

Catholic University Law Review

Volume 37
Issue 3 Spring 1988

Article 9

1988

Rousey v. Rousey: The District of Columbia Joins the National Trend Towards Abolition of Parental Immunity

Carla Maria Marcolin

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

Recommended Citation

Carla M. Marcolin, *Rousey v. Rousey: The District of Columbia Joins the National Trend Towards Abolition of Parental Immunity*, 37 Cath. U. L. Rev. 767 (1988).

Available at: <https://scholarship.law.edu/lawreview/vol37/iss3/9>

This Comments is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

ROUSEY v. ROUSEY: THE DISTRICT OF COLUMBIA JOINS THE NATIONAL TREND TOWARDS ABOLITION OF PARENTAL IMMUNITY

The parental immunity doctrine, once widely accepted by American courts,¹ has faced numerous challenges to its vitality in the past few decades.² The doctrine of parental immunity bars an unemancipated, minor child from bringing either a negligent or intentional tort action against a parent.³ The harsh effect of this broad prohibition and the widespread criticism provoked by its rationale have prompted many courts to reconsider the doctrine.⁴ Initially, courts reacted to the parental immunity doctrine by creating exceptions to it, thereby imposing liability for specified parental conduct.⁵ Gradually, however, courts began to abolish parental immunity partially or entirely.⁶ This movement has continued to the extent that, today, the continued viability of the doctrine is questionable.

The District of Columbia Court of Appeals recently abolished the doctrine of parental immunity in *Rousey v. Rousey*.⁷ This decision marked the District of Columbia's alignment with the growing number of jurisdictions which have partially or entirely abrogated the doctrine. The *Rousey* case

1. Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, 50 *FORDHAM L. REV.* 489, 494 (1982). The courts of Alaska, Hawaii, Kansas, North Dakota, South Dakota, Utah, and Vermont have never affirmatively adopted parental immunity. *Id.* at 494 n.39.

2. *See, e.g.*, *Gibson v. Gibson*, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971) (en banc); *Gelbman v. Gelbman*, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969); *Goller v. White*, 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

3. Hollister, *supra* note 1, at 489.

4. *See generally* *Ard v. Ard*, 414 So. 2d 1066 (Fla. 1982) (parental immunity abridged only where negligent parent has liability insurance and policy limits curtail extent of liability); *Palcsey v. Tepper*, 71 N.J. Super. 294, 176 A.2d 818 (1962) (no parental immunity where child sues deceased parent's estate); *Felderhoff v. Felderhoff*, 473 S.W.2d 928 (Tex. 1971) (parent held liable for injury to child occurring during conduct of purely business activities; not familial ones).

5. *See* cases cited *supra* note 4.

6. *See* *Streenz v. Streenz*, 106 Ariz. 86, 471 P.2d 282 (1970); *Gibson v. Gibson*, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971) (en banc); *Goller v. White*, 20 Wis. 2d 402, 122 N.W.2d 193 (1963). Although these cases are generally cited for the proposition that they have completely abrogated parental immunity, all three jurisdictions recognize that certain parental acts will remain privileged and, thus, are immune from liability. *Streenz*, 106 Ariz. at 89, 471 P.2d at 285; *Gibson*, 3 Cal. 3d at 921, 479 P.2d at 652, 92 Cal. Rptr. at 292; *Goller*, 20 Wis. 2d at 413, 122 N.W.2d at 198.

7. 528 A.2d 416 (D.C. 1987) (en banc).

involved a minor child who brought a tort action against her mother, alleging that the mother's negligence caused an automobile accident in which the child sustained injuries.⁸ The trial court granted the mother's motion for summary judgment on the ground that the doctrine of parental immunity barred the child's suit.⁹ The District of Columbia Court of Appeals reversed, holding that parents will be liable to their minor children for injuries sustained in automobile accidents caused by parental negligence, provided that the negligent parent carries liability insurance.¹⁰

One year later, the court of appeals reheard the case en banc and extended its previously narrow holding to announce a general rejection of the doctrine of parental immunity in all cases of parental negligence.¹¹ The court recognized, however, that certain parental acts would remain privileged due to the traditional nature of the parent-child relationship and, therefore, were exempt from this general rule.¹²

Judges Nebeker and Belson each wrote separate dissenting opinions.¹³ Judge Nebeker criticized the majority's reliance upon the prevalence of liability insurance as a significant factor in its decision to abolish parental immunity and predicted that abolition would create dissension and strife among family members.¹⁴ Judge Belson, on the other hand, characterized the majority's opinion as an unjustified departure from an established judicial doctrine and suggested that the issue of parental immunity would be more appropriately resolved by the legislature.¹⁵

This Note will explore the history of the parental immunity doctrine and briefly examine the various jurisdictional approaches to its abolition or retention. It will then discuss the opinion in *Rousey v. Rousey* in light of the prior law in the District of Columbia, and analyze the legal and factual support for the court of appeal's present position. Finally, this Note will conclude by suggesting that the District of Columbia adopt a "reasonable person" standard for determining privileged parental conduct rather than proceed on an unguided case-by-case basis.

8. *Id.* at 416.

9. *Id.*

10. *Rousey v. Rousey*, 499 A.2d 1199, 1202 (D.C. 1985), *rev'd en banc*, 528 A.2d 416 (D.C. 1987).

11. *Rousey*, 528 A.2d at 416.

12. *Id.* at 421 n.9.

13. *See infra* notes 141-55 and accompanying text (discussion of dissenting opinions).

14. *Rousey*, 528 A.2d at 421 (Nebeker, J., dissenting).

15. *Id.* at 424 (Belson, J., dissenting).

I. PARENTAL IMMUNITY DOCTRINE: A LATE NINETEENTH CENTURY JUDICIAL CREATION

A. *Origin of the Parental Immunity Doctrine*

Common law did not expressly recognize the legal doctrine of parental immunity.¹⁶ Unlike its conception of husband and wife as a single legal entity, common law treated parent and child as separate legal entities.¹⁷ A child could both own property and maintain actions based upon his property rights.¹⁸ He could also maintain an action in tort to recover damages and be held liable as an individual for any tortious injuries he caused to others.¹⁹ Until 1891, however, no child ever attempted to recover for injuries inflicted tortiously by a parent. This reluctance to bring suit can most likely be attributed to the "almost unbridled parental authority" nineteenth century parents enjoyed.²⁰

The first attempt by a child to recover personal injury damages from a parent arose in *Hewellette v. George*.²¹ In *Hewellette*, a minor child sued her mother for actual and compensatory damages after her mother falsely imprisoned her in a mental institution for eleven days.²² Although the daugh-

16. The case of *Hewellette v. George*, 68 Miss. 703, 9 So. 885 (1891) is generally recognized by commentators as the first case to deny recovery to a minor on the ground that a parent enjoys immunity from any personal injury action brought by his or her child. See, e.g., Hollister, *supra* note 1, at 493-94; McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1063 (1930). It has been noted that Canada and Scotland have allowed personal injury actions against parents and that English law does not prohibit such actions. W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 122, at 904 (5th ed. 1984) [hereinafter W. PROSSER & R. KEETON].

17. W. PROSSER & R. KEETON, *supra* note 16, at 904-05.

18. *Id.* at 904; see also 1 J. SCHOULER, MARRIAGE, DIVORCE, SEPARATION, AND DOMESTIC RELATIONS § 691, at 719 (6th ed. 1921). However, an unemancipated child did not have full contractual capacity. See McCurdy, *supra* note 16, at 1057.

19. W. PROSSER & R. KEETON, *supra* note 16, at 904. In litigation, common law required that an unemancipated child be represented by a "next friend." 2 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 8.11, at 571 (2d ed. 1986).

20. Hollister, *supra* note 1, at 493. Nineteenth century authorities held conflicting and somewhat vague views regarding the possibility that a parent may be held liable to its child for personal injuries. McCurdy, *supra* note 16, at 1059-63. The principle that a parent deserves substantial discretion over the control and discipline of its child received general recognition. Moreover, it was suggested by some that criminal prosecution or denial of custody would provide a more appropriate remedy for unreasonably harsh parental chastisement. *Id.*; see also 1 J. SCHOULER, *supra* note 18, § 691, at 717-18. Criminal prosecution and conviction of parents for child abuse or mistreatment was rare, however, and direct state intervention by separating the child from its parents was utilized almost exclusively in poverty cases. Hollister, *supra* note 1, at 492-93.

21. 68 Miss. 703, 9 So. 885 (1891). The plaintiff's name in this case is also spelled "Hewlett" by many courts and critics. The spelling in the Southern Reporter, however, is "Hewellette."

22. 68 Miss. at 704, 9 So. at 887.

ter prevailed at trial, the Supreme Court of Mississippi reversed the jury verdict on appeal.²³ The court held that the public policy of promoting peace and unity among family members barred a minor from bringing a personal injury action against his or her parent "so long as the parent is under obligation to care for, guide, and control" the child.²⁴

Subsequent to *Hewellette's* first pronouncement of a doctrine of parental immunity, all but eight states adopted the doctrine of parental immunity judicially.²⁵ Although most courts accepted the reasoning advanced by *Hewellette*, that parental immunity furthered societal interests in family unity and harmony, courts additionally offered numerous other rationales to support the doctrine.²⁶

Many courts reasoned that permitting children to sue their parents would undermine parents' traditional authority to discipline and control their children.²⁷ Courts maintained that parents have a duty to discipline and support their children, and considered children to have a reciprocal duty to obey and serve their parents.²⁸ They hypothesized that children would lose respect and deference for their parents, in derogation of their filial duties, if they were aware of their parents' vulnerability to suit for tortious conduct.²⁹

In *Roller v. Roller*,³⁰ the Supreme Court of Washington buttressed its ac-

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

24. *Id.*, 9 So. at 887. The Mississippi Supreme Court denied the plaintiff daughter relief despite the fact of the daughter's marriage. *Id.*, 9 So. at 887. The plaintiff and her husband had separated at the time of the plaintiff's imprisonment, however, and the court deemed the plaintiff's resumption of residence at her mother's home to resurrect the parent-child relationship although the court actually was uncertain as to whether or not the plaintiff had returned to her mother's home to live. *Id.*, 9 So. at 887. The court did acknowledge the possibility that marriage could dissolve the obligations created by the parent-child relationship and thus allow the maintenance of a personal injury suit by a minor child. *Id.*, 9 So. at 887.

25. For a list of the eight states which failed to judicially adopt parental immunity, see Hollister, *supra* note 1, at 494 n.39.

26. See generally McCurdy, *supra* note 16, at 1072-77 (expositing the rationales advanced by different jurisdictions to support their adoption of parent-child immunity). For an extensive critique of the merits of these rationales, see Hollister, *supra* note 1, at 496-508.

27. See, e.g., *Emery v. Emery*, 45 Cal. 2d 421, 429, 289 P.2d 218, 223-24 (1955) (a parent's right to discipline his or her child constitutes the "basic policy" behind parental immunity); *Fowler v. Fowler*, 242 S.C. 252, 256, 130 S.E.2d 568, 569 (1963) (public policy behind parental immunity is to prevent deterioration of family harmony and parental discipline); *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S.W. 664 (1903) (first opinion to set out the parental discipline rationale in a case where a minor child was subjected to cruel and unusual punishment by her stepmother with her father's acquiescence), *overruled on other grounds sub nom.* *Davis v. Davis*, 657 S.W.2d 753 (Tenn. 1983) (abolished spousal immunity).

28. Comment, *Child v. Parent: Erosion of the Immunity Rule*, 19 HASTINGS L.J. 201, 204 (1967).

29. *Id.*

30. 37 Wash. 242, 79 P. 788 (1905), *overruled sub. nom.* *Borst v. Borst*, 41 Wash. 2d 642, 251 P.2d 149 (1952) (en banc). Commentators occasionally refer to the *Hewellette*, *McKelvey*,

ceptance of the doctrine by analogizing parental immunity to the doctrine of spousal immunity.³¹ The *Roller* court propounded several other arguments in favor of the doctrine as well.³² It maintained that recovery by one child would deplete the familial assets available for its siblings.³³ This, the court stated, conflicted with a strong public policy demanding that a parent's estate be equally available to all his or her children.³⁴ The court also suggested that a tortfeasor parent might eventually inherit the recovery of a successful child if the child predeceased the parent.³⁵

B. *The Doctrine of Parental Immunity in the District of Columbia*

The District of Columbia first examined the doctrine of parental immunity in 1948.³⁶ In *Villaret v. Villaret*,³⁷ a thirteen-year-old child brought suit against his mother for injuries sustained in an automobile accident.³⁸ Although the accident occurred in Maryland, the child sued in the United

and *Roller* opinions as the "great trilogy" of cases presenting the basic rationales behind the parental immunity doctrine. Comment, *Tort Actions Between Members of the Family—Husband & Wife—Parent & Child*, 26 MO. L. REV. 152, 182 (1961).

31. 37 Wash. at 245, 79 P. at 789. The doctrine of spousal immunity prevents a husband from suing a wife and vice versa due to the legal fiction that they constitute a single entity. Hollister, *supra* note 1, at 496-97. However, common law did not treat parents and children similarly, rather it legally recognized them as entirely separate individuals. See *supra* notes 16-18 and accompanying text.

32. The *Roller* court could not rely upon the *Hewellette* family unity rationale because the minor plaintiff sought to recover damages against her father for rape. 37 Wash. at 243, 79 P. at 788. The daughter argued that the parental immunity doctrine did not apply to her case because her father's actions irreparably destroyed the possibility of family unity. *Id.*, 79 P. at 789. The court responded that the creation of an exception to the doctrine in this instance would, in effect, open the floodgates on parental immunity and "allow an action to be brought for any other [parental] tort." *Id.* at 244, 79 P. at 789.

33. *Id.* at 245, 79 P. at 789. This rationale, labeled the "family exchequer" argument, McCurdy, *supra* note 16, at 1073, ignores the fact, however, that parents may devise or bequest their estates to their children in any proportion they desire and may even exclude their children from inheritance entirely. In *Roller*, the trial court awarded the plaintiff minor a \$2,000 judgment. 37 Wash. at 243, 79 P. at 788. This judgment was attached to the family homestead where the defendant and his other minor children resided, thereby lending weight to the family exchequer argument in this instance. *Id.*, 79 P. at 788.

34. *Roller*, 37 Wash. at 245, 79 P. at 789.

35. *Id.*, 79 P. at 789. The court implied that this result would contravene the mandate that a wrongdoer shall not benefit from his wrongful act. *Id.*, 79 P. at 789.

36. *Villaret v. Villaret*, 169 F.2d 677 (D.C. Cir. 1948). Although, subsequent to the *Villaret* decision the issue of parental immunity arose several times in the federal courts in the District of Columbia, the District of Columbia Court of Appeals did not have the opportunity to address the parental immunity doctrine until 1985. See *infra* notes 113, 117, 134, and accompanying text.

37. 169 F.2d at 677.

38. *Id.*

States District Court for the District of Columbia.³⁹ Therefore, on appeal, the United States Court of Appeals for the District of Columbia applied Maryland law and held the mother immune from suit despite the existence of liability insurance.⁴⁰ The court noted that the District of Columbia had never addressed the issue of parental immunity although the court recognized that other jurisdictions had almost unanimously adopted the doctrine.⁴¹

The United States District Court for the District of Columbia affirmatively adopted parental immunity in *Dennis v. Walker*.⁴² *Dennis* involved the injury of a minor child while riding as a passenger in a car driven by his mother.⁴³ The child did not sue his mother, rather he sued the driver of the second vehicle for negligence.⁴⁴ The defendant driver counterclaimed against the minor's mother for contribution, alleging that her negligence had contributed to the accident.⁴⁵ In response, the mother stated that District of Columbia law prohibited a defendant from seeking contribution from a joint tortfeasor unless that tortfeasor could be held liable to the plaintiff as an individual.⁴⁶ The mother argued that the defendant could not claim contribution from her because parental immunity precluded her own liability to her child.⁴⁷ The United States District Court for the District of Columbia granted the mother's motion for summary judgment.⁴⁸ The court held that the mother was immune from liability to her child and agreed that controlling case law precluded contribution unless the plaintiff could hold each joint tortfeasor liable individually.⁴⁹

The court justified its decision to adopt the parental immunity doctrine with the traditional rationale that it preserved family unity.⁵⁰ It acknowledged the theory that the growing prevalence of liability insurance better

39. *Id.*

40. *Id.* at 678-79. The court stated that the existence of liability insurance did not justify the creation of a new cause of action and warned that domestic disharmony and collusion would likely result from suits predicated upon the presence of insurance. *Id.*

41. *Id.* at 678.

42. 284 F. Supp. 413 (D.D.C. 1968).

43. *Id.* at 415. The car belonged to the child's father who was also riding as a passenger at the time of the collision. *Id.*

44. *Id.* The minor's parents also sued the driver of the second vehicle for injuries they sustained. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 419.

49. *Id.* at 417-19. However, the court criticized this bar to contribution, because an "extraneous principle of law" allowed one joint tortfeasor to escape liability, thereby unjustly placing the entire burden of a plaintiff's recovery on only one joint tortfeasor. *Id.* at 418.

50. *Id.* at 417.

protected the unity of the family but concluded that the presence of insurance would also encourage collusion and fraud.⁵¹ In addition, the court accorded deference to the fact that Maryland had adopted parental immunity.⁵²

A year after the *Dennis* decision, the United States District Court for the District of Columbia rendered a similar opinion in *Emmert v. United States*.⁵³ The court applied Tennessee law under choice of law principles. *Emmert* also concerned a defendant automobile driver's claim for contribution against the parent of a minor plaintiff.⁵⁴ The adoption of the parental immunity doctrine by Tennessee ultimately precluded contribution, but the court expressed doubt over the soundness of the *Dennis* decision.⁵⁵ It questioned the continued vitality of the parental immunity doctrine in the District of Columbia and announced that its viability was "tenuous at best" in light of the recent trend towards abrogation of the doctrine.⁵⁶

C. Exceptions to Parental Immunity

Largely in response to the rigidity of the parental immunity doctrine, judicially created exceptions to parent-child immunity proliferated over the years.⁵⁷ Generally, courts fashioned exceptions to the doctrine "whenever the family relationship no longer existed or had been 'temporarily aban-

51. *Id.* This is the rationale as first propounded by the court in *Hewellette v. George*, 68 Miss. 703, 9 So. 885 (1891). See *supra* notes 21-24 and accompanying text.

52. *Dennis*, 284 F. Supp. at 416. The court noted that the District of Columbia derives its common law from Maryland, and therefore Maryland law deserves special scrutiny and consideration. *Id.* The District of Columbia does not accord undue deference to Maryland law, however, as evidenced by the fact that Maryland remains one of the few states which has retained the parental immunity doctrine in almost its entirety. See *Frye v. Frye*, 305 Md. 542, 567, 505 A.2d 826, 839 (1986) (refusal to create an exception for automobile negligence cases); *Shell Oil Co. v. Ryckman*, 43 Md. App. 1, 4, 403 A.2d 379, 381 (1979) (refusal to create an exception for injuries inflicted during business activity). But see *Mahnke v. Moore*, 197 Md. 61, 68, 77 A.2d 923, 926 (1951) (exception created for wanton and malicious conduct of parent).

53. 300 F. Supp. 45 (D.D.C. 1969).

54. 300 F. Supp. at 47. In *Emmert*, the Emmert family car collided with a vehicle driven by a United States employee. *Id.* Mrs. Emmert brought suit against the United States under the Federal Tort Claims Act, 28 U.S.C. § 1346 (1982), individually and on behalf of her two daughters, for injuries they sustained in the accident. *Emmert*, 300 F. Supp. at 47. The United States joined Mr. Emmert as a third-party defendant and presented a claim for contribution against him. *Id.*

55. *Emmert*, 300 F. Supp. at 48, 51.

56. *Id.* at 48. The court construed choice of law principles as mandating Tennessee law as the applicable law. Under § 390g of the RESTATEMENT (SECOND) CONFLICT OF LAWS (Tentative Draft No. 9, 1964), the law of a family's domicile determines potential immunity among family members. The Emmerts resided in Tennessee, therefore, Tennessee law governed the case.

57. Hollister, *supra* note 1, at 509.

done.'⁵⁸ Thus, a number of courts held the estate of a parent liable in situations where the tortfeasor parent died⁵⁹ or where a parent caused the wrongful death of either the other parent⁶⁰ or the child.⁶¹ Many courts held parents liable for intentional and malicious conduct because of the inappropriateness of such behavior in a familial setting.⁶² Some courts held parents liable for grossly negligent conduct as well.⁶³

Another recognized exception to parental immunity involved children who were emancipated at the time the tort occurred.⁶⁴ Emancipation legally terminates the parent-child relationship, therefore the relationship can no longer serve as a basis for immunity.⁶⁵ Courts also formulated exceptions to

58. *Id.*; see also *Brennecke v. Kilpatrick*, 336 S.W.2d 68, 70 (Mo. 1960) (parental immunity applies only where a lawsuit would seriously disturb family unity).

59. See, e.g., *Brennecke*, 336 S.W.2d at 69 (mother killed in automobile accident in which child injured); *Palcsey v. Tepper*, 71 N.J. Super. 294, 295, 176 A.2d 818, 818 (1962) (father killed in automobile accident in which his two children were injured); *Sisler v. Seeberger*, 23 Wash. App. 612, 613, 596 P.2d 1362, 1363 (1979) (mother killed in automobile accident in which killed one child and injured two other children).

60. Where a parent is responsible for the wrongful death of his or her child or the other parent, the family relationship usually will be considered destroyed by the parent's wrongdoing. See, e.g., *Small v. Rockfeld*, 66 N.J. 231, 246, 330 A.2d 335, 344 (1974) (son permitted to recover from father who was responsible for mother's death); *Fowler v. Fowler*, 242 S.C. 252, 255, 130 S.E.2d 568, 569-70 (1963) (where mother killed as a result of father's reckless driving, children allowed recovery as mother's beneficiaries). But see *Perkins v. Robertson*, 140 Cal. App. 2d 536, 544, 295 P.2d 972, 978, (Cal. Dist. Ct. App. 1956) (children denied recovery from stepfather whose negligence caused mother's death); *Durham v. Durham*, 227 Miss. 76, 85, 85 So. 2d 807, 809 (1956) (daughter unable to maintain wrongful death suit against father for her mother's death).

61. See *Harlan Nat'l Bank v. Gross*, 346 S.W.2d 482, 484 (Ky. 1961) (child's estate entitled to sue father for child's wrongful death); *Shumway v. Nelson*, 259 Minn. 319, 324, 107 N.W.2d 531, 534 (1961) (daughter may recover from father's estate for the wrongful death of her mother). But see *Orefice v. Albert*, 237 So. 2d 142, 145 (Fla. 1970) (mother barred from suing father's estate for the wrongful death of their child); *Hale v. Hale*, 426 P.2d 681, 684 (Okla. 1967) (mother unable to maintain a wrongful death action against father for wrongful death of child), *overruled on other grounds sub nom.* *Unah v. Martin*, 676 P.2d 1366, 1370 (Okla. 1984) (parental immunity abrogated to extent of parent's liability insurance in automobile negligence cases).

62. See *Emery v. Emery*, 45 Cal. 2d 421, 427, 289 P.2d 218, 224 (1955) (willful misconduct); *Wright v. Wright*, 85 Ga. App. 721, 727, 70 S.E.2d 152, 155 (1952) (willful and malicious wrong); *Mahnke v. Moore*, 197 Md. 61, 68, 77 A.2d 923, 926 (1951) (father's murder of mother in child's presence constitutes malicious and willful conduct); *Hoffman v. Tracy*, 67 Wash. 2d 31, 37, 406 P.2d 323, 327 (1965) (driving while intoxicated is willful misconduct).

63. See *Leggett v. Leggett*, 216 N.Y.S.2d 781, 782 (N.Y. Sup. Ct. 1961) (driving while intoxicated considered gross negligence).

64. See *Martinez v. Southern Pac. Co.*, 45 Cal. 2d 244, 288 P.2d 868, 873 (1955) (emancipation amounts to a question of fact involving control of earnings and contribution to family expenses); *Shea v. Pettee*, 19 Conn. Supp. 125, 127, 110 A.2d 492, 493 (1954) (child must allege emancipation in the complaint); *Parker v. Parker*, 230 S.C. 28, 31, 94 S.E.2d 12, 13 (1956) (emancipation during a child's minority dependent upon parental agreement).

65. Comment, *supra* note 28, at 208.

the doctrine where the child's injury occurred in the course of the parent's business or vocational activity⁶⁶ or involved a person standing *in loco parentis* to the child.⁶⁷ The temporary abandonment of the parent-child relationship again served as a justification for these exceptions to parental immunity.

Finally, a few courts suspended parental immunity in cases where a child sued a parent for negligently causing an automobile accident, and the parent carried liability insurance.⁶⁸ This exception resulted from the fact that the insurance payments relieved parents of financial responsibility for their child's injuries and thus eliminated any threat to family harmony.⁶⁹ In addition, courts ascribed significance to the fact that the act of driving an automobile involves a general responsibility to the public rather than an exercise

66. See *Foy v. Foy Elec. Co.*, 231 N.C. 161, 161, 56 S.E.2d 418, 418 (1949) (child injured by truck owned and operated by parents' business); *Signs v. Signs*, 156 Ohio St. 566, 566, 103 N.E.2d 743, 743 (1952) (child burned by gasoline fire at father's business). See generally Sanford, *Personal Torts Within The Family*, 9 VAND. L. REV. 823 (1956).

67. See *Xaphes v. Mossey*, 224 F. Supp. 578, 579-80 (D. Vt. 1963) (stepfather could be held liable for child injured while a passenger in automobile stepfather was driving); *Cwik v. Zylstra*, 58 N.J. Super. 29, 32, 155 A.2d 277, 280 (1959) (grandmother liable for child injured under her supervision). But see *Bricault v. Deveau*, 21 Conn. Supp. 486, 487, 157 A.2d 604, 605 (1960) (step-parent standing *in loco parentis* immune from liability to child). In some instances where the negligent parent does not have custody of the injured child, courts have held that parent-child immunity will not protect the parent. See *Bondurant v. Bondurant*, 386 So. 2d 705, 706 (La. Ct. App. 1980) (parents separated and negligent parent did not have custody); *Fugate v. Fugate*, 582 S.W.2d 663, 669 (Mo. 1979) (child could maintain a wrongful death suit against father for mother's death where parents divorced and mother retained custody).

68. See *Williams v. Williams*, 369 A.2d 669, 673 (Del. 1976) (parents liable to extent of automobile liability insurance policy); *Ard v. Ard*, 414 So. 2d 1066, 1067 (Fla. 1982) (parental immunity considered waived to extent of parent's automobile liability insurance coverage); *Sorenson v. Sorenson*, 369 Mass. 350, 365, 339 N.E.2d 907, 916 (1975) (child may recover to limit of parent's insurance coverage in an automobile accident; court specifically limits abolition of parental immunity to facts of case); cf. *Transamerica Ins. Co. v. Royle*, 202 Mont. 173, 180, 656 P.2d 820, 824 (1983) (parental immunity abrogated in all automobile negligence cases regardless of insurance coverage). Many courts have expressly refused to consider liability insurance as grounds for the creation of an exception to parent-child immunity or even as a motivating factor. See *Cosmopolitan Nat'l Bank v. Heap*, 128 Ill. App. 2d 165, 262 N.E.2d 826, 829 (1970) (insurance coverage not a factor in determining parental immunity); *Baker v. Baker*, 364 Mo. 453, 458, 263 S.W.2d 29, 32 (1953) (parental immunity is unaffected by insurance coverage), modified on other grounds *sub nom.* *Wurth v. Wurth*, 322 S.W.2d 745 (Mo. 1959). As illustrated above, the presence of liability insurance has served as a foundation for arguments both for and against parental immunity. Proponents of the doctrine contend that the availability of insurance encourages collusive and fraudulent suits among family members, while opponents of the doctrine maintain that the award of insurance benefits protects the family exchequer and promotes family harmony. Comment, *supra* note 28, at 217.

69. Although family unity may be strained where a parent is forced to make compensatory payments to his or her child, see *supra* note 68 and cases cited therein, payments by an insurance carrier alleviate any burden on the family budget or exchequer. See *infra* note 137 and accompanying text.

of parental discretion.⁷⁰

Similarly, the District of Columbia fashioned its own exceptions to the parental immunity doctrine. In *Dennis v. Walker*,⁷¹ the United States District Court for the District of Columbia expressly recognized exceptions to parental immunity where the injuries resulted from willful or wanton parental conduct, the injuries occurred in the course of the parent's business activities, or the injuries were followed by the death of either the parent or the child.⁷²

In *Perchell v. District of Columbia*,⁷³ the United States Court of Appeals for the District of Columbia Circuit created a fourth exception to parental immunity. The *Perchell* case involved an automobile collision between plaintiff Perchell and a District of Columbia police officer in which Perchell and his two children sustained injuries.⁷⁴ The trial court determined that Perchell was contributorily negligent, and the appellate court permitted the District of Columbia to seek contribution from him.⁷⁵ In doing so, the District of Columbia Circuit accepted the position which the *Dennis v. Walker* court advocated but felt constrained to reject: that contribution should be available to prevent the inequity resulting from the placement of full responsibility for a joint tort upon only one party.⁷⁶ Although the court acknowledged that permitting a defendant to claim contribution from a parent for a child's injuries might interfere with domestic harmony, it concluded that the preservation of domestic harmony did not justify the imposition of a new inequity upon a third party.⁷⁷

II. A NATIONAL TREND BEGINS TOWARD ABROGATION OF PARENTAL IMMUNITY

In 1963, the Wisconsin Supreme Court first acted to substantially abrogate the parental immunity doctrine.⁷⁸ In *Goller v. White*,⁷⁹ the highest court of Wisconsin generally abolished parental immunity but held that the

70. See *Schneider v. Coe*, 405 A.2d 682, 684 (Del. 1979); *Wright v. Wright*, 213 Va. 177, 178-79, 191 S.E.2d 223, 225 (1971).

71. 284 F. Supp. 413 (D.D.C. 1968).

72. *Id.* at 416.

73. 444 F.2d 997 (D.C. Cir. 1971).

74. *Id.* at 998 n.1. Perchell subsequently brought an action against the District of Columbia as the owner of the automobile and employer of the police officer. *Id.*

75. *Id.* at 999. The court in *Perchell*, disapproved of the holding reluctantly announced by the federal district court in *Dennis v. Walker*, 284 F. Supp. 413, 419 (D.D.C. 1968), which denied recovery of contribution from a contributorily negligent mother.

76. 284 F. Supp. 413, 418 (D.D.C. 1968).

77. *Perchell*, 444 F.2d at 998.

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

79. *Id.*, 122 N.W.2d at 193. The Wisconsin Supreme Court remanded *Goller* to determine

doctrine would continue to constitute a defense from liability where the negligent act involved an exercise of parental authority or parental discretion over support or other care of the child.⁸⁰ In reaching this decision, the court noted the abundance of exceptions to parental immunity in various jurisdictions.⁸¹ The court stated that the prevalence of liability insurance significantly influenced its decision to abrogate the doctrine because insurance coverage reduces the possibility of domestic disharmony.⁸²

Several courts soon followed the example set by *Goller* and abrogated the parental immunity doctrine in whole or in part.⁸³ Some jurisdictions circumscribed more narrowly the areas of parental conduct for which a parent could be held liable. A few courts, for example, limited liability to automobile negligence cases,⁸⁴ while others abolished parental immunity only in cases where the parent carried liability insurance.⁸⁵ Moreover, many of these jurisdictions limited their invalidation of parental immunity to the specific facts presented in the case before them.⁸⁶ Although they declined to pronounce a general abolition of the doctrine, these courts by and large indi-

whether the foster parent defendant negligently operated a tractor in a manner causing injury to his foster child. *Id.* at 413, 122 N.W.2d at 198.

80. *Id.*, 122 N.W.2d at 198. The subsequent Wisconsin case of *Thoreson v. Milwaukee & Suburban Transp. Co.*, 56 Wis. 2d 231, 201 N.W.2d 745 (1972), determined that "other care" did not encompass daily living activities. *Id.* at 258, 201 N.W.2d at 753.

81. *Goller*, 20 Wis. 2d at 410-12, 122 N.W.2d at 197.

82. *Id.* at 412, 122 N.W.2d at 197.

83. See *Streenz v. Streenz*, 106 Ariz. 86, 89, 471 P.2d 282, 285 (1970) (approval of *Goller* formulation of parental immunity abrogation); *Rigdon v. Rigdon*, 465 S.W.2d 921, 923 (Ky. 1970) (total abrogation of immunity except where exercise of parental authority or discretion); *Black v. Solmitz*, 409 A.2d 634, 639 (Me. 1979) (refusal to limit abrogation to automobile accident cases or liability insurance cases); *Briere v. Briere*, 107 N.H. 432, 436, 224 A.2d 588, 591 (1966) (total abrogation). Three jurisdictions statutorily abrogated the parental immunity doctrine with regard to children injured by parents in motor vehicle accidents: Connecticut, North Carolina, and South Carolina. See CONN. GEN. STAT. ANN. § 52-572c (Supp. 1987); N.C. GEN. STAT. § 1-539.21 (Cum. Supp. 1985); S.C. CODE ANN. § 15-5-210 (Law. Co-op. 1976). The South Carolina statute, however, was held unconstitutional in *Elam v. Elam*, 275 S.C. 132, 268 S.E.2d 109 (1980), because it denied equal protection of the law to all parents. *Id.* at 133-34, 268 S.E.2d at 110.

84. *Smith v. Kauffman*, 212 Va. 181, 186, 183 S.E.2d 190, 194 (1971) (abrogates parental immunity in automobile negligence cases); *Begley v. Kohl & Madden Printing Ink Co.*, 157 Conn. 445, 450 n.1, 254 A.2d 907, 910 n.1 (1969) (acknowledging statutory modification of parental immunity regarding automobile negligence); *Merrick v. Sutterlin*, 93 Wash. 2d 411, 416, 610 P.2d 891, 893 (1980) (abolishes parental immunity in automobile negligence cases leaving other areas of abolition to decision on a case-by-case basis).

85. See *supra* note 68 and cases cited therein.

86. See *Sorenson v. Sorenson*, 369 Mass. 350, 365, 339 N.E.2d 907, 916 (1975) (limits abolition to facts of case: child may recover to the limit of parent's insurance coverage in an automobile negligence case); *Merrick v. Sutterlin*, 93 Wash. 2d 411, 416, 610 P.2d 891, 893 (abolishes parental immunity in automobile negligence cases leaving other areas of abolition to decision on a case-by-case basis); see also *Beal*, "Can I Sue Mommy?" *An Analysis of a Wo-*

cated that they would proceed on a case-by-case basis and resolve new parental immunity issues as they arose.⁸⁷

The American Law Institute also advocated a case-by-case approach in section 895G of the *Restatement (Second) of Torts*.⁸⁸ The *Restatement* announced that the parent-child relationship itself will not form a basis for immunity, but it recognized that certain acts and omissions may remain privileged due to the relationship.⁸⁹ Under comment k of section 895G, parental discipline is privileged, thus permitting a degree of physical contact among family members which would be tortious among strangers.⁹⁰ The comment further observed that whether or not conduct arises directly from the family relationship will affect a determination of negligence.⁹¹ It also suggested that a "reasonable prudent parent" standard is the proper test of liability because it takes into consideration parental discretion over the care and education of the child.⁹²

At least three jurisdictions, New York, Illinois, and Arizona, premised their abrogation of parental immunity upon the principle that a parent should be held liable for a breach of duty owed to the public at large.⁹³ In the Illinois case of *Cummings v. Jackson*,⁹⁴ the court held a mother liable for

man's Tort Liability for Prenatal Injuries to her Child Born Alive, 21 SAN DIEGO L. REV. 325, 342 n.106 (1984).

87. See *supra* note 86.

88. Parent and Child

(1) A parent or child is not immune from tort liability to the other solely by reason of that relationship. (2) Repudiation of general tort immunity does not establish liability for an act or omission that, because of the parent-child relationship, is otherwise privileged or is not tortious.

RESTATEMENT (SECOND) OF TORTS § 895G (1979). Oregon remains the only other jurisdiction to adopt the *Restatement* position besides the District of Columbia. *Winn v. Gilroy*, 296 Or. 718, 731, 681 P.2d 776, 784 (1984).

89. RESTATEMENT (SECOND) OF TORTS § 895G (1979).

90. *Id.* § 895G comment k (1979). Comment k isolates parental discipline as the single category of intentional tort which may constitute privileged behavior because of the parent-child relationship. *Id.*

91. *Id.* Comment k states: "If the conduct giving rise to an injury does not grow directly out of the family relationship, the existence of negligence may be determined as if the parties were not related." The comment specifically mentions parental authority and supervision as conduct it considers "essential" to the parent-child relationship. *Id.*

92. *Id.* In the *Restatement's* view, conduct must be "palpably unreasonable" in order to impose liability upon a parent. *Id.* The *Restatement* also suggests that family members may be able to draw an analogy to assumption of the risk in defense of their negligent torts. *Id.*

93. *Sandoval v. Sandoval*, 128 Ariz. 11, 13, 623 P.2d 800, 802 (1981); *Cummings v. Jackson*, 57 Ill. App. 3d 68, 70, 372 N.E.2d 1127, 1128 (1978); *Holodook v. Spencer*, 36 N.Y.2d 35, 50-51, 324 N.E.2d 338, 346, 364 N.Y.S.2d 859, 871-72 (1974). The jurisdictions which distinguish between familial and public duties must also determine exactly what duties a parent owes its child.

94. 57 Ill. App. 3d 68, 372 N.E.2d 1127 (1978).

her daughter's injuries because they resulted from the mother's breach of a general duty to the public.⁹⁵ The mother failed to keep the trees on her property properly trimmed, and consequently, they obstructed the view of a motorist who struck the child.⁹⁶ The court reasoned that the mother's violation of a city ordinance, which required property owners to trim their trees, constituted a breach of duty to the general public.⁹⁷

Conversely, these jurisdictions have extended immunity to parents who negligently perform or fail to perform, a duty peculiar to the family relationship.⁹⁸ In *Sandoval v. Sandoval*,⁹⁹ an Arizona court held that parental immunity protected parents of a child struck by an automobile because they had left open a gate leading to the road.¹⁰⁰ The court deemed the parents' failure to safeguard their child's play area to be a breach of the parental duty to take "care and control" of their child and, therefore, held them immune from liability.¹⁰¹

New York has taken a further step in its duty analysis and has concluded that a parent has no legal or public duty to supervise its child.¹⁰² The New York Court of Appeals reasoned that parents have only a moral obligation to supervise their children.¹⁰³ The translation of this moral duty into a legal one, the court stated, would circumscribe basic parental discretion and judgment.¹⁰⁴ In New York, therefore, a parent has no public duty to supervise his or her child and will not be held liable for negligent supervision.

California generally abolished parental immunity and now evaluates parental conduct in terms of traditional tort principles.¹⁰⁵ The Supreme Court

95. *Id.* at 70, 372 N.E.2d at 1128.

96. *Id.*, 372 N.E.2d at 1128.

97. *Id.*, 372 N.E.2d at 1128. The court could just as easily have concluded that the mother breached a parental duty to supervise or control her child, thus protecting the mother from liability.

98. See cases cited *supra* note 93.

99. 128 Ariz. 11, 623 P.2d 800 (1981).

100. *Id.* at 14, 623 P.2d at 802.

101. *Id.*, 623 P.2d at 802.

102. *Holodook v. Spencer*, 36 N.Y.2d 35, 51, 324 N.E.2d 338, 346, 364 N.Y.S.2d 859, 871-72 (1974). New York initially abrogated parental immunity in *Gelbman v. Gelbman*, 23 N.Y.2d 434, 439, 245 N.E.2d 192, 194, 297 N.Y.S.2d 529, 532 (1969).

103. *Holodook*, 36 N.Y.2d at 50-51, 324 N.E.2d at 346, 364 N.Y.S.2d at 871.

104. *Id.*, 324 N.E.2d at 346, 364 N.Y.S.2d at 871. For an extensive analysis and critical discussion of the *Holodook* case, see Hollister, *supra* note 1, at 516-24. Hollister concludes that the *Holodook* approach sacrifices both the child and third parties for the sake of the family without adequate justification. *Id.* at 524. The court of appeals had also barred third parties from seeking contribution from joint tortfeasor parents where the parents themselves could not be held directly liable to the child. *Holodook*, 36 N.Y.2d at 51, 324 N.E.2d at 344, 364 N.Y.S.2d at 872.

105. See *Gibson v. Gibson*, 3 Cal. 3d 914, 921, 479 P.2d 648, 653, 92 Cal. Rptr. 288, 293 (1971).

of California abolished the parental immunity doctrine in the case of *Gibson v. Gibson*.¹⁰⁶ The court pronounced that a parent's liability will depend upon the court's evaluation of whether the parent acted as any reasonable and prudent parent would have acted in similar circumstances.¹⁰⁷ Thus, the standard that California utilized consisted of the traditional measure of reasonableness tempered by an acknowledgement of the inherent responsibilities and privileges accompanying parenthood.¹⁰⁸ The court afforded parents discretion to care for and control their children, thereby enabling them to take actions considered tortious outside of the context of the parent-child relationship.¹⁰⁹

The California Supreme Court expressly rejected the approach formulated by Wisconsin in the *Goller* case, which grants general immunity to parental conduct involving authority or discretion.¹¹⁰ The court maintained that classifying certain conduct as either discretionary or negligent would inevitably create arbitrary distinctions.¹¹¹ Furthermore, the court found "intolerable" the proposition that a parent theoretically had "carte blanche to act negligently toward his child" as long as his behavior could be categorized as discretionary.¹¹²

III. *ROUSEY v. ROUSEY*: THE ABROGATION OF PARENTAL IMMUNITY IN THE DISTRICT OF COLUMBIA

The District of Columbia Court of Appeals did not examine the merits of the parental immunity doctrine until 1985.¹¹³ In *Rousey v. Rousey*,¹¹⁴ the father of a minor alleged that the child's mother had negligently caused an automobile accident in which the child was injured and therefore brought

106. *Id.* at 915-16, 479 P.2d at 648, 92 Cal. Rptr. at 288.

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

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

109. *Id.*, 479 P.2d at 653, 92 Cal. Rptr. at 293. For example, the court noted that parents could not be held liable for battery if they "spanked" a disobedient child or for false imprisonment if they sent a child to its room. *Id.*, 479 P.2d at 652, 92 Cal. Rptr. at 292.

110. *Id.* at 921-22, 479 P.2d at 652-53, 92 Cal. Rptr. at 293. For a discussion of the *Goller* case, see *supra* notes 78-82 and accompanying text.

111. 3 Cal. 3d at 922, 479 P.2d at 653, 92 Cal. Rptr. at 293. The Supreme Court of Minnesota had employed the *Goller* formula for 12 years when it discarded it in favor of the *Gibson* approach in *Anderson v. Stream*, 295 N.W.2d 595, 601 (Minn. 1980). The court found the *Goller* exceptions too vague and subjective to apply equitably, while the "reasonable parent" standard afforded flexibility and greater uniformity. *Id.* at 598-99; see also *Nolecheck v. Gesuale*, 46 N.Y.2d 332, 346, 385 N.E.2d 1268, 1277, 413 N.Y.S.2d 340, 349 (1978) (Fuchsberg, J., concurring) (approving reasonable parent standard).

112. *Gibson*, 3 Cal. 3d at 922, 479 P.2d at 653, 92 Cal. Rptr. at 293.

113. *Rousey v. Rousey*, 499 A.2d 1199 (D.C. 1985), *rev'd en banc*, 528 A.2d 416 (D.C. 1987).

114. *Id.* at 1199.

suit on the child's behalf.¹¹⁵ The trial court granted the mother summary judgment, holding her immune from tort liability.¹¹⁶ The court of appeals reversed and remanded the case, declaring the parental immunity doctrine obsolete and "declin[ing] to adopt it."¹¹⁷

The court of appeals appeared to base its decision entirely upon the prevalence of liability insurance in modern society.¹¹⁸ The court found that the presence of insurance minimized any disruption of domestic tranquility by relieving parents of direct financial responsibility for injuries suffered by their children.¹¹⁹ The insurance carrier, the court asserted, replaces the parent as the real party in interest.¹²⁰ The court conceded that the availability of insurance benefits offered families a ready opportunity for collusion, but declared that the possibility of collusion existed in every insurance case and did not justify a "blanket denial of recovery for all minors."¹²¹ Furthermore, the court relied upon a Massachusetts opinion which concluded that trial courts possess the ability to distinguish between fact and fiction and to guard against collusive actions.¹²² Thus, the court of appeals limited its abolition of parental immunity to cases where the parent carries liability insurance and announced that it would resolve other issues regarding parental immunity as they arose.¹²³

Dissatisfied with the court of appeals' initial decision, the defendant mother petitioned the court for a rehearing *en banc*.¹²⁴ The petition was granted and the original opinion vacated.¹²⁵ The court of appeals, sitting en

115. *Id.* at 1200.

116. *Id.*

117. *Id.* The court announced that no prior controlling law existed on the issue because the court was not bound by the United States district court's decision in *Dennis v. Walker*, 284 F. Supp. 413 (D.D.C. 1968). *Rousey*, 499 A.2d at 1202 n.6.

118. *Rousey*, 499 A.2d at 1202. The court largely attributed the trend towards abolition in other jurisdictions to this same motivating factor. *Id.*

119. *Id.*

120. *Id.* At least one judge has proposed that courts recognize insurance companies as the real parties in interest in practice as well as in theory. *Petersen v. City of Honolulu*, 51 Haw. 484, 490, 462 P.2d 1007, 1010 (1969) (Abe, J., dissenting). His suggestion provides for the retention of the parental immunity doctrine but permits minors to sue insurance companies directly when their parents carry liability insurance. *Id.* at 491, 462 P.2d at 1010-11 (Abe, J., dissenting).

121. *Rousey*, 499 A.2d at 1202 (quoting *Sorenson v. Sorenson*, 369 Mass. 350, 364, 339 N.E.2d 907, 915 (1975)). The court of appeals largely relied upon the reasoning presented in *Sorenson* to support its holding. *Id.* *Sorenson* maintained that any damage to domestic harmony was inflicted when the tortious injury occurs—not when a child attempted to recover damages for it. *Sorenson*, 369 Mass. at 360, 339 N.E.2d at 913-14.

122. *Rousey*, 499 A.2d at 1202.

123. *Id.* at 1202-03 & n.7.

124. *Rousey v. Rousey*, 507 A.2d 1046 (D.C. 1986).

125. *Id.*

banc, broadened its original holding and abolished parental immunity in all cases.¹²⁶ In doing so, the court adopted the position of section 895G of the *Restatement (Second) of Torts*, which abrogates parent-child immunity but recognizes that certain conduct will remain privileged because of the nature of the parent-child relationship.¹²⁷

Writing for the majority, Judge Terry presented an historical account of the parental immunity doctrine and identified the traditional justifications offered to support the doctrine: the preservation of family unity, the need for parental discretion over discipline and control, and the analogy drawn to interspousal immunity.¹²⁸ He criticized the interspousal immunity analogy and emphasized that the common law neither treated children as “mere extensions” of their parents nor considered children and their parents to constitute a single legal entity, as it did with husband and wife.¹²⁹

Although Judge Terry thoroughly discredited the interspousal immunity analogy, he only briefly mentioned the two more significant rationales to the parental immunity doctrine: family harmony and parental discipline and control. He merely observed that these rationales are absurd in cases involving intentional torts and in cases where the parent-child relationship has been terminated by death.¹³⁰ Judge Terry did note that the District of Columbia legislature rejected the family unity rationale with regard to interspousal immunity when it statutorily abolished interspousal immunity in 1976.¹³¹

The majority opinion addressed District of Columbia prior law by discuss-

126. *Rousey v. Rousey*, 528 A.2d 416, 420-21 (D.C. 1987) (en banc). The court declined to adopt the parental immunity doctrine. *Id.* at 416. Although the District of Columbia Court of Appeals had never explicitly adopted parental immunity, the local federal courts followed the doctrine in practice. *See infra* note 134; *see also infra* notes 149-53 and accompanying text.

127. *Rousey*, 528 A.2d at 416; *see supra* note 88.

128. *Rousey*, 528 A.2d at 417-18.

129. *Id.* Judge Terry also questioned the rationale behind permitting children to sue their parents in property and contract actions while barring them from instituting tort actions against their parents. *Id.* at 418.

130. *Id.* Judge Terry stated: “When a wrong has been committed between parent and child, ‘the harm to the family relationship has already occurred; and to prohibit reparations can hardly aid in restoring harmony.’” *Id.* at 421 (quoting *Petersen v. City of Honolulu*, 51 Haw. 484, 488, 462 P.2d 1007, 1009 (1969)). This reasoning, based upon the destruction of, or significant harm to, the family relationship, fails to provide an adequate explanation for the abolition of parental immunity in cases of simple negligence where family harmony remains intact. *See id.* at 422 (Nebeker, J., dissenting). Thus, the majority opinion places greater emphasis on the fact that a national trend towards the abrogation of parental immunity exists, rather than upon the weaknesses of its doctrinal foundations.

131. *Id.* at 417 n.1.

ing the *Villaret*¹³² and *Dennis*¹³³ cases although it found that there was no controlling precedent on the issue of parental immunity in the District of Columbia.¹³⁴ Although Judge Terry extensively quoted language from the *Dennis* opinion expressing concern about the possibility of collusion where the parent carried liability insurance, he failed to acknowledge that the *Dennis* case ultimately adopted and applied the parental immunity doctrine.¹³⁵

As in the initial *Rousey* hearing, the court of appeals' rationale in the *en banc* hearing relied heavily upon the prevalence of liability insurance.¹³⁶ Judge Terry noted that the availability of insurance benefits lessens the likelihood of domestic tension.¹³⁷ Quoting from other opinions, he maintained that the possibility of collusion alone did not justify the universal denial of recovery.¹³⁸ Although Judge Terry considered widespread insurance coverage to be a strong impetus for abolition, he refused to limit his holding to cases where the parent carried liability insurance, nor would he limit recov-

132. *Villaret v. Villaret*, 169 F.2d 677 (D.C. Cir. 1948); see also *supra* notes 36-41 and accompanying text (discussing facts and law).

133. *Dennis v. Walker*, 284 F. Supp. 413 (D.D.C. 1968); see also *supra* notes 42-52 and accompanying text (discussing facts and law).

134. *Rousey*, 528 A.2d at 418-19. The District of Columbia Court Reorganization Act of 1970, D.C. CODE ANN. § 11-102 (1981), installed the District of Columbia Court of Appeals as the highest court in the District of Columbia. After the effective date of February 1, 1971, the District of Columbia Court of Appeals need no longer treat decisions of the United States Court of Appeals for the District of Columbia Circuit as precedent. See *M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971). As a "matter of internal policy," however, decisions announced by the District of Columbia Circuit before the effective date must be followed by any division of the District of Columbia Court of Appeals. *Id.* Only when the District of Columbia Court of Appeals sits *en banc* can the court refuse to follow the District of Columbia Circuit's decisions. *Id.* The decision in *Dennis v. Walker*, 284 F. Supp. 413 (D.D.C. 1968), adopting parental immunity, dates prior to 1971, but because it was decided by the United States district court rather than the circuit court, it is not controlling upon the court of appeals. *Perchell v. District of Columbia*, 444 F.2d 997 (D.C. Cir. 1971), implicitly recognizing the viability of the parental immunity doctrine, was a District of Columbia Circuit decision but was decided in May 1971. *Id.* at 997. Thus, the *Rousey* decision was technically correct in stating that no controlling precedent existed on the issue of parental immunity in the District of Columbia. *Rousey*, 528 A.2d at 418-19.

135. *Rousey*, 528 A.2d at 419.

136. *Id.* at 420.

137. *Id.* Judge Terry stated that the insurance payments decreased the likelihood that lawsuits against parents would disrupt family harmony because these payments relieved the parents of direct financial responsibility for their actions. *Id.* However, he failed to address the possibility that insurance companies would react to the abrogation of parental immunity by curtailing the availability of insurance for parental torts. See *infra* text accompanying note 143.

138. *Rousey*, 528 A.2d at 420. Judge Terry quoted approvingly language from the *Sorenson* opinion which declares that the risk of collusion accompanies all litigation and is adequately minimized by the fact-finding process. *Id.* (quoting *Sorenson v. Sorenson*, 369 Mass. 350, 365, 339 N.E.2d 907, 914-15 (1975)).

ery to the amount of the insurance policy.¹³⁹ In support of the majority position, Judge Terry simply declared that the formulation of different rules for the insured and the uninsured was unjustified.¹⁴⁰ Therefore, the court failed to reconcile the significant role liability insurance played in its decision to abolish parental immunity with its ultimate holding that the presence of insurance is immaterial to liability.

In the first of two dissenting opinions, Judge Nebeker emphasized that he believed the majority was misguided in relying upon the widespread existence of liability insurance as justification for its abrogation of parental immunity.¹⁴¹ He commented that basing a new form of tort liability upon the availability of insurance constituted "imprudent public policy."¹⁴² Judge Nebeker further predicted that insurance companies would inevitably respond by raising premiums or cancelling coverage for parental torts.¹⁴³

In his dissenting opinion, Judge Nebeker also pointed out that a case-by-case approach to abolition presented numerous problems due to the uncertainty of its consequences.¹⁴⁴ Given the absence of any parameters for liability, Judge Nebeker queried whether children could recover for parental failure to seek medical treatment, failure to provide a special education, or the failure to abort a fetus with foreseeable birth defects.¹⁴⁵

Finally, Judge Nebeker argued that the majority holding would disturb familial tranquility and "disparage the wisdom of the past which championed the family unit, as if a contrary modern view is obviously superior."¹⁴⁶ He contended that it would be difficult to subject parental discretion over child-rearing to a uniform standard.¹⁴⁷ Judge Nebeker concluded that the abolition of parental immunity would force parents to sue one another, often

139. *Id.* at 421.

140. *Id.*

141. *Id.* at 422-23 (Nebeker, J., dissenting).

142. *Id.* at 422 (Nebeker, J., dissenting). Judge Nebeker stated: "The theory of insurance is that it is supposed to give financial protection against the occurrence of a known risk. Once a type of insurance exists, it is not supposed to encourage the creation of new actions at law." *Id.* (Nebeker, J., dissenting).

143. *Id.* at 423 (Nebeker, J., dissenting). Once this occurred, Judge Nebeker submitted, the majority's primary rationale for the abolition of parental immunity would be effectively nullified. *Id.* (Nebeker, J., dissenting).

144. *Id.* (Nebeker, J., dissenting).

145. *Id.* (Nebeker, J., dissenting).

146. *Id.* at 421 (Nebeker, J., dissenting). Without stating his reasons why, Judge Nebeker disagreed with the majority's suggestion that the availability of insurance would alleviate domestic tension created by "offspring suits" by relieving parents of financial responsibility for their child's recovery. *Id.* at 422 (Nebeker, J., dissenting). The judge further contended that the presence of insurance would, instead, foster fraudulent actions. *Id.* (Nebeker, J., dissenting).

147. *Id.* at 423 (Nebeker, J., dissenting).

recovering damages on behalf of one child while depleting the resources available for other siblings.¹⁴⁸

Judge Belson wrote the second dissenting opinion¹⁴⁹ and primarily challenged the majority's characterization of District of Columbia prior law as inconclusive.¹⁵⁰ The judge observed¹⁵¹ that the United States District Court for the District of Columbia actively applied the doctrine of parental immunity in *Dennis v. Walker*,¹⁵² and the United States Court of Appeals for the District of Columbia Circuit, by modifying the doctrine's scope, implicitly recognized it in *Perchell v. District of Columbia*.¹⁵³ Judge Belson regarded the majority's departure from an established judicial doctrine as an imprudent excursion into the realm of public policy.¹⁵⁴ He maintained that the abrogation of parental immunity presented strong public policy considerations which the legislature was better equipped to handle.¹⁵⁵

IV. THE FUTURE OF PARENTAL IMMUNITY IN THE DISTRICT OF COLUMBIA: A PIECEMEAL APPROACH

The traditional doctrine of parental immunity has indeed become outdated and obsolete. As a matter of public policy, parents should not be permitted to act negligently towards their children without fear of liability. It is well established, however, that society must accord a parent a greater degree of discretion and control over his relationship with his child than would be warranted over his other personal and business relationships. Therefore, a balance must be struck between a child's right to recover for personal injuries negligently inflicted and a parent's right to rely upon his own judgment in raising a child.

Basically five different jurisdictional approaches exist to the abrogation of the parental immunity doctrine: 1) partial abolition in cases where the par-

148. *Id.* at 423-24 (Nebeker, J., dissenting). One parent must sue another on behalf of the child because a child younger than 18 is considered to be under a disability and, therefore, does not have the legal capacity to sue on his or her own behalf. D.C. CODE ANN. § 12-302(a)(1) (1981). In light of this statutory bar to the maintenance of a lawsuit by a child, Judge Nebeker questioned whether the court's ruling might now permit the liability of a parent for failing to sue his spouse on his child's behalf. *Rousey*, 528 A.2d at 423 (Nebeker, J., dissenting).

149. *Rousey*, 528 A.2d at 424 (Belson, J., dissenting). Chief Judge Pryor joined in Judge Belson's dissent. *Id.* (Belson, J., dissenting).

150. *Id.* (Belson, J., dissenting).

151. *Id.* (Belson, J., dissenting).

152. *Dennis v. Walker*, 284 F. Supp. 413, 416-17 (D.D.C. 1968).

153. *Perchell v. District of Columbia*, 444 F.2d 997, 999 (D.C. Cir. 1971).

154. *Rousey*, 528 A.2d at 424-25 (Belson, J., dissenting).

155. *Id.* (Belson, J., dissenting). Judge Belson specified "the potential for collusive lawsuits, divisiveness in family structures, and the need to compensate tort victims" as factors the District of Columbia council might properly contemplate. *Id.* (Belson, J., dissenting).

ent has liability insurance coverage;¹⁵⁶ 2) partial abolition in cases where the parent has breached a public duty, as followed by New York, Illinois, and Arizona;¹⁵⁷ 3) general abolition with the exception of cases involving an exercise of ordinary parental authority or discretion, or the *Goller* approach;¹⁵⁸ 4) general abolition with parental privileges determined on a case-by-case basis as set out by section 895G of the *Restatement (Second) of Torts*;¹⁵⁹ and 5) general abolition with liability tested by the reasonable parent standard, or the California approach.¹⁶⁰

The least tenable of these five approaches is the abolition of parental immunity only in cases where there is liability insurance. The creation of a new area of tort liability solely because the intended defendants carry liability insurance has received sound criticism as an imprudent method of fashioning public policy.¹⁶¹ The purpose of insurance coverage is to guard against known risks, it is not intended to encourage the creation of a new form of liability.¹⁶² Moreover, insurance companies may react by eliminating or restricting parental coverage, thereby nullifying the intended effect of this narrow abolition of parental immunity.¹⁶³

The *Goller* formula of retaining parental immunity where the parent's conduct involved an exercise of "ordinary" parental authority or discretion has received justified criticism by commentators and courts because it inevitably draws a vague and somewhat arbitrary line between cases.¹⁶⁴ Wisconsin, for example, interprets "parental authority" as limited to parental discipline, while in Michigan the term also includes the negligent supervision of a child.¹⁶⁵ Therefore, parents held liable for negligent supervision in Wisconsin would be immune from liability for the same conduct in Michigan although both states have ostensibly adopted identical approaches.

The public versus parental duty approach adopted by New York, Arizona, and Illinois draws criticism for the same reasons as the *Goller* ap-

156. A corollary to this approach is the abrogation of parental immunity in all automobile negligence cases, regardless of insurance coverage. *See supra* note 68.

157. *See supra* notes 93-104 and accompanying text.

158. The Wisconsin approach formulated in *Goller v. White*, 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

159. *See supra* notes 88-92 and accompanying text.

160. The California approach formulated in *Gibson v. Gibson*, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971) (en banc).

161. *See supra* notes 141-43 and accompanying text.

162. *Id.*

163. *Id.*

164. Hollister, *supra* note 1, at 513-14; *see also Gibson*, 3 Cal. 3d at 914, 479 P.2d at 648, 92 Cal. Rptr. at 288; *Pedigo v. Rowley*, 101 Idaho 201, 203-04, 610 P.2d 560, 563 (1980); *Anderson v. Stream*, 295 N.W.2d 595, 598 (Minn. 1980).

165. Hollister, *supra* note 1, at 514.

proach. The distinction between public and parental duties is often blurred and contradictory.¹⁶⁶ Therefore, the distinction between liability and immunity is likewise arbitrary and inconsistent.

The District of Columbia Court of Appeals has chosen the approach towards abolition of parental immunity articulated by section 895G of the *Restatement (Second) of Torts*.¹⁶⁷ The *Restatement's* position attempts to coordinate the complete abolition of parental immunity with the acknowledgement that certain parental conduct must remain "privileged" because of the nature of the parent-child relationship.¹⁶⁸ However, by failing to specify exactly what conduct it considers privileged, the *Restatement* leaves a continuing puzzle for future cases to resolve.

Rather than providing a workable solution, this approach creates further problems because it places the court of appeals in the same position that other jurisdictions are struggling to abandon. Most courts announced a general rule of parental immunity and gradually eroded the viability of that rule by the judicial creation of exceptions to it.¹⁶⁹ The District of Columbia, on the other hand, has created a general rule of parental *liability* and intends to immunize "privileged" conduct on a case-by-case basis, thereby initiating a similar process of erosion. Such an approach leaves open the possibility that the exceptions to parental liability will proliferate to such an extent that the utility of fashioning a general rule becomes dubious.

Alternatively, the California approach provides a single test for parental conduct.¹⁷⁰ The use of a reasonable parent standard affords a uniform method to determine the propriety of holding a parent responsible to his child for negligence.¹⁷¹ At the same time, it avoids the unpredictability and uncertainty of the case-by-case approach announced by section 895G of the *Restatement (Second) of Torts* and now followed by the District of Columbia.¹⁷²

Although the reasonable parent approach has earned almost universal academic approval, it has drawn judicial criticism.¹⁷³ For example, Idaho has

166. See *supra* notes 93-101 and accompanying text.

167. See *supra* note 127 and accompanying text.

168. See *supra* notes 88-92 and accompanying text.

169. See *supra* notes 57-77 and accompanying text.

170. See *supra* notes 105-12 and accompanying text.

171. *Id.*

172. See *supra* note 127 and accompanying text.

173. Beal, *supra* note 86, at 353-54. The Supreme Court of Oregon offered another criticism of the California approach in *Winn v. Gilroy*, 296 Or. 718, 730, 681 P.2d 776, 783 (1984). The court claimed that the reasonable parent standard precludes the development of judicial boundaries to govern parental conduct and, therefore, forces each case to trial. *Id.*, 681 P.2d at 783. This reasoning is unpersuasive, however, as case law itself will set precedent and will alert potential plaintiffs to the likelihood of success or failure before litigation ensues. The

expressly rejected the reasonable parent standard.¹⁷⁴ This state's supreme court challenged that it would be impossible and impractical to adopt a single standard for its citizens because of the "diversity in [their] religious, ethnic and cultural backgrounds."¹⁷⁵ The court maintained that an objective standard would infringe upon the freedom of parental choice to determine the proper upbringing for a child in light of a family's socio-economic, educational and geographic circumstances, and the opportunities they afforded.¹⁷⁶

This argument ignores, however, the fact that a reasonable person standard is applied to all defendants who come before the courts in tort actions. These defendants represent a multitude of social, economic, racial, and religious groups, yet all are held to one standard of reasonableness. Moreover, a defendant parent will only be held to a standard of reasonableness relative to the behavior of similarly situated parents. Furthermore, juries may easily be instructed to take into consideration the many variables such as background, education, and wealth, which will necessarily differ with each parent.

V. CONCLUSION

In *Rousey v. Rousey* the District of Columbia has wisely decided to abolish the doctrine of parental immunity. The court would have been better advised, however, to adopt a reasonable parent standard of liability applicable to all cases rather than labor to develop parental privileges on a case-by-case basis. The course the court has chosen requires the accommodation of com-

Gilroy court went on to adopt the position of § 895G of the *Restatement (Second) of Torts* on the abolition of parental immunity. 296 Or. at 734, 681 P.2d at 785. This is surprising in light of the court's criticism of the California approach because the *Restatement's* position requires that parental privileges be determined on a case-by-case basis. See RESTATEMENT (SECOND) OF TORTS § 895G (1979).

174. *Pedigo v. Rowley*, 101 Idaho 201, 205, 610 P.2d 560, 564 (1980). The court ultimately held that negligent supervision would not constitute a cause of action against parents, but stated that parental immunity was no longer an absolute bar to parental liability. *Id.*, 610 P.2d at 564.

175. *Id.*, 610 P.2d at 564.

176. *Id.*, 610 P.2d at 564. Another critic has proposed that the employment of a reasonable parent standard would "necessarily substitute parental judgments based upon the individual juror's views of proper or ideal child-rearing practices." *Anderson v. Stream*, 295 N.W.2d 595, 602 (Minn. 1980) (Rogosheske, J., dissenting); see also *Pedigo*, 101 Idaho at 205, 610 P.2d at 564 ("The people of Idaho are too diverse and independent to be judged by a common standard in such a delicate area as the parent-child relationship."). *Anderson* also suggests that collusion is possible where a parent is asked to testify regarding the reasonableness of the principles and practices by which he raises his child. 295 N.W.2d at 602. These two arguments, however, disregard the fact that the dangers they suggest specifically arise when a reasonable parent standard is applied, are dangers inherent in all litigation because of the nature of the trial process itself. See *Pedigo*, 101 Idaho at 203, 610 P.2d at 562 ("As in any other tort action, judges and juries can be relied upon to ferret out fraudulent and collusive claims.").

peting public policy considerations to determine which behavior constitutes privileged parental conduct. In addition, the court will undoubtedly be confronted with numerous "test" cases because the boundaries of parental "privilege" have been left uncharted.¹⁷⁷ The reasonable parent standard bypasses these complications by providing a single measure of liability with which both courts and juries have long been familiar. In *Rousey v. Rousey* the District of Columbia Court of Appeals has taken the leap and abolished parental immunity. The stability of the ground upon which it now stands remains to be seen.

Carla Maria Marcolin

177. See *supra* notes 144-45 and accompanying text.

