousal immunity.<sup>197</sup> In so doing, the court mentioned that in allowing suits between spouses, trial courts must observe that "[t]here is an intimate sharing of contact within the marriage relationship, both intentional and unintentional, that is uniquely unlike the exposure among strangers."<sup>198</sup> The court explained that because of the unique relationship between spouses, not all contact and injury that would be tortious between strangers would qualify as tortious between spouses.<sup>199</sup> A jury determination of whether two adults have acted reasonably towards each other appears to be an easier task than a jury determination of whether a parent has acted reasonably in caring for and disciplining his children. An adult's conduct with other adults is more standardized than an adult's conduct with his children. The jury determination of reasonableness is not the problem with this approach, but rather the problem is that it allows for disruption of family harmony and family resources.

Another approach is to waive interspousal immunity in automobile negligence cases. The Massachusetts Supreme Court did this in the case of *Lewis v. Lewis*.<sup>200</sup> The court based its decision on the fact that an auto accident does not require a jury to delve into the rights and privileges that exist between husband and wife. This eliminates any fear that the jury will be mandating which inter-

194. *Id.* at 191.

195. See 92 A.L.R.3d 901 § 13 (1979). Twenty-four states have abolished interspousal immunity. They are: Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Idaho, Indiana, Kentucky, Maine, Michigan, Minnesota, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Washington, West Virginia and Wisconsin.

196. 173 N.W.2d 416 (Minn. 1969).

197. See, e.g., *Merenoff v. Merenoff*, 388 A.2d 951 (N.J. 1978); *Freehe v. Freehe*, 500 P.2d 771 (Wash. 1972).

198. 173 N.W.2d at 420.

199. See, generally, 173 N.W.2d 416.

200. 351 N.E.2d 526 (Mass. 1976).

spousal activities are reasonable.

Some states make an exception to interspousal immunity when intentional tortious conduct is involved. The Texas Supreme Court provided the rationale for this exception in *Bounds v. Candle*<sup>201</sup> when it stated, "The peace and harmony of a home which has already been strained to the point where an intentional physical attack could take place will not be further impaired by allowing a suit to be brought to recover damages for the attack."<sup>202</sup> Florida does not recognize this exception because allowing suits for intentional torts would hinder possible reconciliation and an alternative civil remedy is provided by a dissolution proceeding for those unwilling to reconcile.<sup>203</sup>

The last area of disagreement among the states as to the use of interspousal immunity focuses on the time that the immunity attaches to an act of tortious conduct. If a spouse is injured prior to the marriage, some states hold that the immunity will not prevent her from suing for the tort while married. In *Moulton v. Moulton*,<sup>204</sup> the Maine Supreme Court held that the subsequent marriage of the parties did not prevent an action for a tort occurring prior to the marriage. It reasoned that the common law did not prevent the woman from having her own cause of action before marriage and that the Married Women's Property Statute allowed a woman to retain her own cause of action in marriage; hence the legal unity of husband and wife did not bar her cause of action in tort just because she got married. The other view is that the immunity does bar a suit for premarital torts while the couple is married. Florida adopted this view in *Gatson v. Pittman*,<sup>205</sup> holding that while a spouse couldn't sue on the claim during marriage, she could sue should she ever get divorced.

Whether a spouse has the right to sue after the marriage has ended for a tort committed during the marriage is also treated differently by different states. The view of Utah and some other states is that a spouse may sue on the tort after the marriage has ended by divorce.<sup>206</sup> The Utah Supreme Court reasoned that the threat to marital harmony no longer exists in such a case. The Florida Supreme Court, on the other hand, in the case of *West v.*

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201. 560 S.W.2d 925, 927 (Tex. 1977).

202. *Id.* at 927.

203. See *Hill* 415 So. 2d 20.

204. 309 A.2d 224 (Me. 1973).

205. 224 So. 2d 326 (Fla. 1969).

206. *Stoker v. Stoker*, 616 P.2d 590 (Utah 1980).

*West*,<sup>207</sup> has held that even though the marriage has ended by divorce, no cause of action can be brought for tortious conduct during the marriage because an alternate civil remedy exists in the dissolution. The Supreme Court of Missouri prevented a suit after divorce for a different reason in *Ebel v. Ferguson*,<sup>208</sup> explaining that, because of the common law principle of unity of husband and wife, no valid claim even arose.<sup>209</sup> Some states have treated the death of one spouse as a circumstance in which the immunity may be waived, while some other jurisdictions still use the immunity to prevent suit even though one spouse has died.<sup>210</sup> It appears that a state's interpretation of the purposes served by the immunities will prescribe the circumstances in which the immunity will be applied.

#### IV. CONCLUSION

States have used intrafamilial tort immunities to different degrees and for different purposes. Recently some states have severely modified the use of the immunities realizing that the immunities cannot adequately protect the family unit in many circumstances. Florida has sought to protect family resources and family harmony from intrusion by intrafamilial suits. The Florida Supreme Court has recognized that insurance can protect family resources and tranquility. It was for this reason that the court waived parental immunity to the extent of liability insurance coverage. Yet the Florida Supreme Court has left the job half done.

Interspousal immunity must be waived to the extent of liability insurance coverage because insurance preserves family resources and tranquility in these suits as well. There is no reason to deprive a spouse of a civil remedy when insurance can substitute in protecting the family. If the supreme court leaves the intrafamilial immunities in their current state, the court will be inconsistent with its own logic and its own precedent. Waiving interspousal immunity to the extent of insurance will increase a spouse's right to civil redress to the same level as a minor's and will make the use of the immunities wholly consistent with Florida's theory of comparative negligence. The court can do this and at the same time preserve the family unit.

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207. 414 So. 2d 189.

208. 478 S.W.2d 334 (Mo. 1972).

209. Some jurisdictions, such as Florida, would claim that a cause of action would exist, but would just be indefinitely suspended by the immunity.

210. 92 A.L.R.3d 901 §§ 31-32 (1979).