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# Parent-Child Tort Immunity Law in Ohio

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# PARENT-CHILD TORT IMMUNITY LAW IN OHIO

*Few rules in our time are so well established that they may not be called upon any day to justify their existence as means adapted to an end.*<sup>1</sup>

On a day in which it handed down forty-four<sup>2</sup> opinions in a fashion reminiscent of the appointments of the “midnight judges” by President Adams, the Ohio Supreme Court was called upon to justify its long-standing retention of the parent-child tort immunity doctrine. In *Kirchner v. Crystal*,<sup>3</sup> the court was unable to vindicate the doctrine as a means adapted to an end and, thus, joined the current trend<sup>4</sup> by abolishing parental immunity without reservation.<sup>5</sup> Although Ohio’s long overdue abrogation of the doctrine comports with contemporary notions of justice and fairness, the sudden manner in which the reversal of positions occurred is devoid of logic, since only five months earlier the court had reaffirmed its adherence to parent-child tort immunity.<sup>6</sup>

In light of the abrupt change in Ohio concerning the parental immunity doctrine, this comment will examine the historical justifications for the doctrine, with an extended discussion of the Ohio experience with the immunity prior to its change in *Kirchner*. This comment also analyzes the present Ohio position, contrasting it with the approaches of other states, and cautions against the increasing use of family exclusion clauses<sup>7</sup> in liability insurance policies which have the practical effect of retaining the immunity where the court has abrogated it.<sup>8</sup>

## HISTORICAL BACKGROUND

Parent-child tort immunity is an invention of American courts. Without citing any authority, either English or American, the court in *Hewlett v.*

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<sup>1</sup>Justice Benjamin Cardozo, *The Nature of The Judicial Process* 98 (1921) quoted in *Silva v. Silva*, 446 A.2d 1013, 1016 (R.I. 1982).

<sup>2</sup>The forty-four opinions begin in the Ohio Official Reports series with *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St. 3d 75, 472 N.E.2d 707 (1984) and end with *Heckert v. Patrick*, 15 Ohio St. 3d 402, 473 N.E.2d 1204 (1984). The court delivered the forty-four opinions on December 31, 1984, which was the last day of the January 1984 term and also the last day on the bench for retiring Justice William Brown and defeated incumbent Justice J.P. Celebrezze.

<sup>3</sup>15 Ohio St. 3d 326, 474 N.E.2d 275 (1984). The holding in *Kirchner* has been given retroactive application by at least one district court of appeals. See *Price v. Price*, No. 3708 (Lorain County Ct. App. March 14, 1985).

<sup>4</sup>See Appendix at end of this Comment which lists ten states that have totally abrogated the parental immunity doctrine, twenty-five states that have partially abrogated the doctrine, and only fourteen states that still retain the doctrine. One state has yet to consider the issue.

<sup>5</sup>15 Ohio St. 3d at 326, 474 N.E.2d at 275 (syllabus).

<sup>6</sup>See *Mauk v. Mauk*, 12 Ohio St. 3d 156, 466 N.E.2d 166 (1984). *Mauk* had reaffirmed Ohio’s retention of parental immunity by a four to three vote. *Kirchner* overruled *Mauk* by the same margin. Justice J.P. Celebrezze, who had lost a November, 1984 reelection bid and who was serving his last day on the bench, was the justice who flip-flopped.

<sup>7</sup>See *infra* note 134.

<sup>8</sup>See *infra* text accompanying note 134.

*George*<sup>9</sup> established the doctrine that an unemancipated child is barred from bringing suit against a parent for injuries sustained as a result of the parent's negligence. Denying the minor the right to sue her mother for wrongful incarceration in an insane asylum, the *Hewlett* court said that "[t]he 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" would be disturbed by such a suit and concluded that the child, through criminal laws, had protection from parental violence and wrongdoing.<sup>10</sup>

Despite the lack of authority, states almost universally adopted the *Hewlett* rule.<sup>11</sup> For example, the North Carolina Supreme Court declared that "[i]f this restraining doctrine were not announced by any of the writers of the common law, because no such case was ever brought before the courts of England, it was unmistakably and indelibly carved upon the tablets of Mount Sinai."<sup>12</sup> Courts following the *Hewlett* rationale advance several reasons for support of parental immunity.

The traditional reason in support of the doctrine is that family tranquility or harmony will be disrupted by allowing the child to sue the parent.<sup>13</sup> A related and legitimate concern is the threat to parental authority and discipline.<sup>14</sup> Further reasons for retaining parental immunity include the possibility of a drain on the family funds or exchequer to the detriment of other family members<sup>15</sup> and the possibility that the parent, through succession, would obtain the funds the child might have recovered if the suit were allowed.<sup>16</sup>

Other courts adhere to the doctrine citing the danger of fraud or collusion particularly where liability insurance exists,<sup>17</sup> the analogy of the denial of a cause of action between husband and wife,<sup>18</sup> and the general social policy

<sup>9</sup>68 Miss. 703, 9 So. 885 (1891).

<sup>10</sup>*Id.* at 711, 9 So. at 887.

<sup>11</sup>See Hollister, *Parent-Child Immunity: A Doctrine In Search Of Justification*, 50 FORDHAM L. REV. 489 (1982) [hereinafter cited as Hollister] where the author notes in a comprehensive citation that forty-two states followed the *Hewlett* court's example. *Id.* at 494-95.

<sup>12</sup>*Small v. Morrison*, 185 N.C. 577, 585-86, 118 S.E. 12, 16 (1923).

<sup>13</sup>See *Barlow v. Iblings*, 261 Iowa 713, 156 N.W.2d 105 (1968) and cases listed at Annot. 6 A.L.R. 4th 1066, 1078-87 (1981).

<sup>14</sup>*Id.*

<sup>15</sup>*Id.*

<sup>16</sup>See *Agustin v. Ortiz*, 187 F.2d 496 (1st Cir. 1951). As this argument has had little, if any, support by courts (even those that retain the doctrine), it will not be examined in this Comment. For example, in *Dunlap v. Dunlap*, 84 N.H. 352, 150 A. 905 (1930), the court held the possibility of succession argument "too unsubstantial to be considered as more than mere makeweights. . . ." *Id.* at 361, 150 A. at 909. Furthermore, not only is such a contingency remote, but it also applies equally to contract and property suits which are allowed by the courts. See, *Comment, Parent-Child Tort Immunity: A Rule In Need Of Change*, 27 U. MIAMI L.REV. 191, 196 (1972) [hereinafter cited as *Comment, A Rule In Need Of Change*].

<sup>17</sup>See *Dennis v. Walker*, 284 F. Supp. 413 (D.D.C. 1968) and cases listed at Annot. 6 A.L.R. 4th at 1078-81.

<sup>18</sup>See *Turner v. Turner*, 304 N.W.2d 786, 787 (Iowa 1981).

against interference with domestic government.<sup>19</sup> Each historical justification for retention of parental immunity will be discussed in relation to the Ohio experience with the doctrine.<sup>20</sup>

## ANALYSIS OF OHIO DECISIONS

### A. *Ohio's Historical Background*

No sooner had parental immunity gained universal acceptance, then courts, including Ohio's, began to fashion a number of qualifications and exceptions to the doctrine.<sup>21</sup> Such exceptions and qualifications were developed on the theory that the suit involved more than just a simple negligence action.<sup>22</sup> However, as the California Supreme Court noted in its decision totally abrogating the immunity, "such cases probably rested as much on growing judicial distaste for a rule of law which in one sweep disqualified an entire class of injured minors."<sup>23</sup>

Prior to the recent litigation in this state concerning parental immunity, Ohio qualified its retention of the doctrine in two situations. The first situation was in the 1952 case of *Signs v. Signs*,<sup>24</sup> where a minor child sustained burns when fire burst forth near a gasoline pump of his father's business. The *Signs* court held that "a parent in his business or vocational capacity is not immune from a personal tort action by his unemancipated minor child."<sup>25</sup> Other jurisdictions had recognized this qualification as early as 1932.<sup>26</sup>

While qualifying its retention of the immunity doctrine in simple negligence cases in *Signs*, the court rejected some of the historical justifications for the doctrine. The court rejected the family harmony argument stating that tort actions by children against their parents would be rare in harmonious families and that "where such actions were brought there would be a strong indication that there was no harmony or domestic felicity in the family to be

<sup>19</sup>*Id.*

<sup>20</sup>While the following analysis of the Ohio decisions may appear somewhat lengthy, especially in light of the fact that *Kirchner* has made the cases obsolete, such analysis provides a vehicle for discussing the inconsistencies and inequities produced by adhering to parent-child tort immunity and allows for a sampling of the rationale of the majority of jurisdictions which have wholly or partially rejected the doctrine. Furthermore, the discussion of the Ohio cases prior to *Kirchner* should put into proper perspective the dilemma the Ohio Supreme Court entrenched itself in by adhering to the immunity.

<sup>21</sup>See *Smith v. Kauffman*, 212 Va. 181, 183 S.E.2d 190 (1971) and cases listed at Annot. 6 A.L.R. 4th at 1093-1113.

<sup>22</sup>For example, the willful or malicious act exception followed in *Mahnke v. Moore*, 197 Md. 61, 77 A.2d 923 (1951), is obviously outside the scope of a simple negligence situation for which the doctrine is generally retained.

<sup>23</sup>*Gibson v. Gibson*, 3 Cal. 3d 914, 918, 479 P.2d 648, 650, 92 Cal. Rptr. 288, 290 (1971).

<sup>24</sup>156 Ohio St. 566, 103 N.E.2d 743 (1952).

<sup>25</sup>*Id.*, 103 N.E.2d at 744 (syllabus).

<sup>26</sup>See *Lusk v. Lusk*, 113 W.Va. 17, 166 S.E. 538 (1932).

disturbed.<sup>27</sup> Accordingly, the court, in *Signs*, attacked the domestic harmony argument by noting that denying the tort action would be illogical since the court allowed suits between children and parents on contract or property actions where the threat of disruption is equally as great.<sup>28</sup>

The *Signs* court also rejected the fraud or collusion argument, particularly where liability insurance was involved. While acknowledging that the danger of fraud or collusion existed in a suit by an unemancipated child against the parent, the court relied on two possible alternatives: 1) either the legislature could abolish the minor's right to sue the parent where the danger was great or 2) insurance companies could place exclusions in their policies.<sup>29</sup>

The second situation in which Ohio qualified its retention of the doctrine occurred where the tort was willful or malicious. In *Teramano v. Teramano*,<sup>30</sup> the minor child sued for injuries received when his father drove an automobile into the driveway of the residence at a high rate of speed, failing to stop in time to avoid hitting his child.<sup>31</sup> The court denied recovery to the child, holding that the parent was immune from the suit, since the facts of the case failed to show an abandonment of the parental relationship.<sup>32</sup> However, the *Teramano* court held that a malicious intent to injure evidences such abandonment, making a parent liable in a tort action by an unemancipated child.<sup>33</sup> Despite making a second qualification to Ohio's now abrogated parental immunity doctrine, the *Teramano* case neither rejected historical justifications for the doctrine nor defined which justifications supported the past Ohio position.

## B. Recent Ohio Cases

In *Karam v. Allstate Insurance Co.*,<sup>34</sup> Ohio defined the scope of its previous immunity doctrine. In *Karam*, the minor children were injured in an automobile negligently driven by their mother who was killed in the accident.<sup>35</sup> In denying the minor children the right to sue the estate of the parent and the respective insurance company, the Ohio Supreme Court simply reiterated the holding of *Teramano*, adding that since the court recently reaffirmed

<sup>27</sup>156 Ohio St. at 576, 103 N.E.2d at 748.

<sup>28</sup>*Id.*

<sup>29</sup>*Id.* at 577, 103 N.E.2d at 748. The issue of an exclusion clause placed in liability insurance policies is discussed in greater detail later in the Comment. See *infra* text accompanying notes 134-49. See also Comment, *A Job Half-Done: Florida's Judicial Modification Of The Intrafamilial Tort Immunities*, 10 FLA. ST. U.L. REV. 639 (1983) [hereinafter cited as Comment, *A Job Half-Done*] which provides an excellent discussion of the debate over the presence of liability insurance.

<sup>30</sup>6 Ohio St. 2d 117, 216 N.E.2d 375 (1966).

<sup>31</sup>*Id.*

<sup>32</sup>*Id.* at 120, 216 N.E.2d at 377.

<sup>33</sup>*Id.* at 117, 216 N.E.2d at 376 (Paragraph two of syllabus).

<sup>34</sup>70 Ohio St. 2d 227, 436 N.E.2d 1014 (1982), *cert. denied*, 459 U.S. 1070. See Recent Cases, *Karam v. Allstate Ins. Co.*, 12 CAP. U.L. REV. 173 (1982).

<sup>35</sup>70 Ohio St. 2d at 227, 436 N.E.2d at 1015.

adherence to the doctrine of interspousal immunity based upon the danger of fraud or collusion,<sup>36</sup> it would be illogical to reject such reasoning with regard to parental immunity.<sup>37</sup>

The *Karam* court identified other reasons besides fraud or collusion in retaining the doctrine where the parent was deceased: preservation of family tranquility, possible interference with parental discipline and control, and potential depletion of family funds.<sup>38</sup> Such reasoning, however, not only contravened Ohio precedent but was inconsistent with the rationale of the increasing majority of states which had either repudiated the doctrine or had abrogated it in part.<sup>39</sup>

The fraud or collusion argument relied on in *Karam* conflicted with the court's rejection of that argument in *Signs*.<sup>40</sup> Further, as the dissent in *Karam* noted, modern civil procedure and discovery tools, available to courts and insurance companies, could meet the challenge of spurious or fraudulent claims.<sup>41</sup> Courts of other jurisdictions have also rejected the fraud or collusion argument. Those courts allowed suits between spouses and between the adult child and parent where the threat of collusion equals that between an unemancipated child and a parent.<sup>42</sup> The argument was also dismissed on the policy ground that the interest of the child in receiving redress outweighed any possible threat of collusion.<sup>43</sup>

The preservation of domestic tranquility argument cited in *Karam* conflicted both with Ohio precedent and with the rationale of numerous other jurisdictions. In *Signs*, the court expressly rejected the family harmony argument.<sup>44</sup> *Karam's* failure to either overrule or distinguish the *Sign's* opinion rejecting the family harmony argument gave little credence to its holding.

Other jurisdictions have rejected the domestic tranquility argument stating that the negligent act of the parent, not the possibility of a lawsuit,

<sup>36</sup>The Court had reaffirmed its adherence to the doctrine of interspousal immunity in *Bonkowsky v. Bonkowsky*, 69 Ohio St. 2d 152, 431 N.E.2d 998, *cert denied*, 457 U.S. 1135 (1982).

<sup>37</sup>70 Ohio St. 2d at 234, 436 N.E.2d at 1019.

<sup>38</sup>*Id.* at 229, 436 N.E.2d at 1016.

<sup>39</sup>The rationale used in the *Karam* opinion had been rejected not only by the majority of jurisdictions noted in the Appendix to this Comment, but also by numerous commentators condemning the parental immunity doctrine. See Hollister, *Parent-Child Immunity*, *supra* note 11; Comment, *A Rule In Need Of Change*, *supra* note 16; Comment, *Parent Child Tort Immunity: Time for Maryland To Abrogate An Anachronism*, 11 U. BALT. L. REV. 435 (1982); Comment, *Parental Immunity: The Case For Abrogation Of Parental Immunity In Florida*, 25 U. FLA. L. REV. 794 (1973); Note, *Intrafamilial Tort Immunity In New Jersey: Dismantling The Barrier To Personal Injury Litigation*, 10 RUT. CAM. L.J. 661 (1971); and Note, *Turner v. Turner: Abrogation Of The Parental Immunity Doctrine*, 27 S.D.L. REV. 171 (1982).

<sup>40</sup>See *supra* text accompanying note 29.

<sup>41</sup>70 Ohio St. 2d at 239, 436 N.E.2d at 1022 (C. Brown, J., dissenting).

<sup>42</sup>See *e.g.*, *Briere v. Briere*, 107 N.H. 432, 436, 224 A.2d 588, 590 (1966); *Williams v. Williams*, 369 A.2d 669, 673 (Del. 1976) and *Immer v. Risko*, 56 N.J. 482, 495, 267 A.2d 481, 488 (1970).

<sup>43</sup>See *Falco v. Pados*, 444 Pa. 372, 380-81, 282 A.2d 351, 355 (1971).

<sup>44</sup>See *supra* text accompanying notes 27, 28.

disrupts the domestic tranquility of a family.<sup>45</sup> Such an argument was found objectionable by the New Hampshire Supreme Court where it stated that "it is difficult, if not impossible, to perceive how . . . family peace can be jeopardized more in an ordinary tort for negligence . . . than by an action in contract or to protect property rights or for an assault — all of which are permitted in this state."<sup>46</sup> Therefore, there is no reasonable distinction which mandates a court to protect property rights more than personal rights.

The potential depletion of family funds argument relied upon by the *Karam* majority also lacked merit where liability insurance existed, such as in the *Karam* case.<sup>47</sup> Both Massachusetts and Delaware have dispensed with this argument since 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>48</sup> Since most tort suits are not undertaken in absence of a deep pocket, in cases where insurance does not exist, a minor child is not likely to bring suit (especially where mutual love and respect exists).<sup>49</sup>

The final argument relied upon in *Karam* was the legitimate concern for possible interference with parental discipline and control. However, this argument was of doubtful validity under the facts of *Karam* where the suit was against the deceased parent's estate.<sup>50</sup> As the dissent in *Karam* correctly noted:

Since the tortfeasor parent . . . is now deceased, such action can have no effect whatever on the discharge of the surviving parent's responsibilities. . . . Rather, a successful suit by the *Karam* children against the deceased parent's administrator, the children thereafter obtaining the liability insurance benefits to satisfy such claims, would ease the financial burdens caused by the bodily injuries, thereby promoting family harmony.<sup>51</sup>

Such a suit cannot possibly interfere with the deceased parent's discipline or control.

The parental discipline and control argument has been rejected by other jurisdictions faced with factual situations almost identical to *Karam*. Some jurisdictions hold that the doctrine expires upon the death of the person protected since the death terminates the family relationship. Accordingly, there is

<sup>45</sup>See e.g., *Petersen v. City and County of Honolulu*, 51 Hawaii 484, 488, 462 P.2d 1007, 1009 (1969) and *Smith v. Kaufman*, 212 Va. 181, 185-86, 183 S.E.2d 190, 194 (1971) (quoting *Immer v. Risko*, 56 N.J. 482, 489-90, 267 A.2d 481, 484-85 (1970)).

<sup>46</sup>*Briere*, 107 N.H. at 435-46, 224 A.2d at 591.

<sup>47</sup>70 Ohio St. 2d at 227, 436 N.E.2d at 1015.

<sup>48</sup>See *Sorenson v. Sorenson*, 369 Mass. 350, 362, 339 N.E.2d 907, 914 (1975) and *Williams*, 369 A.2d at 672. See also *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).

<sup>49</sup>See *Sorenson*, 369 Mass. at 361, 339 N.E.2d at 913.

<sup>50</sup>70 Ohio St. 2d at 227, 436 N.E.2d at 1015.

<sup>51</sup>*Id.* at 236-38, 436 N.E.2d at 1021-22 (C. Brown, J., dissenting).

no longer in existence a relationship within the reasonable contemplation of the doctrine.<sup>52</sup> Other states dismiss the argument in automobile negligence actions on the theory that driving has no relationship to parental care and control and is outside the realm of immunity.<sup>53</sup>

As the rationale in *Karam* was both inconsistent with Ohio precedent and criticized by numerous other jurisdictions when faced with identical fact situations, the *Karam* opinion was of questioned validity. A short year and one-half later, the Ohio Supreme Court expressly overruled *Karam* in *Dorsey v. State Farm Mutual Automobile Insurance Co.*<sup>54</sup> The factual situation in *Dorsey* was identical to that of *Karam*: a parent negligently operated an automobile injuring her minor children in an accident in which the parent received fatal injuries.<sup>55</sup>

The court overruled *Karam* and held that the doctrine of parental immunity does not bar an action in negligence brought against the estate of a deceased parent and the respective insurance company by the unemancipated minor children.<sup>56</sup> The court supported its ruling by noting that it had recently faced a similar issue in the context of interspousal immunity, where the estate of the deceased spouse brings an action against the surviving spouse, and held that the action was not barred by the interspousal immunity doctrine.<sup>57</sup>

The court's analogy to the partial abrogation of interspousal immunity was weak since Ohio, in *Signs*, expressly rejected the validity of such an analogy.<sup>58</sup> Furthermore, recognized writers<sup>59</sup> and other jurisdictions have criticized the drawing of such an analogy.<sup>60</sup>

However, since numerous other states hold that approval or disapproval of interspousal immunity can support the acceptance or rejection of the parental immunity doctrine,<sup>61</sup> the analogy drawn in *Dorsey* may be valid. Regardless of the validity of the drawing of such an analogy, the *Dorsey* decision was sustainable on other grounds.

The *Dorsey* majority rejected the traditional justifications that the *Karam* court cited for its retention of parental immunity. The *Dorsey* court said that such justifications are not present where the parent, who would normally be

<sup>52</sup>See *Fugate v. Fugate*, 582 S.W.2d 663, 667 n. 5 (Mo. 1979).

<sup>53</sup>See *Hebel v. Hebel*, 435 P.2d 8, 14 (Alaska 1967) and *Sorenson*, 369 Mass. at 365-66, 339 N.E.2d at 916.

<sup>54</sup>90 Ohio St. 3d 27, 457 N.E.2d 1169 (1984).

<sup>55</sup>*Id.* at 28, 457 N.E.2d 1169.

<sup>56</sup>*Id.* at 27, 457 N.E.2d 1169 (syllabus).

<sup>57</sup>*Id.* at 29, 457 N.E.2d at 1170-71 (citing *Prem v. Cox*, 2 Ohio St. 3d 149, 443 N.E.2d 511 (1983)).

<sup>58</sup>See *Signs*, 156 Ohio St. at 570, 103 N.E.2d at 746.

<sup>59</sup>See W. Prosser, *LAW OF TORTS* §122 at 865-66 (4th ed. 1971).

<sup>60</sup>See *Worrel v. Worrel*, 174 Va. 11, 19-20, 4 S.E.2d 343, 346 (1939). The dissent in *Dorsey* also criticized the drawing of the analogy between the interspousal and parental immunity doctrines. *Dorsey* 9 Ohio St. 3d at 31, 457 N.E.2d at 1172 (Holmes, J., dissenting).

<sup>61</sup>See, e.g., *Turner*, 304 N.W.2d at 787.



able to invoke the immunity, is deceased.<sup>62</sup> The court said that:

[T]here is no longer the compelling need to preserve harmony and tranquility between a child and a deceased parent or to insure the ability of the parent to discipline the child. Moreover, the risks of fraud and collusion are considerably lessened where the parent . . . is deceased and is no longer capable of fabricating evidence or structuring a lawsuit so as to allow recovery by the child against the parent's insurer.<sup>63</sup>

*Dorsey's* limited exception to the immunity doctrine was justified since the parental immunity doctrine should be confined to cases supported by the traditional justifications.<sup>64</sup> Clearly, such justifications are not present where the suit is brought against the estate of a deceased parent and the respective insurance company.

The limited exception fashioned by the *Dorsey* court seemingly signaled a relaxation of Ohio's strict adherence to parental immunity. Six months after *Dorsey*, the court in *Mauk v. Mauk*<sup>65</sup> addressed the issue of parent-child immunity in a simple negligence case where both the unemancipated minor and parent were alive. Any relaxation of Ohio's position signaled by *Dorsey* was laid to rest in *Mauk*, as the court reaffirmed its longstanding adherence to the doctrine.<sup>66</sup>

*Mauk* arose under a factual situation different from the previous Ohio cases concerning parental immunity. In *Mauk*, the parents brought a tort action against their unemancipated minor son who negligently allowed a ladder to fall off his truck into the path of his parents, who were following the son, causing the parents to lose control of their car resulting in a collision.<sup>67</sup> Although the parents had brought suit, the *Mauk* court recognized the corollary rule to parental immunity — that a parent may not prosecute a tort action against the unemancipated minor child.<sup>68</sup>

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<sup>62</sup>9 Ohio St. 3d at 29, 457 N.E.2d at 1171.

<sup>63</sup>*Id.*

<sup>64</sup>An additional argument was suggested by the appellant in *Dorsey*. Appellant contended that the *Karam* decision did not represent the view of the duly elected and currently serving members of the court. 9 Ohio St. 2d at 30 n. 2, 457 N.E.2d at 1171 n. 2. Appellant's suggestion was in reference partly to the intervening election in which Democrat James P. Celebrezze (the Chief Justice's brother) won election and replaced Republican Blanche Krupansky (appellant was also likely referring to the fact that two of the justices in the *Dorsey* majority were temporarily not sitting when *Karam* was decided). The *Dorsey* majority rejected such a suggestion, stating that *Karam* is *unjust*, irrespective of the source of that determination. *Id.*

The importance of such a substantial change in the court personnel from the *Karam* to *Dorsey* decisions cannot be ignored. Attention is given to this argument especially in light of the November, 1984 election in which Justices Craig and Wright won election and will be replacing retiring Justice William Brown and unsuccessful incumbent James P. Celebrezze. This argument is discussed more fully later in this Comment. See *supra* text preceding note 111.

<sup>65</sup>12 Ohio St. 3d 156, 466 N.E.2d 166 (1984).

<sup>66</sup>*Id.*

<sup>67</sup>*Id.*

<sup>68</sup>*Id.* at 157, 466 N.E.2d at 167.

In a *per curiam* opinion in which four justices concurred,<sup>69</sup> the *Mauk* court stated that two of the historical justifications in support of parental immunity had special application to the adoption of the reciprocal immunity of the unemancipated minor child.<sup>70</sup> The court cited the fraud or collusion<sup>71</sup> and domestic tranquility<sup>72</sup> arguments, adding that it would be inconsistent for the parent "to occupy the role of parent and guardian to a child, thereby being entrusted with the child's care, and to simultaneously pursue an action for damages against the child."<sup>73</sup>

The opinion in *Mauk* surveyed the case law concerning both the parent's immunity and the child's immunity. Although the court's own research revealed that only fifteen other jurisdictions adhered to the parental immunity doctrine for simple negligence torts<sup>74</sup> (while the remaining jurisdictions either have never initially adopted the doctrine or have abrogated it in part),<sup>75</sup> the *Mauk* court sustained the immunity doctrine. The court, in *Mauk*, was inclined to agree with the weight of authority which considered the issue of the child's liability and had come down in favor of immunity.<sup>76</sup>

The *per curiam* opinion was severely criticized by the three dissenters in *Mauk*. Justice Clifford Brown said that by overruling the parental immunity doctrine, the court would not have had to create a child-immunity rule.<sup>77</sup> He rejected the policy argument of Justice Locher, who concurred in the *Mauk* result, by saying that "[n]o amount of glorification of the family unit and be-

<sup>69</sup>Chief Justice Celebrezze and Justices Locher, Holmes and J.P. Celebrezze formed the majority. *Id.* at 159, 466 N.E.2d at 169.

<sup>70</sup>12 Ohio St. 3d at 159, 466 N.E.2d at 168.

<sup>71</sup>The court said that where the parent in this case was the owner of both vehicles involved in the collision, and presumably the insurer of both, it was "indeed doubtful as to whether the interests of the parties [were] truly adverse in nature. In the event they are not, the potential for fraud and collusion is unusually great." *Id.*, 466 N.E.2d at 169.

The court's concern here is unfounded. In citing the fraud or collusion argument, the court neither addressed the fact that insurance companies and/or the judicial system can ferret out false claims nor did it respond to other arguments which defeat the fraud or collusion contention. *See supra* text accompanying notes 40-43.

<sup>72</sup>In discussing the domestic tranquility argument, the court said that if "the relationship of the parties is in fact adverse as a consequence of this lawsuit, violence is done to the peace and harmony of the family unit." 12 Ohio St. 3d at 159, 466 N.E.2d at 169. However, the court neither addressed the argument that it is the negligent act, and not the lawsuit, that disrupts the harmony nor did it respond to other arguments defeating the domestic tranquility contention. *See supra* text accompanying notes 44-46.

<sup>73</sup>12 Ohio St. 2d at 159, 466 N.E.2d at 169.

<sup>74</sup>The court lists the state of Illinois in its citation of fifteen jurisdictions which adhere to the doctrine despite the recent reversal of that position by numerous Illinois appellate courts. *See, e.g., Hogan v. Hogan*, 106 Ill. App. 3d 104, 435 N.E.2d 770 (1982) and other cases listed in the Appendix to this Comment which categorizes Illinois as a jurisdiction which has partially abrogated the immunity doctrine.

<sup>75</sup>The court's citation of the group of states never initially adopting the doctrine or which have at least abrogated it in part does not include the states of South Dakota or Texas. *See Appendix* to this Comment.

<sup>76</sup>12 Ohio St. 3d at 159, 466 N.E.2d at 168.

<sup>77</sup>*Id.* at 160, 466 N.E.2d at 169 (C. Brown, J., dissenting). The "child immunity corollary" to the parental immunity doctrine was expressly rejected in dictum in the *Kirchner* case. *Kirchner*, 15 Ohio St. 3d at 330, 474 N.E.2d at 274.

moaning that elimination of parental immunity 'would deal another blow to those fighting the glorious battle to support the family,' and the false foundation upon which it rests, can justify this court's continued acceptance of this useless doctrine."<sup>78</sup>

Justice Brown also rejected the per curiam opinion on several substantive grounds. He noted that the fraud or collusion argument was unanimously rejected by the court when it declared Ohio's Guest Statute unconstitutional.<sup>79</sup> Citing the many safeguards against fraudulent or collusive claims,<sup>80</sup> he added that the decision in *Mauk* exhibited no faith in the judicial system, "implicitly assert[ing] that the system is paralyzed when it comes to discerning false negligence actions between a parent and a child."<sup>81</sup>

Noting that the per curiam factual statements concerning the states' positions as to the immunity doctrine gave a false impression of the support for it, Justice Brown correctly disagreed with the per curiam statements since the current trend rejected the doctrine.<sup>82</sup> Furthermore, he raised the argument that the doctrine was unconstitutional under both the Ohio Constitution's and United States Constitution's due process of law and equal protection clauses.<sup>83</sup> He argued that allowing a child to sue a parent, and vice versa, in many other civil actions<sup>84</sup> pointed to the discriminatory nature of the bar to a suit in negligence actions provided by the immunity doctrine.<sup>85</sup>

While *Mauk* represented the Ohio Supreme Court's clearest justification of its previous adherence to the doctrine in simple negligence situations, a case decided one week after *Mauk* "*sub silentio* places a foot in the door to abrogate the doctrine of parent-child immunity which was recently upheld . . . ."<sup>86</sup> While inconsistent with *Mauk*, the court's result in *Sumwalt v. Allstate Insurance Co.*<sup>87</sup> suggested at the very least that the status of parental immunity in Ohio was far from settled.<sup>88</sup>

<sup>78</sup>12 Ohio St. 3d at 160, 466 N.E.2d at 170 (C. Brown, J., dissenting).

<sup>79</sup>*Id.* at 161, 466 N.E.2d at 170 (C. Brown, J., dissenting). The court declared Ohio's Guest Statute unconstitutional in *Primes v. Taylor*, 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975).

<sup>80</sup>The safeguards noted by Justice C. Brown include the extensive and pretrial discovery procedures of Ohio Rules of Civil Procedure 26 through 37 and the procedures of Civil Rule 56 relating to summary judgment. *Mauk*, 12 Ohio St. 3d at 161, 466 N.E. 2d at 170 (C. Brown, J., dissenting).

<sup>81</sup>*Id.*

<sup>82</sup>*Id.*

<sup>83</sup>*Id.* at 162, 466 N.E.2d at 171 (C. Brown, J., dissenting).

<sup>84</sup>The other civil actions in which a child may sue his parent, and vice versa, in Ohio include the right to sue to set aside a real estate conveyance, and the right to sue for compensation for services. See 41 OHIO JUR. 2d *Parent and Child* §§ 60, 62 (1960).

<sup>85</sup>12 Ohio St. 2d at 162, 466 N.E.2d at 171 (C. Brown, J., dissenting).

<sup>86</sup>*Sumwalt v. Allstate Ins. Co.*, 12 Ohio St. 3d 294, 297, 466 N.E.2d 544, 547 (Holmes, J., dissenting).

<sup>87</sup>12 Ohio St. 3d 294, 466 N.E.2d 544 (1984).

<sup>88</sup>In *Sumwalt*, Justice J.P. Celebrezze, who voted with the majority in *Mauk* in retaining the immunity, joined with Justice Sweeney in Justice Clifford Brown's plurality opinion. Justice William Brown concurred in the judgment only, while Chief Justice Celebrezze concurred in the syllabus and judgment only.

In *Sumwalt*, the minor child injured his parent who was standing in front of her car when the child started the car engine with the transmission in gear.<sup>89</sup> The parent filed an action against the Allstate Insurance Company to determine if she had a right to uninsured motorists benefits under Allstate's automobile insurance policy in effect on the date of the accident.<sup>90</sup> The court of appeals in this case reasoned that the basic principle of parent-child immunity was dispositive and dismissed the parent's complaint, entering judgment for Allstate.<sup>91</sup>

In reversing the court of appeals decision, the Ohio Supreme Court rejected the court of appeals' rationale that [*Mauk's*] retention of the immunity doctrine was applicable.<sup>92</sup> The supreme court, after interpreting an uninsured motorists provision<sup>93</sup> in the parent's liability policy, held that:

The phrase "legally entitled to recover from the owner or operator of an uninsured auto," . . . means that the insured must be able to prove the elements of her claim necessary to recover damages. That the uninsured motorist tortfeasor has a child-parent immunity does not affect the insured's elements of the claim for damages nor the insured's right to recover uninsured motorists benefits from her insurer.<sup>94</sup>

This holding clearly abrogates parent-child tort immunity where a "legally entitled to recover" provision exists in an automobile liability insurance policy. However, the *Sumwalt* majority noted that since only three justices favored total abrogation of the doctrine, the immunity's posture and efficacy discussed in *Karam* is as stated in the majority opinion in *Dorsey*.<sup>95</sup>

Justice Holmes correctly noted in dissent that *Sumwalt* is inconsistent with the court's holding in *Mauk* and listed other jurisdictions which concurred, in his view, that due to parent-child immunity a mother could not recover from her insurer since she was not legally entitled to recover damages from her child.<sup>96</sup> Although Holmes correctly identified the flaw in the majority's opinion, his opinion fails to recognize the inequities that would be created by adhering to the immunity doctrine under factual situations similar

<sup>89</sup>12 Ohio St. 3d at 294, 466 N.E.2d at 545.

<sup>90</sup>*Id.*

<sup>91</sup>*Id.* at 295, 466 N.E.2d at 545.

<sup>92</sup>*Id.*

<sup>93</sup>The uninsured motorists provision in the parent's liability policy states, in pertinent part:

We will pay for bodily injury, sickness, disease or death which a person insured is *legally entitled to recover* from the owner or operator of an uninsured auto. Injury must be caused by accident and arise out of the ownership, maintenance or use of an uninsured auto. (emphasis added by the court). *Id.* at 294-95, 466 N.E.2d at 545.

<sup>94</sup>*Id.* at 295, 466 N.E.2d at 545-46.

<sup>95</sup>*Id.* at 296, 466 N.E.2d at 546.

<sup>96</sup>*Id.* at 297, 466 N.E.2d at 547 (Holmes, J., dissenting). One of the cases Holmes cited is *Patrons Mutual Ins. Assn. v. Norwood*, 231 Kan. 709, 647 P.2d 1335 (1982).

to *Sumwalt*.<sup>97</sup>

While the court in *Sumwalt* reached the equitable result, possibly for wrong or inconsistent reasons, it signaled that the court had not settled the controversy over its purported retention of parental immunity. A short five months after the *Mauk* and *Sumwalt* cases, the court did an abrupt reversal, abrogating the doctrine without reservation in *Kirchner v. Crystal*.<sup>98</sup>

### C. Ohio's Rejection of Parental Immunity — *Kirchner v. Crystal*

Without any explanation whatsoever, Justice J.P. Celebrezze made a sudden reversal of his views on parental immunity and joined the majority opinion in *Kirchner* in abrogating the doctrine.<sup>99</sup> In *Kirchner*, a parent had negligently driven an automobile, injuring his stepson, a passenger in the vehicle. The lower courts granted summary judgment for the defendant stepfather based upon Ohio's then existing parental immunity.<sup>100</sup>

Although the (minor stepson) appellant had urged the court to carve out an exception to the court's parental immunity doctrine with respect to step-parents or persons who stand *in loco parentis*, the Ohio Supreme Court resisted such an argument since to create another exception would "only serve to perpetuate the fallacious arguments which have supposedly supported the doctrine."<sup>101</sup> In an opinion which rejected the four basic justifications for the doctrine, Justice Sweeney wrote that the best approach for the *Kirchner* court to follow was "to abrogate parental immunity *in toto*."<sup>102</sup>

The court, in *Kirchner*, rejected the domestic tranquility argument based upon the criticism of such rationale in the *Signs* case<sup>103</sup> and stated that the tortious conduct, rather than allowance of the suit, was more likely to disrupt the family harmony.<sup>104</sup> Similarly, the court refuted the parental discipline and control argument since in many actions, no question of parental control will arise — "the possibility that some cases may involve the exercise of parental

<sup>97</sup>For example, had a neighbor's child caused the negligent act in this case, Holmes's rationale would not apply, since there would be no immunity to contend with under such a situation. Thus, if a neighbor's child caused the negligent act, the mother could recover; but, under Holmes' rationale, she could not recover if the act were caused by her own child. Such a result is inequitable.

<sup>98</sup>15 Ohio St. 3d 326, 474 N.E.2d 275 (1984). The one-paragraph syllabus expressly overruled the *Teramano* and *Mauk* cases. *Id.*

<sup>99</sup>In fairness to Justice J.P. Celebrezze, he did indicate, by joining the plurality opinion in the *Sumwalt* case, that he had changed his views as to the doctrine prior to the *Kirchner* decision. See, *supra* note 8; of course, this is even more perplexing as *Sumwalt* was decided only a week after Justice J.P. Celebrezze concurred in *Mauk* in affirming parental immunity. See also, *supra* notes 2 and 6.

<sup>100</sup>15 Ohio St. 3d 326, 474 N.E.2d at 276.

<sup>101</sup>*Id.* at 330, 474 N.E.2d at 278.

<sup>102</sup>*Id.* The court noted that in doing so, it joined the minority of jurisdictions that have totally abrogated the doctrine. See Appendix, Section I.B.

<sup>103</sup>See *supra* text accompanying notes 27 and 29.

<sup>104</sup>15 Ohio St. 3d at 328, 474 N.E.2d at 277.

authority does not justify continuation of a blanket rule of immunity."<sup>105</sup>

Citing the widespread availability of liability insurance, the *Kirchner* court dismissed the potential depletion of family funds or exchequer argument.<sup>106</sup> Likewise, the court debunked the fraud or collusion argument on familiar grounds: "The deterrent effect of a perjury charge, extensive and detailed pretrial discovery procedures, the opportunity for cross examination, and the availability of summary judgment motions are but a few examples of the tools available . . . in exposing fraudulent claims. . . ."<sup>107</sup> By individually rejecting the basic justifications for the doctrine, the court, in *Kirchner*, joined the "long-overdue landslide"<sup>108</sup> that has eliminated, in whole or in part, a procedural bar to recovery in negligence actions.

While the Ohio Supreme Court has joined the modern trend of legal thought by abolishing the doctrine, the *Kirchner* case rests on uneasy grounds due to the abrupt manner in which the opinion was rendered. In dissent, Chief Justice Celebrezze correctly noted that a majority of the court, as it existed at the time of *Kirchner*, held in *Dorsey* and *Mauk* that parental immunity was based on valid public policy objectives.<sup>109</sup> The Chief Justice was also at a loss for an explanation regarding the court's sudden reversal, stating that he was not convinced that his positions in *Dorsey* or *Mauk* were incorrect, nor did he perceive "the type of societal revolution that would convince [him] that the policy objectives . . . have become obsolete."<sup>110</sup>

Justice J.P. Celebrezze's failure to support his seemingly inexplicable change from *Mauk* to *Kirchner* has opened, to speculation, the validity of the court's abrogation of parental immunity, especially in light of the election of two new justices to the court. Those newly elected justices have replaced Justices William Brown and J.P. Celebrezze, who constituted half of the majority opinion in the four-three *Kirchner* decision. Furthermore, the court delivered the *Kirchner* opinion along with forty-three other opinions on the last day of the term for Justices William Brown and J.P. Celebrezze. The manner in which *Kirchner* was rendered opens the Ohio Supreme Court to the criticism that the decision was no more than political maneuvering.<sup>111</sup>

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<sup>105</sup>*Id.* (quoting *Gibson v. Gibson*, 3 Cal. 3d 914, 920-21, 479 P.2d 648, 652, 92 Cal. Rptr. 288, 292 (1971)).

<sup>106</sup>15 Ohio St. 3d at 329, 474 N.E.2d at 277-78. The court again relied upon the *Gibson* rationale, *supra* note 105, in rejecting the family exchequer argument. Such rationale is similar to that discussed at *supra*, text accompanying notes 47-49.

<sup>107</sup>15 Ohio St. 3d at 329, 474 N.E.2d at 278.

<sup>108</sup>Prosser, *Law of Torts* §122 at 867 (4th Ed., 1971).

<sup>109</sup>15 Ohio St. 3d at 331, 474 N.E.2d at 280 (Celebrezze, C.J., dissenting). Justice Holmes concurred in the Chief Justice's dissent. Justice Locher submitted a separate dissent.

<sup>110</sup>15 Ohio St. 3d at 332, 474 N.E.2d at 280 (Celebrezze, C.J., dissenting).

<sup>111</sup>The newly elected justices are Republicans Craig R. Wright and Andrew Douglas. Justices J.P. Celebrezze and William Brown are Democrats.

Despite the weaknesses of the *Kirchner* decision due to Justice J.P. Celebrezze's inexplicable change in views, the result comports with the rationale of a vast majority of states which have either wholly or partially abrogated parental immunity.<sup>112</sup> Ohio's *in toto* rejection of the immunity doctrine is in accord with only six other states.<sup>113</sup> Most jurisdictions, unlike Ohio, have opted to retain the immunity in limited areas or have replaced the doctrine with a standard similar to that of the reasonably prudent person.

#### APPROACHES OF OTHER JURISDICTIONS

Wisconsin was the first court to express general dissatisfaction with the parent-child tort immunity doctrine. In *Goller v. White*,<sup>114</sup> the court abrogated the immunity except in two situations: "(1) where the alleged negligent act involves an exercise of parental authority over the child; and (2) where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care."<sup>115</sup> Despite being criticized for its two-fold exceptions which allowed the parent "carte blanche to act negligently toward his child . . . with impunity,"<sup>116</sup> the *Goller* exceptions recognized the legitimate concern over infringing upon the parents' discretion in performing their parental obligations.

The more liberal California approach, developed in *Gibson v. Gibson*<sup>117</sup>, totally abrogated the doctrine and replaced it with the following test: "what would an ordinarily reasonable and prudent *parent* have done in similar circumstances?"<sup>118</sup> This test has been adopted by one other jurisdiction, which once recognized the *Goller* exceptions.<sup>119</sup>

The *Gibson* test has been supported since it avoids the inconsistent results reached under a *Goller* approach<sup>120</sup> and because it is more flexible, allowing the court to impose or reject the immunity as the situation demands.<sup>121</sup> However, the reasonably prudent parent standard has drawn severe criticism by courts<sup>122</sup> and writers<sup>123</sup> since the test "requires that parents conform to a community standard that may be directly at odds with the parents' belief as to how to raise

<sup>112</sup>See Appendix to this Comment which lists thirty-five states that have wholly or partially repudiated the immunity.

<sup>113</sup>See, e.g., *Falco v. Pados*, 444 Pa. 372, 282 A.2d 351 (1971).

<sup>114</sup>20 Wis. 2d 402, 122 N.W.2d 193 (1963).

<sup>115</sup>*Id.* at 413, 122 N.W.2d at 198.

<sup>116</sup>*Gibson*, 3 Cal. 3d at 921, 479 P.2d at 653, 92 Cal. Rptr. at 293.

<sup>117</sup>3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971).

<sup>118</sup>*Id.* at 921, 479 P.2d at 653, 92 Cal. Rptr. at 293. See Comment, *The "Reasonable Parent" Standard: An Alternative to Parent-Child Tort Immunity*, 47 U. COLO. L. REV. 795 (1976).

<sup>119</sup>See generally, *Anderson v. Stream*, 295 N.W.2d 595 (Minn. 1980).

<sup>120</sup>*Id.*

<sup>121</sup>See Comment, *A Rule in Need of Change*, *supra* note 16.

<sup>122</sup>See *Holodook v. Spencer*, 36 N.Y. 2d 35, 324 N.E.2d 338, 364 N.Y.S. 2d 859 (1974).

<sup>123</sup>See Comment, *A Job Half-Done*, *supra* note 29.

their children."<sup>124</sup>

A third approach, which has drawn acceptance by the Illinois appellate courts, would abrogate the immunity where the negligent act occurred outside the scope of the parental relationship.<sup>125</sup> That view has been couched in different terms. In *Cummings v. Jackson*,<sup>126</sup> the court abrogated the immunity where the negligent act is a breach of a duty "owed primarily to the general public, however, and only incidentally to the members of the family,"<sup>127</sup> thus, taking the act outside the scope of the family relationship.

As the Illinois approach is relatively new, it has not yet gained either acceptance or rejection at any level. However, the approach is laudable as it seeks to compensate the child in situations where, previously, recovery was denied to the child yet allowed to a member of the general public. The obvious criticism of this view is that it denies redress to the injured minor in situations where the negligent act can be classified as within the parental relationship.

A final approach<sup>128</sup> is derived from a recent Florida Supreme Court decision. In *Ard v. Ard*,<sup>129</sup> the court abrogated the immunity in negligence suits to the extent of the parents' existing liability insurance coverage.<sup>130</sup> The court stressed that "[t]he presence of this type of insurance cannot create a liability where none previously existed, but, rather, forms the basis for the recognition of the change in conditions upon which the public policy behind the immunity is based."<sup>131</sup>

The Florida approach, despite its problems with the family exclusion clause exception,<sup>132</sup> recognizes that insurance defeats the traditional justifications for the doctrine. Since most parent-child suits occur in the automobile negligence situation where insurance likely exists,<sup>133</sup> the Florida view should be able to effectively guide a court in the majority of cases.

That approach eliminates the inconsistencies of categorizing the negligent act either as one of parental discretion or control or as within or outside the scope of the parental relationship. The Florida view also avoids subjecting

<sup>124</sup>*Id.* at 656.

<sup>125</sup>See *Illinois Nat'l Bank & Trust Co. v. Turner*, 83 Ill. App. 3d 234, 403 N.E.2d 1256 (1980).

<sup>126</sup>57 Ill. App. 3d 68, 372 N.E.2d 1127 (1978).

<sup>127</sup>*Id.* at 70, 372 N.E.2d at 1128.

<sup>128</sup>See Appendix for additional approaches.

<sup>129</sup>414 So. 2d 1066 (Fla. 1982).

<sup>130</sup>*Id.* at 1067. The court did qualify its abrogation by stating that the immunity would not be waived if no insurance existed or if the insurance policy contained a family exclusion clause. *Id.* at 1070.

<sup>131</sup>*Id.* at 1068.

<sup>132</sup>See Comment, *A Job Half-Done*, *supra* note 29, for an explanation of this inconsistency.

<sup>133</sup>See Comment, *A Job Half-Done*, *supra* note 29, at 650, which discusses the observation of the Florida Supreme Court in *Ard v. Ard*, *supra* note 129, where it predicted that the most common child/parent suit will involve automobile accidents.



parents to adherence to the nebulous community standard of a *Gibson* approach. Although it can be criticized since it limits recovery where insurance exists only, with the possible discriminatory effect on those unable to afford liability insurance, the Florida approach will provide redress to a large class of injured plaintiffs who would have previously borne the consequences of another's negligent act.

The various approaches discussed above demonstrate that states, including Ohio, will continue to be faced with litigation as to which approach constitutes the most equitable view. In point of fact, a further issue concerning the status of parental immunity has arisen due to the response of the insurance industry to the trend toward abrogation of the immunity.

#### OHIO ABROGATION NULLIFIED BY FAMILY EXCLUSION CLAUSES?

An issue not yet raised in the Ohio Supreme Court is whether a family exclusion clause<sup>134</sup> in a liability insurance policy can operate to defeat the court's abrogation of the parental-child tort immunity doctrine. By sustaining the validity of a family exclusion clause,<sup>135</sup> the court would not only be contradicting its own rationale when it abrogated the immunity but it would also be violating an express public policy of this state as evidenced by the legislature's adoption of a Financial Responsibility Act.<sup>136</sup>

When the Ohio Supreme Court abrogated the immunity doctrine, it stated that the traditional justifications supporting the doctrine were absent.<sup>137</sup> To allow insurance companies to circumvent its rationale in *Kirchner* by permitting family exclusion clauses, that have the effect of reinstating the immunity, is obviously inconsistent.<sup>138</sup> Furthermore, since virtually no intrafamily suits are brought except where there is insurance,<sup>139</sup> recognizing the family exclusion clause would destroy the rights of the minor child to bring suit. Such a harsh result would be violative of the court's rationale in rejecting the immunity doctrine.

<sup>134</sup>Such a clause provides that the liability policy does not cover injuries to a named insured or to a member of the insured's family, if the injuries are caused by the named insured.

<sup>135</sup>The court may likely sustain the validity of such a clause if it follows Ohio precedent. This proposition is supported by the statement in the *Signs* case that if insurance companies are fearful of the danger of fraud and collusion "they could provide in their policies that there be no coverage in reference to an action between such unemancipated child and his parent." *Signs*, 156 Ohio St. at 577, 103 N.E.2d at 748.

<sup>136</sup>OHIO REV. CODE ANN. §4507.212 (Baldwin 1983).

<sup>137</sup>See *supra* text accompanying notes 103-07.

<sup>138</sup>See Comment, *Family Exclusion Clauses: Whatever Happened to the Abrogation of Intrafamily Immunity*, 21 SAN DIEGO L. REV. 415 (1984) [hereinafter cited as Comment, *Family Exclusion Clauses*] where the author argues that "[b]y denying indemnity for the negligence of an insured against another family member, the insurance industry destroys what was achieved through the abrogation in intrafamily immunity." *Id.* at 420. The family exclusion clauses' inconsistency with either total or partial abrogation of the immunity doctrine is also condemned in Note, *The Household Exclusion Clause — Returning to the Days of Family Immunity: State Farm Fire & Casualty Co. v. McPhee*, 7 HAMILINE L. REV. 507 (1984) [hereinafter cited as Note, *The Household Exclusion Clause*].

<sup>139</sup>See *Gibson*, 3 Cal. 3d 914, 922, 479 P.2d 648, 653, 92 Cal. Rptr. 288, 293 (1971) (citing James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549, 553 (1948)).

Of course, the court could argue that such clauses, which have the effect of reinstating the immunity where the court has previously abrogated it, are supportable on other grounds. For example, the court can argue freedom of contract principles, namely, that the insurer and insured can bargain for various kinds of liability insurance.<sup>140</sup> However, since most insurance contracts are adhesional, the inclusion of the family exclusion clause should be declared unconscionable as a "bad faith effort by insurance companies to misrepresent policy benefits to unwary and unsophisticated consumers."<sup>141</sup>

Additionally, recognition by the Ohio Supreme Court of the family exclusion clause violates an express public policy of the state. When it enacted the law that requires every driver operating a motor vehicle in Ohio to maintain proof of financial responsibility,<sup>142</sup> arguably the legislature sought to provide minimum levels of insurance for any injured motorists.<sup>143</sup> Allowing a family exclusion clause to eradicate the minimum levels of protection that the legislature sought to provide would contravene the dictates of Ohio's Financial Responsibility Act.<sup>144</sup>

Furthermore, approval of family exclusion clauses in automobile liability insurance policies would also violate express statutory language to the contrary. Ohio Revised Code §4509.54 lists the permissible exclusions of automobile liability policies and does not include family exclusion clauses among its permissible exclusions.<sup>145</sup> Thus, Ohio should not recognize the exclusion clause, particularly in the context of automobile insurance policies.<sup>146</sup>

The issue of the family exclusion clause (i.e., as the functional equivalent

<sup>140</sup>This argument lacks merit due to the increasing use by insurance companies of the family exclusion clause. For example, the court in *Schwalbe v. Jones*, 16 Cal. 3d 514, 522 n. 9, 546 P.2d 1033, 1038 n. 9, 128 Cal. Rptr. 321, 326 n. 9 (1976) took judicial notice that such clauses appeared in virtually all auto insurance policies issued in that state. *Id.* Although the holding in *Schwalbe* was overruled in *Cooper v. Bray*, 21 Cal. 3d 841, 582 P.2d 604, 148 Cal. Rptr. 148 (1978) (en banc), the judicial notice taken in *Schwalbe* remains valid. See *infra* text accompanying note 147.

<sup>141</sup>Comment, *Family Exclusion Clauses*, *supra* note 138 at 416.

<sup>142</sup>See *supra* note 136.

<sup>143</sup>Since Ohio does not keep records of debate surrounding its legislative enactments, this proposition is subject to an attack that it is mere speculation. However, one of the obvious effects of such a law should be an increase in the percentage of motorists who carry liability insurance.

<sup>144</sup>By analogy, cases from other jurisdictions support this proposition. See *Estate of McNeal v. Farmer's Ins. Exch.*, 93 Nev. 348, 566 P.2d 81 (1977). (Family exclusion clause is void where it violates state law's minimum levels of required liability insurance) and *Allstate Ins. Co. v. Wyoming Ins. Dept.*, 672 P.2d 810 (Wyo. 1983). (Clause is void to extent of minimum coverage contemplated by state law).

<sup>145</sup>OHIO REV. CODE ANN. §4509.54 provides:

A motor-vehicle liability policy need not insure any liability under any workers' compensation law, or any liability on account of bodily injury to or death of an employee of the insured while engaged in the employment, other than domestic, of the insured, or while engaged in the operation, maintenance, or repair of any such motor vehicle, or any liability for damage to property owned by, rented to, in charge of, or transported by the insured. *Id.*

<sup>146</sup>Since Ohio expressly disapproves of the family exclusion clause in automobile insurance policies under §4509.54, it should also disapprove of them in homeowner's policies. See Note, *The Household Exclusion Clause*, *supra* note 138, where the author states that approval of a family exclusion clause in a homeowner's policy and disapproval of such clause in an auto policy is an "inherent inconsistency." *Id.* at 517.

of the immunity doctrine) is raised due to the strong possibility of future litigation in this area. For example, the Allstate Insurance Company, a party in both *Karam* and *Sumwalt*, now includes family exclusion clauses in its liability insurance policies.<sup>147</sup> If they have not done so already, probably many other insurance companies will follow Allstate's lead to avoid liability, even though the Ohio Supreme Court has abrogated the immunity doctrine. It will be a matter of time until a parent or child challenges such a clause as being violative of the public policy expressed either by the court's cases or the legislature's statutory enactments.

The debate over the insurance industry's use of the family exclusion clause has surfaced in other states, with conflicting results. For example, the California courts have upheld the validity of family exclusion clauses despite their inconsistency with court opinions totally abrogating parental immunity in California.<sup>148</sup> In contrast, the Wyoming courts hold such clauses invalid, with the effect of permitting suits between parents and children, even though the courts still retain the immunity doctrine in Wyoming.<sup>149</sup>

The erratic results of courts dealing with the parental immunity/family exclusion clause issue should signal the Ohio courts to prepare for such litigation. With the results of the other jurisdictions in mind, the Ohio courts can remain consistent with *Kirchner's in toto* obliteration of the immunity doctrine by holding any family exclusion clause invalid.

### CONCLUSION

With its decision in *Kirchner v. Crystal*, the Ohio Supreme Court has purportedly laid to rest the anachronistic parent-child tort immunity doctrine. Unfortunately, the abrupt manner in which the court reversed its position on parental immunity has placed the status of the doctrine in doubt. Justice J.P. Celebrezze's inexplicable change from *Mauk's* retention of the immunity to *Kirchner's in toto* rejection of the doctrine some five months later has unnecessarily opened the court to the criticism that the change was political maneuvering.<sup>150</sup>

Despite the possible problems with the manner the court employed in reversing its views on parental immunity, abrogation of the doctrine in *Kirchner* clearly comports with the current legal thought in most American jurisdictions. As evidenced by the experiences of other states that have at least partially abrogated the doctrine, the probability of future litigation in Ohio on the im-

<sup>147</sup>A typical Allstate provision reads:

THIS INSURANCE DOES NOT APPLY UNDER: Coverage B, bodily injury to any insured or member of the family of an insured residing in the same household as the insured.

<sup>148</sup>See *Farmers Ins. Exch. v. Cocking*, 29 Cal. 3d 383, 628 P.2d 1, 173 Cal. Rptr. 846 (1981).

<sup>149</sup>See *Allstate Ins. Co. v. Wyoming Ins. Dept.*, 672 P.2d 810 (Wyo. 1983).

<sup>150</sup>See *supra* text preceding note 111 and *see also, supra* notes 2 and 6.

munity issue is high. This high probability of future litigation is due to the reaction of the liability insurance industry in placing family exclusion clauses in insurance policies in an attempt to circumvent the court's abrogation of the immunity.<sup>151</sup> In light of the other states' experiences, Ohio can avoid the inconsistency of sustaining the validity of family exclusion clauses by declaring such clauses invalid.<sup>152</sup>

While the Ohio Supreme Court is applauded for its rejection of parent-child tort immunity, its change was long overdue. "Why intelligent Justices of this court had to wait this long to discern the justice in eliminating parental and child immunity is inexplicable. . . . [U]ntil our decision today some parents and children were denied due process of law and equal justice. This was an unnecessary judicial extravagance."<sup>153</sup>

JEFFREY L. HALL

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<sup>151</sup>See *supra* notes 140 and 147.

<sup>152</sup>See *supra* text accompanying notes 142-45 and note 138.

<sup>153</sup>15 Ohio St. 3d at 331, 474 N.E.2d at 279 (C. Brown, J., concurring).

## APPENDIX

### Validity of Parent-Child Immunity in the United States

#### I. Total Abrogation — Ten States

##### A. Parental Immunity Doctrine Replaced With Reasonable Parent Standard

1. California: Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971) (en banc).
2. Minnesota: Anderson v. Stream, 295 N.W.2d 595 (Minn. 1980).

##### B. Doctrine Eliminated Entirely

1. Hawaii: Petersen v. City and County of Honolulu, 51 Hawaii 484, 462 P.2d 1007 (1970).
2. Nevada: Rupert v. Stienne, 90 Nev. 397, 528 P.2d 1013 (1974).
3. New Hampshire: Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966).
4. New York: Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969). However, parents have no legal duty to their children to supervise them properly and, thus, are not liable for injuries caused by their failure to supervise. Holodook v. Spencer, 36 N.Y.2d 35, 51, 324 N.E.2d 338, 346, 364 N.Y.S.2d 859, 872 (1974).
5. Ohio: Kirchner v. Crystal, 15 Ohio St. 3d 326, 474 N.E.2d 275 (1984).
6. Pennsylvania: Falco v. Pados, 444 Pa. 372, 282 A.2d 351 (1971). Pennsylvania clarified its total abrogation by holding that "negligent supervision of a minor is not incognizable as a cause of action as a matter of law." Miller v. Leljedal, 71 Pa. Commw. 372, 379, 455 A.2d 256, 259 (1983).
7. South Carolina: Elam v. Elam, 275 S.C. 132, 268 S.E.2d 109 (1980).

##### C. Doctrine Never Actually Adopted

1. North Dakota: Nuelle v. Wells, 154 N.W.2d 364 (N.D. 1967).

## II. Partial Abrogation — Twenty-Five States

### A. Immunity Abrogated Except Where The Exercise of Parental Authority Or Discretion Is Somehow Involved

1. Arizona: *Sandoval v. Sandoval*, 128 Ariz. 11, 623 P.2d 800 (1981) (en banc). Immunity abrogated in automobile negligence cases and where the negligent act involved a breach of "a duty owed to the world at large, as opposed to duty owed to a child within the family sphere." *Id.* at 14, 623 P.2d at 803.
- \*2. Delaware: *Schneider v. Coe*, 405 A.2d 682 (Del. 1979).
3. Illinois: *Illinois Nat'l Bank & Trust Co. v. Turner*, 83 Ill. App. 3d 234, 403 N.E.2d 1256 (1980). *See also*, *Larson v. Buschkamp*, 105 Ill. App. 3d 965, 435 N.E.2d 221 (1982) *and* *Hogan v. Hogan*, 106 Ill. App. 3d 104, 435 N.E.2d 770 (1982). However, the most recent Illinois Supreme Court case stated that parents are immune unless their conduct was willful or wanton. *Thomas v. Chicago Bd. of Educ.*, 77 Ill. 2d 165, 171, 395 N.E.2d 538, 540-41 (1979).
4. Iowa: *Turner v. Turner*, 304 N.W.2d 786 (Iowa 1981).
5. Kentucky: *Rigdon v. Rigdon*, 465 S.W.2d 921 (Ky. 1970).
6. Michigan: *Plumley v. Klein*, 388 Mich. 1, 199 N.W.2d 169 (1972).
7. New Jersey: *Small v. Rockfeld*, 66 N.J. 231, 330 A.2d 335 (1974).
8. Texas: *Felderhoff v. Felderhoff*, 473 S.W.2d 928 (Tex. 1971).
9. Vermont: *Wood v. Wood*, 135 Vt. 119, 370 A.2d 191 (1977).
10. Wisconsin: *Goller v. White*, 20 Wis. 2d 402, 122 N.W.2d 193 (1963). *Goller* is the leading case concerning the parental authority and discretion exceptions developed by most of the above jurisdictions.

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\*Delaware also falls among those jurisdictions that have abrogated the doctrine to the extent of liability insurance.

## B. Immunity Abrogated Where The Injury Was Caused By Negligence In A Motor Vehicle Accident

1. Alaska: Hebel v. Hebel, 435 P.2d 8 (Alaska 1967).
2. Connecticut: Ooms v. Ooms, 164 Conn. 48, 316 A.2d 783 (1972). *See also* CONN. GEN. STAT. ANN. §52-572c (West Supp. 1985).
3. Kansas: Nocktonick v. Nocktonick, 227 Kan. 758, 611 P.2d 135 (1980).
4. Maine: Black v. Solmitz, 409 A.2d 634 (Me. 1979). *See also* Flagg v. Flagg, 458 A.2d 748 (Me. 1983).
5. Montana: Transamerica Ins. Co. v. Royale, 656 P.2d 820 (Mont. 1983).
6. New Mexico: Guess v. Gulf Ins. Co., 96 N.M. 27, 627 P.2d 869 (1981).
7. North Carolina: Triplett v. Triplett, 34 N.C. 212, 237 S.E.2d 546 (1977). *See also* N.C. GEN. STAT. ANN. §1-539.21 (1983) *and* Snow v. Nixon, 52 N.C. App. 131, 277 S.E.2d 850 (1981).
8. Rhode Island: Silva v. Silva, 446 A.2d 1013 (R.I. 1982).
9. Virginia: Smith v. Kauffman, 212 Va. 181, 183 S.E.2d 190 (1971).
10. Washington: Merrick v. Sutterlin, 93 Wash. 2d 411, 610 P.2d 891 (1980).
11. West Virginia: Lee v. Comer, 224 S.E.2d 721 (W.Va. 1976).

## C. Immunity Abrogated to Extent of Liability Insurance

- \*\*1. Delaware: Williams v. Williams, 369 A.2d 669 (Del. 1976). *Williams* is limited to automobile negligence cases. *Id.* at 673.
2. Florida: Ard v. Ard, 414 So.2d 1066 (Fla. 1982).
3. Massachusetts: Sorensen v. Sorensen, 369 Mass. 350, 339 N.E.2d 907 (1975). Limited to automobile negligence cases. *Id.* at 352-53, 339 N.E.2d at 916.
4. Oklahoma: Unah v. Martin, 676 P.2d 1366 (Okla. 1984). Limited to automobile negligence cases. *Id.* at 1370.

## D. Immunity Abrogated Except Where Suit Seriously Disrupts Family Harmony

1. Missouri: Fugate v. Fugate, 582 S.W.2d 663 (Mo. 1979) (en banc).

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\*\*See II-A-2 above.

### III. Parent-Child Immunity Valid — Fourteen States

1. Alabama: *Owens v. Auto Mut. Indem.*, 235 Ala. 9, 177 So. 133 (1937). *See also* *American Fire & Casualty Co. v. State Farm Mut. Auto Ins. Co.*, 290 Ala. 21, 273 So.2d 186 (1973).
2. Arkansas: *Thomas v. Inmon*, 268 Ark. 221, 594 S.W.2d 853 (1980). Arkansas has abrogated the doctrine in the case of willful and wanton conduct. *See* *Attwood v. Estate of Attwood*, 276 Ark. 230, 633 S.W.2d 366 (1982).
3. Colorado: *Horton v. Reaves*, 186 Colo. 149, 526 P.2d 304 (1974) (en banc).
4. Georgia: *Coleman v. Coleman*, 157 Ga. App. 533, 278 S.E.2d 114 (1981).
5. Idaho: *Pedigo v. Rowley*, 101 Idaho 201, 610 P.2d 560 (1980).
6. Indiana: *Vaughan v. Vaughan*, 161 Ind. App. 497, 316 N.E.2d 455 (1974). Indiana has abrogated the doctrine where the suit is against a non-custodial parent where the parents' marriage dissolved prior to the child's injury. *Buffalo v. Buffalo*, 441 N.E.2d 711 (Ind. App. 1982).
7. Louisiana: *Boundurant v. Boundurant*, 386 So.2d 705 (La. Ct. App. 1980). Louisiana has abrogated the doctrine where the parents are divorced. *Id.* at 706.
8. Maryland: *Shell Oil Co. v. Ryckman*, 43 Md. App. 1, 403 A.2d 379 (1979). Maryland has abrogated the doctrine for malicious and wanton wrongs. *Mahnke v. Moore*, 197 Md. 61, 77 A.2d 923 (1951).
9. Mississippi: *McNeal v. Estate of McNeal*, 254 So.2d 521 (Miss. 1971). *See also* (the landmark decision recognizing parental immunity in the United States) *Hewlett v. George*, 69 Miss. 703, 9 So. 885 (1891).
10. Nebraska: *Pullen v. Novak*, 169 Neb. 211, 99 N.W.2d 16 (1959).



11. Oregon: *Winn v. Gilroy*, 61 Or. App. 243, 656 P.2d 386 (1983). Oregon has abrogated the doctrine where the tort is willful or malicious. *Chaffin v. Chaffin*, 239 Or. 374, 397 P.2d 771 (1964).
12. Tennessee: *Campbell v. Gruttemeyer*, 222 Tenn. 133, 432 S.W.2d 894 (1968).
13. Utah: *Elkington v. Foust*, 618 P.2d 37 (Utah 1980). Immunity abrogated only for intentional torts.
14. Wyoming: *Oldman v. Bartshe*, 480 P.2d 99 (Wyo. 1971). Wyoming has abrogated the doctrine where a parent has injured his child willfully or wantonly. *Id.* at 101.

#### IV. Issue Not Considered — One State

1. South Dakota: Courts in this state have not considered the issue of a minor suing a parent but have held that a parent cannot maintain a suit against an unemancipated child for injuries sustained in an automobile accident. *See Kloppenburg v. Kloppenburg*, 66 S.D. 167, 280 N.W. 206 (1938).