Campbell Law Review

Volume 13
Issue 1 *Winter 1990*

Article 4

January 1990

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Recommended Citation

Elizabeth Ashley Baker, *Closing One Door on the Parent-Child Immunity Doctrine: Legislature Rejects the Decision of Coffey v. Coffey*, 13 Campbell L. Rev. 105 (1990).

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NOTES

CLOSING ONE DOOR ON THE PARENT-CHILD IMMUNITY DOCTRINE: LEGISLATURE REJECTS THE DECISION OF *Coffey v. Coffey*

INTRODUCTION

The doctrine of parent-child immunity began in the American legal system to preserve harmony and tranquility among family members.[1] The rationale was that suits between members of a family unit would destroy the management of the home and cause social disorder and civic decay.[2] North Carolina adopted the parent-child immunity doctrine in 1923.[3] The doctrine provides that an unemancipated minor child cannot maintain an action against his parents for personal injuries.[4] Conversely, the child's immunity is considered reciprocal of the parent's immunity.[5] Neither a parent nor his personal representative is allowed to bring an action against an unemancipated minor child for a personal tort.[6] The doctrine of parent-child immunity is entirely a creation of the courts.[7] Yet, the courts in North Carolina have consistently refused to abrogate parent-child immunity without legislative action.[8]

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1. 67A C.J.S. *Parent and Child* § 127 (1978).
2. Small v. Morrison, 185 N.C. 577, 584, 118 S.E. 12, 15 (1923).
3. *Id.*
4. Gillikin v. Burbage, 263 N.C. 317, 321, 139 S.E.2d 753, 757 (1965).
5. *Id.*
6. *Id.*
7. 67A C.J.S. *Parent and Child* § 127 (1978).
8. *See, e.g.*, Skinner v. Whitley, 281 N.C. 476, 189 S.E.2d 203 (1972)(unemancipated minor cannot bring action against parent for wrongful death); Foster v. Foster, 264 N.C. 694, 142 S.E.2d 638 (1965)(unemancipated minor cannot maintain tort action against parent even after reaching majority); Gillikin v. Burbage, 263 N.C. 317, 139 S.E.2d 753 (1965)(unemancipated minor cannot maintain tort action against parent for injuries, even though parent's liability is covered by liability insurance); Redding v. Redding, 235 N.C. 638, 70 S.E.2d 676 (1952)(unemancipated minor child cannot maintain a tort action against his parents); Camp v. Camp, 89 N.C. App. 347, 365 S.E.2d 675 (1988)(parent cannot bring ac-

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The unwillingness of the North Carolina courts to abolish the judicially created parent-child immunity doctrine prompted legislative action in 1975.[9] The North Carolina legislature enacted N.C. Gen. Stat. § 1-539.21 which abolished a parent's immunity to suit, but only in motor vehicle cases.[10] In effect, parents injured in motor vehicle accidents by the negligence of their children were unable to sue their unemancipated minor children.[11]

In *Coffey v. Coffey*,[12] the North Carolina Court of Appeals once again refused to abrogate parent-child immunity and allow a parent to maintain an action against a child even though the child had reached the age of majority at the time of the lawsuit.[13] However, the court of appeals allowed the plaintiff-mother to join the father as a party defendant under the family purpose doctrine.[14]

Following the decision in *Coffey*, the North Carolina legislature amended N.C. Gen. Stat. § 1-539.21 and completely abolished parent-child immunity in motor vehicle cases.[15] The amendment rejects the *Coffey* decision and allows parents to sue a child for injuries caused by the child's negligent operation of a motor vehicle.[16]

This Note has four objectives. First, this Note will summarize the facts of *Coffey*. Second, this Note will review the history of parent-child immunity and the role of the family purpose doctrine in cases involving parent-child immunity in automobile cases. Third, this Note will analyze the *Coffey* case, the North Carolina Legislature's abolishment of parent-child immunity in motor vehicle cases, and possible alternatives to the parent-child immunity doctrine in cases other than those involving motor vehicles. Fourth, this Note will suggest that the North Carolina courts are not powerless to abrogate parent-child immunity. The courts

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tion against minor child for injuries sustained in accident involving automobile operated by child).

9. N.C. GEN. STAT. § 1-539.21 (1975).

10. *Id.*

11. *Id.*

12. Coffey v. Coffey, 94 N.C. App. 717, 381 S.E.2d 467 (1989), *aff'd*, 326 N.C. 586, 391 S.E.2d 40 (1990).

13. *Id.*

14. *Id.* at 723, 381 S.E.2d at 471. The family purpose doctrine is a legal fiction that imputes liability to the owner of a motor vehicle when a member of his family commits a tort while driving his car. Note, *Use of The Family Purpose Doctrine When No Outsiders Are Involved*, 21 WAKE FOREST L. REV. 243 (1985).

15. N.C. GEN. STAT. § 1-539.21 (Supp. 1989)

16. *Id.*

should take the initiative to modernize the judicially created parent-child immunity doctrine as it applies to tort actions between parents and their children.

THE CASE

On January 27, 1988, Elvera A. Coffey sued her nineteen-year-old son, Michael Coffey, alleging that she sustained injuries from his negligent operation of an automobile in which she was a passenger.[17] The accident occurred on August 17, 1985 when the defendant was sixteen years old and was living with the plaintiff.[18] The parties stipulated that the defendant was the unemancipated minor son of the plaintiff at the time of the accident.[19] Prior to trial, plaintiff moved to amend her complaint to join Clayton Coffey, the defendant's father, as a party defendant.[20] Plaintiff alleged that the father was liable under the family purpose doctrine.[21] The trial court denied plaintiff's motion to amend[22] without assigning reasons.[23] Defendants moved to dismiss the plaintiff's complaint on the basis it failed "to state a claim upon which relief [could] be granted."[24] The trial court thereafter granted summary judgment for the defendant and dismissed the case with prejudice.[25]

The plaintiff appealed, arguing that the defendant was an adult on the date the complaint was filed and was no longer immune from an action by a parent.[26] Specifically, the plaintiff ar-

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17. Coffey v. Coffey, 94 N.C. App. 717, 718, 381 S.E.2d 467, 468 (1989).
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. Rule 15(a) of the North Carolina Rules of Civil Procedure provides:

> (a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served, or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within 30 days after service of the amended pleading, unless the court otherwise orders.

N.C. GEN. STAT. § 1A-1, Rule 15(a) (1983).
23. Coffey v. Coffey, 94 N.C. App. 717, 718, 381 S.E.2d 467, 468 (1989).
24. N.C.R. Civ. P. 12(b)(6).
25. *Coffey*, 94 N.C. App. at 718, 381 S.E.2d at 468.
26. *Id.* at 719, 381 S.E.2d at 469.

gued that when a child reaches the age of majority the rule prohibiting a parent's action against a child should not apply because one of the reasons for the rule, the maintenance of the family relationship, no longer exists.[27] The plaintiff also argued that the trial court erred in not allowing the defendant's father to be joined as a party defendant under the family purpose doctrine.[28]

The North Carolina Court of Appeals affirmed the lower court and held that "the right to sue must exist at the time of the injury and the subsequent emancipation or majority of the minor is of no consequencce."[29] However, the court of appeals reversed the trial court's denial of plaintiff's motion to amend to join the father as a defendant under the family purpose doctrine.[30] The court of appeals found the trial court's denial of the plaintiff's motion an abuse of descretion.[31] The court held that under North Carolina Rules of Civil Procedure 20(a)[32] and 21,[33] joining the defendant's

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27. *Id. See infra* note 54 and accompanying text listing five policy reasons supporting the parent-child immunity doctrine.

28. *Coffey*, 94 N.C. App. at 721, 381 S.E.2d at 470.

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

30. *Id.* at 722, 381 S.E.2d at 471. The court noted that absent any declared reasons for denial of leave to amend, the appellate court can examine apparent reasons for the denial. Apparent reasons include: undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice and futility of the amendment. The court reasoned that since the trial court did not state reasons, none were apparent. The court found this an abuse of discretion. *Id.* However, Rule 15(a) does not specifically require the trial judge to state reasons for denial of a motion to amend pleadings. *See supra* note 22.

31. *Coffey*, 94 N.C. App. at 722, 381 S.E.2d at 471.

32. Rule 20(a) of the North Carolina Rules of Civil Procedure provides:

> (a) Permissive joinder.—All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all parties will arise in the action. *All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all parties will arise in the action.* A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

N.C. GEN. STAT. § 1A-1, Rule 20(a) (1983)(emphasis added).

33. Rule 21 of the North Carolina Rules of Civil Procedure provides:

father was permissible and notice was served without delay.[34] Accordingly, the court of appeals remanded the case to allow the defendant's father to be joined in the action.[35]

Judge Lewis dissented to reversing the denial of the motion to amend the complaint.[36] He noted that the majority opinion put the appellate court in the position of legislating how much time constitutes undue delay.[37] He determined that the trial judge is in a better position to exercise such discretion.[38]

BACKGROUND

A. *History of Parent-Child Immunity*

At common law, there was no immunity between parents and children for their torts.[39] The doctrine of parent-child immunity was first introduced in 1891 in the case of *Hewlett v. George*.[40] In *Hewlett*, a minor child brought an action against her mother's estate for illegal imprisonment in an insane asylum.[41] The daughter alleged that the mother was motivated by a desire for the daughter's property.[42] The court would not allow the daughter's claim stating:

> [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 interest of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent.[43]

> Neither misjoinder of parties nor misjoinder of parties and claims is ground for dismissal of an action; but *on such terms as are just parties may be dropped or added by order of the court* on motion of any party or on its own initiative at any stage of the action. Any claim against a party may be severed and proceeded with separately.

N.C. GEN. STAT. § 1A-1, Rule 21 (1983)(emphasis added).

34. *Coffey*, 94 N.C. App. at 721, 381 S.E.2d at 470. Plaintiff served a copy of the proposed amendment on defendant Michael Coffey notifying him that she would appear in court on a specified day to request an order allowing amendment. *Id.*

35. *Id.* at 723, 381 S.E.2d at 471.

36. *Id.* at 723, 381 S.E.2d at 471-72 (Lewis, J., dissenting).

37. *Id.*

38. *Id.*

39. 67A C.J.S. *Parent and Child* § 127 (1978).

40. 68 Miss. 703, 9 So. 885 (1891).

41. *Id.*

42. *Id.*

43. *Id.* at 705, 9 So. at 887.

The court based its argument solely on the fear that civil actions between parents and children would disrupt the family unit and society.[44] Gradually, courts in other states also adopted the parent-child immunity doctrine.[45]

North Carolina first used the doctrine of parent-child immunity in the case of *Small v. Morrison*.[46] In *Small*, the North Carolina Supreme Court denied a minor's claim against her father for injuries sustained in an automobile collision.[47] The court stated that "[f]rom the very beginning, the family in its integrity has been the foundation of American institutions, and we are not now disposed to depart from this basic principle."[48] The *Small* decision set precedent and was rigorously adhered to by the North Carolina courts.[49]

Thus, the general rule emerged in North Carolina that "an unemancipated minor child cannot maintain a tort action against his parents for personal injuries, even though the parent's liability is covered by liability insurance."[50] Furthermore, the child's immunity is considered reciprocal of the parent's immunity and bars tort actions by parents against their unemancipated minor children.[51]

In *Skinner v. Whitley*, the North Carolina Supreme Court was urged to abolish parent-child immunity in a wrongful death action but refused to do so.[52] The plaintiff argued that the death of family members removed the family relationship and the reason for the rule.[53] The court rejected this theory and gave five policy reasons supporting the doctrine: "(1) disturbance of domestic tranquility, (2) danger of fraud and collusion, (3) depletion of family [funds], (4) the possibility of inheritance, by the parent, of the amount recovered in damages by the child, and (5) the interference

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44. *Id.* The court also stated: "But so long as the parent is under obligation to care for, guide and control, and the child is under reciprocal obligation to aid and comfort and obey, no such action as this can be maintained." *Id.*

45. *See generally* McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); Roller v Roller, 37 Wash. 242, 79 P. 788 (1905); Barlow v. Iblings, 261 Iowa 713, 156 N.W.2d 105 (1968); Parks v. Parks, 390 Pa. 287, 135 A.2d 65 (1957).

46. 185 N.C. 577, 118 S.E. 12 (1923).

47. *Id.*

48. *Id.* at 584, 118 S.E. at 15.

49. *See supra* note 8.

50. Gillikin v. Burbage, 263 N.C. 317, 321, 139 S.E.2d 753, 757 (1965).

51. *Id.*

52. Skinner v. Whitley, 281 N.C. 476, 189 S.E.2d 230 (1972).

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

with parental care, discipline and control."[54] The court refused to abolish or modify the parent-child immunity doctrine which began nearly 50 years prior to the *Skinner* case.[55] The court stated that "total abrogation of the immunity rule would lead to judicial supervision over the conduct of parent and child in the ordinary operation of the household. . . . Piecemeal abrogation of established law by judicial decree is, like a partial amputation, ordinarily unwise and usually unsuccessful."[56] However, the court noted that if the immunity rule in ordinary negligence cases is no longer suited to the times, change should occur "*prospectively* by legislation rather than *retroactively* by judicial decree."[57]

B. Enactment of N.C. Gen. Stat. § 1-539.21

Legislative action was taken with regard to the parent-child immunity doctrine as it relates to motor vehicle cases.[58] In 1975, the North Carolina Legislature enacted N.C. Gen. Stat. § 1-539.21[59] which provides:

> **Abolition of parent-child immunity in motor vehicle cases.**
>
> The relationship of parent and child shall not bar the right of action by a minor child against a parent for personal injury or property damages arising out of the operation of a motor vehicle owned or operated by such parent.[60]

North Carolina General Statute § 1-539.21 abolished parent child immunity only in motor vehicle cases.[61] The growing number of automobile accidents and the existence of compulsory automobile liability insurance resulted in legislative action.[62] However, the statute abolished only a parent's immunity to suit.[63] Therefore, parents injured by their children's negligence in motor vehicle cases were still unable to bring actions against their unemanci-

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54. *Id.* at 480, 189 S.E.2d at 232.
55. *Id.* at 484, 189 S.E.2d at 235.
56. *Id.*
57. *Id.*
58. N.C. GEN. STAT. § 1-539.21 (1975).
59. *Id.*
60. *Id.*
61. *Id.*
62. Lee v. Mowett Sales Co., 316 N.C. 489, 492, 342 S.E.2d 882, 885 (1986).
63. Allen v. Allen, 315 N.C. App. 504, 506, 333 S.E.2d 530, 532 (1985).

pated minor children.[64]

Ledwell v. Berry[65] challenged the constitutionality of N.C. Gen. Stat. § 1-539.21 on the basis of the equal protection clauses of the North Carolina and United States Constitutions. In *Ledwell*, a minor child sued his parents for personal injuries that allegedly resulted from the parent's negligent operation of a motor vehicle.[66] The parents argued that by removing only the parent's immunity to suit, and not the child's, the North Carolina Legislature had created an arbitrary classification to which the doctrine of parent-child immunity did not apply.[67] The parents contended this classification was not based on a reasonable distinction.[68] The court held that the statute was constitutional and the class recognized by the North Carolina Legislature was based on a reasonable distinction.[69]

North Carolina General Statute § 1-539.21 was challenged again in *Allen v. Allen*.[70] In *Allen*, a parent sued her sixteen-year-old son for injuries she sustained while riding in an automobile operated by the son.[71] The plaintiff-mother argued that the title of the statute "Abolition of Parent-Child Immunity in Motor Vehicle Cases" should be used in construing the meaning of the statute.[72] Specifically, the plaintiff asserted that the title implied total abolition of the parent-child immunity doctrine in motor vehicle cases.[73] The plaintiff's final contention was that the statute violated the substantive due process and equal protection requirements of the North Carolina and United States Constitutions.[74]

The *Allen* court held that N.C. Gen. Stat. § 1-539.21 abolished

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64. N.C. GEN. STAT. § 1-539.21 was amended in 1989 allowing parents to sue their children for negligence in motor vehicle accidents. The effective date of the amendment is August 12, 1989. N.C. GEN. STAT. § 1-539.21 (Supp. 1989). *See infra* note 149 and accompanying text.

65. 39 N.C. App. 224, 249 S.E.2d 862 (1978), *disc. rev. denied* 296 N.C. 585, 254 S.E.2d 35 (1979).

66. *Id.* at 224, 249 S.E.2d at 863.

67. *Id.* at 225, 249 S.E.2d at 863.

68. *Id.* at 226, 249 S.E.2d at 864. "Any law adopted by the General Assembly must have a reasonable relation to the accomplishment of the legislative purpose and must not be unreasonable in degree in comparison with the probably public benefit." *Id.* at 225, 249 S.E.2d at 863 (citing Indemnity Co. v. Ingram Comm'r of Ins., 290 N.C. 457, 226 S.E.2d 498 (1976)).

69. *Ledwell*, 39 N.C. App. at 226, 249 S.E.2d at 864.

70. 76 N.C. App. 504, 333 S.E.2d 530 (1985).

71. *Id.* at 505, 333 S.E.2d at 532.

72. *Id.*

73. *Id.*

74. *Id.*

only a parent's immunity to suit.[75] The *Allen* court reasoned that a statute's title may be considered where there is confusion in the text but in N.C. Gen. Stat. § 1-539.21 the legislative intent was clearly expressed and was controlling.[76] Finally, the *Allen* court followed *Ledwell*[77] and held that N.C. Gen. Stat. § 1-539.21 was constitutional and did not violate the state and federal equal protection clauses.[78] The court also reasoned that "[§] 1-539.21 [did] not violate substantive due process because it [did] not deny plaintiff a right to which she would otherwise be entitled."[79] The court stated: "To hold that an established right was taken away because the statute did not open the same door for parents is incorrect. Even if one views [§] 1-539.21 as 'denying' parents of such a right, such denial is within the rights of the legislature."[80]

The enactment of N.C. Gen. Stat. § 1-539.21 placed a significant limitation on the parent-child immunity doctrine. However, the statute abolished only a parent's immunity from suit.[81] The statute continued to leave parents who were injured by their children's negligent driving without compensation.[82]

C. *Use of the Family Purpose Doctrine*

The family purpose doctrine has been invoked by parents in suits against their children when such actions would have otherwise been barred by the parent-child immunity doctrine.[83] The family purpose doctrine is based on the rule of respondeat superior and the principles of agency.[84] The family purpose doctrine imputes liability to the owner of a vehicle for the negligent operation of that vehicle by a member of the owner's household.[85] Owner liability is imposed:

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75. *Id.*
76. *Id.* at 505-06, 333 S.E.2d at 532.
77. *See supra* note 65.
78. Allen v. Allen, 76 N.C. App. 504, 506, 333 S.E.2d 530, 532 (1985).
79. *Id.*
80. *Id.*
81. *Id.* at 504, 333 S.E.2d at 532.
82. *Id.*; *see also*, Camp v. Camp, 89 N.C. App. 347, 365 S.E.2d 675 (1988).
83. *E.g.*, Cox v. Shaw, 263 N.C. 361, 139 S.E.2d 676 (1965) (A child's negligent operation of an automobile caused the death of his mother, a passenger in the car. The mother's estate's action was barred against the minor child but was allowed against the husband-father under the family purpose doctrine.).
84. Note, *Automobile Agency-Family Purpose Doctrine - Wife's Liability for Husband's Negligence*, 38 N.C.L. REV. 249, 249 (1960).
85. Williams v. Trust Co., 292 N.C. 416, 419-20, 233 S.E.2d 589, 592 (1977).

> When it is shown (1) that the operator was a member of [the owner's] family or household and was living in his home, (2) that the vehicle was owned, provided and maintained for the general use, pleasure and convenience of [the owner's] family, and (3) that the vehicle was being so used by a member of [the owner's] family at the time of the accident with his express or implied consent.[86]

The family purpose doctrine "came into being as an instrument of social policy to afford greater protection for the rapidly growing number of motorists in the United States."[87]

The family purpose doctrine was typically used when the automobile owner's child negligently caused an accident that resulted in injury, death or property damage to a non-family member.[88] However, plaintiffs have tried to use the doctrine to recover in cases where the suit would be barred by parent-child immunity.[89] For example, suppose that a parent is injured in a car accident caused by his child's negligent driving.[90] The child's negligence can be imputed to the noninjured parent under the family purpose doctrine.[91] The injured parent can then file suit against the noninjured parent and in effect recover on the basis of the child's negligence.[92]

The most recent case in which recovery was allowed is *Cox v. Shaw*.[93] In *Cox*, the plaintiff alleged that the deceased minor child's negligent operation of an automobile caused the death of his mother, a passenger in the car.[94] The mother's estate brought an action against the father and the son's administratrix.[95] Parent-child immunity barred the suit against the son's administratrix.[96]

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86. *Id.*

87. Note, *supra* note 84, at 252-53.

88. Note, *Use of The Family Purpose Doctrine When No Outsiders Are Involved*, 21 WAKE FOREST L. REV. 243, 248 (1985).

89. *See, e.g.*, Camp v. Camp, 89 N.C. App. 347, 365 S.E.2d 675 (1988) (wife not allowed to recover from husband under family purpose doctrine for injuries caused by daughter's negligent operation of automobile because there was a question as to who had control of the automobile); Cox v. Shaw, 263 N.C. 361, 139 S.E.2d 676 (1965).

90. *See generally* Cox v. Shaw, 263 N.C. 361, 139 S.E.2d 676 (1965).

91. *Id.*

92. *Id.*

93. 263 N.C. 361, 139 S.E.2d 676 (1965).

94. *Id.* at 362, 139 S.E.2d at 678.

95. *Id.*

96. *Id.* at 363, 139 S.E.2d at 678.

The action was allowed against the father by imputing the son's negligence to the father under the family purpose doctrine.[97] A verdict for the mother's estate was returned against the father.[98] However, only the daughter who was not involved in the accident participated in the judgment.[99] Judgment was entered for one-third of the amount of the verdict to prevent the father and the son's estate from benefitting from the recovery.[100]

ANALYSIS

The court in *Coffey* was faced with the question of whether the defendant, who had reached the age of majority at the time of the lawsuit, was immune from suit by his parent for negligent conduct that occurred when he was an unemancipated minor.[101] The court held that the doctrine of parent-child immunity barred the action.[102] The court refused to carve out an exception to the doctrine even though the defendant was of majority at the time of the suit.[103] The following sections will examine policy rationales supporting the parent-child immunity doctrine as the rationales apply to the *Coffey* case and as to other actions in tort between parents and their children.

A. The Court's Reasoning

1. The Public Policy Rationale

As stated previously, the North Carolina Supreme Court has based parent-child immunity on various public policies. These include: "(1) disturbance of domestic tranquility, (2) danger of fraud and collusion, (3) depletion of the family [funds], (4) the possibility of inheritance, by the parent, of the amount recovered in damages by the child, and (5) interference with parental discipline and control."[104] The policy reasons have lost much of their force over the years, particularly when the child being sued has reached majority.[105] Only the first policy reason was addressed directly by the

97. *Id.* at 367, 139 S.E.2d at 680.
98. *Id.* at 368, 139 S.E.2d at 681.
99. *Id.*
100. *Id.*
101. Coffey v. Coffey, 94 N.C. App. 717, 718, 381 S.E.2d 467, 468 (1989).
102. *Id.* at 719, 381 S.E.2d at 469.
103. *Id.*
104. Skinner v. Whitley, 281 N.C. 476, 480, 189 S.E.2d 203, 232 (1972).
105. *Coffey*, 94 N.C. App. at 718, 381 S.E.2d at 486.

court in *Coffey*.[106] However, the remaining four policy reasons should also be considered in determining whether the parent-child immunity doctrine is consistent with modern day public policy or should be abolished in all contexts.[107]

First, the *Coffey* court considered the effect of suits between parents and children on domestic tranquility.[108] The court refused to allow the plaintiff to sue her minor son after he reached the age of majority stating that "[s]uch a purposeful delay would itself contravene domestic tranquility, one of the policy reasons supporting immunity."[109] Though the prevention of disturbance of domestic tranquility is one of the strongest arguments supporting parent-child immunity, it has serious flaws.[110] First, once an injury has occurred family harmony is disturbed.[111] Refusing to compensate for the injury does not help domestic tranquility and could cause more problems within the family unit.[112] Second, under N.C. Gen. Stat. § 1-539.21 a child is allowed to sue his parent for personal injuries and property damage caused by the parent's negligent operation of a motor vehicle.[113] This is inconsistent with the family harmony rationale. Furthermore, recovery is not limited to the amount of insurance coverage.[114] Third, the North Carolina Supreme Court allows a parent injured by a child's negligent operation of a motor vehicle to sue the noninjured parent under the family purpose doctrine.[115] A parent suing a child directly would not upset domestic tranquility any more than a child suing a parent[116] or a parent suing another parent by virtue of the family purpose doctrine.[117]

The danger of fraud and collusion is the second public policy

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106. *Id.*

107. *See generally* Comment, *The Last Pangs of Parent-Child Immunity in North Carolina: Lee v. Mowett Sales Co. and Allen v. Allen*, 22 WAKE FOREST L. REV. 607 (1987).

108. *Coffey*, 94 N.C. App. at 720, 381 S.E.2d at 469.

109. *Id.*

110. Comment, *supra* note 107, at 618.

111. *Id.*

112. *Id.*

113. N.C. GEN. STAT. § 1-539.21 (1975).

114. Lee v. Mowett Sales Co., 316 N.C. 489, 492, 342 S.E.2d 882, 885 (1986) (The existence of compulsory liability insurance in North Carolina was a factor that prompted legislative enactment of N.C. Gen. Stat. § 1-539.21.).

115. *See, e.g.*, Cox v. Shaw, 263 N.C. 361, 139 S.E.2d 676 (1965).

116. N.C. GEN. STAT. § 1-539.21 (1985).

117. *See generally* Cox v. Shaw, 263 N.C. 361, 139 S.E.2d 676 (1965).

rationale for parent-child immunity.[118] The existence of insurance could give family members a motive to initiate suits to gain unjustified awards from insurance companies.[119] N.C. Gen. Stat. § 1-539.21 rejects the danger of fraud and collusion rationale by allowing the child to sue the parent.[120] Fraud and collusion is no more likely to occur when a parent sues a child than when a child sues a parent.[121] Furthermore, the potential for fraud and collusion exists in all litigation.[122] In actions between family members courts should determine issues of fraud and collusion through impeachment by cross-examination.[123]

The third public policy rationale, the depletion of family funds, has been somewhat weakened by North Carolina's mandatory liability insurance requirements.[124] This argument also ignores the fact that parent-child immunity does not apply to actions by minors with respect to contract and property rights.[125] Recovery in contract and property actions are usually paid out of pocket while judgments from automobile accidents are covered by mandatory liability insurance.[126]

The fourth public policy rationale, the possibility of inheritance by the parent or child of any damages recovered by the injured party, is a weak argument at best.[127] Inheritance of an award by a tortfeasor is possible in any intrafamily suit.[128] However, other family members are allowed to sue each other.[129] Furthermore, the court could fashion relief to eliminate any enrichment of the tortfeasor as it did in *Cox v. Shaw*.[130]

Finally, the fifth public policy concern that a cause of action between a parent and child would interfere with parental control

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118. Skinner v. Whitley, 281 N.C. 476, 480, 189 S.E.2d 203, 232 (1972).

119. Comment, *supra* note 107, at 618.

120. N.C. GEN. STAT. § 1-539.21 (1985).

121. *Id.*

122. Lee v. Mowett Sales Co., 76 N.C. App. 556, 563, 334 S.E.2d 250, 254 (1985)(Becton, J., dissenting).

123. *Id.*

124. N.C. GEN. STAT. § 20-279.1 (1983).

125. 3 R. LEE, *North Carolina Family Law* § 247 (4th ed. 1981).

126. Comment, *supra* note 107, at 618.

127. Note, *Lee v. Mowett Sales Co.: North Carolina Retains its Partial Parent-Child Immunity Doctrine*, 65 N.C.L. REV. 1457, 1461 (1987).

128. *Id.*

129. N.C. GEN. STAT. § 52-5 (1965)(tort actions allowed between husband and wife).

130. *See supra* notes 93-100 and accompanying text.

does not apply to *Coffey*.[131] In *Coffey* the child had reached the age of majority when the lawsuit was filed and thus was no longer under the same parental controls as an unemancipated minor.[132] This argument also falters by allowing the child to sue the parent under N.C. Gen. Stat. § 1-539.21.[133] A child suing a parent would more likely interfere with parental control than a parent suing a child.[134]

2. *Stare Decisis*

In addition to public policy concerns, the *Coffey* court relied on *stare decisis* to reach its decision.[135] The *Coffey* court cited *Allen v. Allen*[136] as being entirely consistent with its holding.[137] In *Allen*, a parent sued her minor son for negligent conduct that occurred on April 23, 1980 when the son was sixteen years old.[138] The son was at least eighteen years old when the complaint was filed on April 22, 1983.[139] The court dismissed the parent's action against her son because of parent-child immunity.[140] The fact situation in *Allen* is very similar to *Coffey*. Though the holdings were consistent, the question of whether parent-child immunity should exist when a child's negligence occurs when the child is a minor but the lawsuit is brought after the child reaches majority, was not directly addressed by the *Allen* court.[141]

Although the parent-child immunity doctrine was judicially created, North Carolina courts have refused to abrogate parent-child immunity without legislative action.[142] The *Coffey* court adhered to *stare decisis* by following these decisions.[143] Yet, the North Carolina courts are not powerless to abrogate the parent-child immunity doctrine.[144] This is shown by the courts' alterations

131. Coffey v. Coffey, 94 N.C. App. 717, 381 S.E.2d 467 (1989).
132. *Id.* at 718, 381 S.E.2d at 468.
133. N.C. GEN. STAT. § 1-539.21 (1985).
134. *See* Coffey v. Coffey, 94 N.C. App. 717, 381 S.E.2d 467 (1989).
135. *Coffey*, 94 N.C. App. at 720, 381 S.E.2d at 470.
136. Allen v. Allen, 76 N.C. App. 504, 33 S.E.2d 530 (1985).
137. *Coffey*, 94 N.C. App. at 720, 381 S.E.2d at 470.
138. *Allen*, 76 N.C. App. at 505, 333 S.E.2d at 531.
139. *Id.*
140. *Id.* at 507, 333 S.E.2d at 533.
141. *See* Allen v. Allen, 76 N.C. App. 504, 333 S.E.2d 530 (1985).
142. *See supra* note 8.
143. Coffey v. Coffey, 94 N.C. App. 717, 720, 381 S.E.2d 467, 470 (1989).
144. Note, *supra* note 127, at 1473.

of other judicially created common law rules.[145] The North Carolina Supreme Court abandoned the charitable immunity of hospitals in 1975 and stated, "[t]his court has never overruled its decisions lightly. No court has been more faithful to *stare decisis*. . . . Nevertheless, when the duty seemed clear, it has done so."[146] The duty to abandon the doctrine of parent-child immunity was clear in *Coffey*.

B. Legislative Reaction to Coffey

On August 12, 1989, after the court of appeals decision in *Coffey*, the General Assembly amended N.C. Gen. Stat. § 1-539.21.[147] The amendment abolished a child's immunity from tort actions by his parents for injuries arising out of the operation of a motor vehicle.[148] The statute provides:

> The relationship of parent and child shall not bar the right of action by a *person or his estate* against his parent *or child* for *wrongful death*, personal injury, or property damage arising out of the operation of a motor vehicle owned or operated by the parent *or child*.[149]

The North Carolina courts have not decided a case under this statute.

The majority of North Carolina cases involving parent-child immunity have arisen in the context of motor vehicle accidents.[150] However, the erosion of the public policy rationales supporting the doctrine of parent-child immunity is visible in other tort actions.[151] It is reasonable to infer that the legislature abrogated parent-child immunity only in motor vehicle cases because this is where the majority of cases arise.[152] Therefore, the courts should not necessarily construe legislative action in this area as an intent to leave the parent-child immunity doctrine otherwise in tact.

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145. *Id.*

146. Rabon v. Rowan Memorial Hospital, 269 N.C. 1, 20, 132 S.E.2d 485, 498 (1967).

147. N.C. GEN. STAT. § 1-539.21 comment (Supp. 1989).

148. *Id.* at § 1-539.21.

149. *Id.* (emphasis added).

150. Note, *supra* note 127, at 1473.

151. *See generally* Comment, *supra* note 107.

152. Note, *supra* note 143, at 1473.

C. *Possible Alternatives*

1. *The Goller Approach*

In 1963, the Wisconsin Supreme Court held that the parent-child immunity doctrine would only apply when (1) the allegedly negligent act involves an exercise of parental authority over the child, or (2) the allegedly negligent act involves an exercise of ordinary parental discretion with regard to the provision of food, clothing, housing, medical and dental services, and other care.[153]

The *Goller* approach determines whether the injury arose out of parental authority or discipline over the child.[154] If the injury arose out of parental authority or discipline, the claim is not actionable.[155] Problems with the *Goller* approach arise in deciding which activities constitute the exercise of parental authority.[156] However, the *Goller* approach preserves parental authority and discretion while recognizing that there are other torts that do not involve parental control.[157] Injured parents and children are allowed to seek recovery where justification for the parent-child immunity doctrine does not exist.[158] In contrast, N.C. Gen. Stat. § 1-539.21 only recognizes torts in motor vehicle cases.[159]

2. *The Gibson Approach*

The California Supreme Court totally abrogated the parent-child immunity doctrine and adopted a reasonably prudent parent standard in *Gibson v. Gibson*.[160] In *Gibson*, a father stopped his car on the highway and asked his child to get out of the car and adjust the wheels of a jeep they were towing.[161] The child was injured by another automobile.[162] The court completely abrogated the parent-child immunity doctrine and decided that the parent's conduct should be judged by what an ordinarily reasonable prudent parent would have done under the circumstances.[163] The

153. Goller v. White, 20 Wis. 2d 402, 413, 122 N.W.2d 193, 198 (1963).
154. *Id.*
155. *Id.*
156. Note, *supra* note 127, at 1470.
157. Comment, *supra* note 107, at 621.
158. *Id.*
159. N.C. GEN. STAT. § 1-539.21 (Supp. 1989).
160. 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971).
161. *Id.*
162. *Id.*
163. *Id.* at 921, 479 P.2d at 653, 92 Cal. Rptr. at 293.

court also noted that parental relationships such as disciplining and control of development should be judged separately.[164] The strongest criticism of the *Gibson* approach is that courts are not in a position to decide what constitutes reasonable parental behavoir in the context of parental discipline and supervision.[165] However, *Gibson* considers the surrounding circumstances of each case before imposing liability.[166] Therefore, the *Gibson* approach allows for a case-by-case analysis of the circumstances.[167]

3. The Restatement Approach

The Restatement (Second) of Torts supports the *Gibson* reasonably prudent parent standard.[168] It improves this standard by noting what actions should not give rise to liability.[169] The Restatement explains that family relationships:

> [I]nvolve intended physical contacts that would be actionable between strangers [but] may be commonplace and expected within the family. Family romping, even roughhouse play and momentary flares of temper not producing serious hurt may become normal in many households, to the point that the privilege arising from consent becomes analogous.[170]

Although the Restatement approach can be criticised for placing courts in the position of deciding what constitutes reasonable parental behavior, the approach expands the *Gibson* test by setting guidelines.[171] The approach allows for more favorable judicial review.[172]

Presently, the public policy rationales behind the parent-child immunity doctrine are almost non-existent.[173] The legislature partially corrected the problems with the parent-child immunity doctrine by amending N.C. Gen. Stat. § 1-539.21 after the *Coffey* decision.[174] However, an analysis of the policy rationale's behind the

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164. *Id.*
165. *See supra* note 127, at 1471.
166. Gibson v. Gibson, 3 Cal. 3d 914, 92l, 479 P.2d 648, 653, 92 Cal. Rptr. 288, 293 (1971).
167. *Id.*
168. RESTATEMENT (SECOND) OF TORTS § 895G (1977).
169. *Id.*
170. *Id.*
171. *Id.*
172. *See supra* note 127, at 1461.
173. *See* notes 104-34 and accompanying text.
174. N.C. GEN. STAT. § 1-539.21 (Supp. 1989).

doctrine implies that further abrogation may be needed. The *Goller*, *Gibson* and Restatement approaches all preserve parental authority and discretion.[175] Yet, these approaches are balanced with the need to allow compensation for injuries that arise in other situations.[176] The Restatement approach appears to be the best option because it takes into consideration the uniqueness of family relationships and gives guidelines for the courts to follow.[177]

CONCLUSION

The *Coffey* court refused to abrogate parent-child immunity even though Michael Coffey had reached the age of majority and none of the public policy reasons supporting the doctrine were present.[178] The *Coffey* court ignored the rationale behind parent-child immunity and followed *stare decisis*.[179] Thus, the court refused to abrogate a doctrine that was judicially created.

The legislature's recognition of the problem with parent-child immunity prompted an amendment to N.C. Gen. Stat. § 1-539.21.[180] While the amendment was a step in the right direction, the approach taken by the legislature does not adequately allow compensation for intrafamily tort injuries. The use of one of the noted tests would better serve modern society. Perhaps the courts should view the legislature's reaction to *Coffey* as a signal to review and possibly abrogate the parent-child immunity doctrine. It appears that the piecemeal approach feared by the North Carolina Supreme Court in 1972[181] has been adopted by the legislature.[182] The courts are in a better position to judge the uniqueness of the parent-child relationship and re-establish the parent-child immunity doctrine consistent with modern day public policy.

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175. *See supra* notes 153-72 and accompanying text.
176. *Id.*
177. Restatement (Second) of Torts § 895G (1977).
178. Coffey v. Coffey, 94 N.C. App. 717, 719, 381 S.E.2d 467, 469 (1989).
179. *Id.* at 723, 381 S.E.2d at 470.
180. N.C. GEN. STAT. § 1-539.21 (Supp. 1989).
181. *See supra* note 56 and accompanying text.
182. Lee v. Mowett Sales Co., 76 N.C. App. 556, 563, 334 S.E.2d 250, 254 (1985)(Becton, J. dissenting).