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The Development and Current Status of Parental Liability for the Torts of Minors

Jeffrey L. Skaare

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I. INTRODUCTION

On April 20, 1999, Eric Harris and Dylan Klebold stormed Columbine, Colorado high school armed with sawed off shotguns and bombs, and in the ensuing madness they killed twelve students and a teacher, wounded twenty-three other students, and took their own lives.[1] This massacre has been considered the deadliest school shooting in United States history.[2] The aftermath of such a tragedy creates feelings of sorrow and anger and raises questions of responsibility.[3] There are at least eighteen lawsuits as a result of the massacre, with numerous parties named as defendants.[4] In particular, parents of some of the victims have filed suit against the parents of the shooters, alleging that the parents failed to take action while their children stockpiled guns and bombs and that they gave their children extraordinary privileges.[5] Such parental liability is the topic of this Note.

The issue of parental liability raises questions about who should take the blame in the aftermath of tragedies such as the Columbine massacre.[6] It is common to blame parents for their child's wrongdoing.[7] However, responsible parents may have a disturbed criminal child, while neglectful parents may have a perfectly healthy child.[8] Therefore, determining parental liability may require addressing parental responsibility while also recognizing a child's inherited predisposition as well as peer

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1. *See* Robert Weller, *Columbine High School Shootings: School Massacre Spawns Lawsuits*, SAN DIEGO UNION AND TRIB., Oct. 20, 1999, at A2.

2. *See id.*

3. *See generally Court Decisions, Second Judicial Department, U.S. District Court: S.D.N.Y.*, 222 N.Y.L.J. 5 (1999) [hereinafter *Court Decisions*] (suggesting that the tragedy at Columbine has created significant legal repercussions).

4. *See* Weller, *supra* note 1, at A2 (explaining that lawsuits are developing that target a variety of potential defendants, including gunmakers, the shooters' parents, the school district, and the sheriff's department).

5. *See* Weller, *supra* note 1, at A2; *see also Court Decisions*, supra note 3, at 5 (stating that the Harrises and the Klebolds allowed their children to "amass a cache of weapons in their home; associate with each other even after they were caught together breaking into a van; and author extremist and hateful writings").

6. *See* Valerie Finholm, *Seeking a Delicate Balance as Parents*, HARTFORD COURANT, May 3, 1999, at B5.

7. *See generally id.*

8. *See id.* (quoting from clinical psychologist Don Hiebel).

and societal influences.[9] This Note highlights both parental responsibility and children's predisposition for violence and examines their effects on parental liability.

There are three major stages in the development of the law with respect to parental liability.[10] The first stage is the traditional common law premise that parents are not liable for the acts of their minor children.[11] The second stage is an exception to the common law tradition, enumerated in the *Restatement (Second) of Torts*, section 316, which holds parents liable, in certain circumstances, for the torts of their minor children.[12] The third stage is the enactment of state statutes that impose liability upon parents for the willful, malicious, or intentional acts of the parents' minor children.[13] This Note examines each stage separately and explores the current status of parental liability, focusing specifically on North Dakota case law and parental liability statutes.

Section II of this Note discusses the common law tradition that parents are not liable for the torts of their minor children. Section III reviews the *Restatement* exception to the common law notion and analyzes how this exception is applied. Section IV explores parental liability statutes by analyzing the constitutionality of such statutes, examining the general form of parental liability statutes, and analyzing the extent of liability imposed by such statutes. This Note concludes by examining how the common law, the *Restatement*, and parental liability statutes likely affect North Dakota.

II. COMMON LAW TRADITION

The common law tradition asserted the premise that a mere parent-child relationship was not sufficient grounds for liability, meaning parents were not held liable for the torts of their minor children.[14] This

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9. *See id.* (explaining that parental responsibility is a significant factor in controlling minor children while also recognizing that other factors of a child's personality may cause him or her to commit crimes).

10. *See* 59 AM. JUR. 2D *Parent and Child* § 116 (1987) (discussing the common law tradition, the *Restatement*, and case law development of parental liability).

11. *See* 59 AM. JUR. 2D *Parent and Child* § 116 n.96 (citing cases).

12. RESTATEMENT (SECOND) OF TORTS § 316 (1965) (imposing a parental duty to control one's minor child and to prevent the child from intentionally harming others). The "certain circumstances" to which the Second Restatement refers are as follows:

> a) When the parent knows or has reason to know he has the ability to control his child; and
>
> b) When the parent knows or should know of the necessity and opportunity for exercising such control.

Id.

13. *See* 59 AM. JUR. 2D *Parent and Child* § 123 n.46 (citing cases from the following states which have enacted parental liability statutes: Connecticut, Georgia, Hawaii, Indiana, Louisiana, Maryland, Nebraska, New Mexico, North Carolina, Ohio, Oklahoma, and Texas).

14. *See* 59 AM. JUR. 2D *Parent and Child* § 116. Reflecting the age of this notion, the common

tradition has deep historical roots.[15] The common law notion existed in the Dakota Revised Codes as early as 1877.[16] This common law notion is now codified in North Dakota Century Code section 14-09-21.[17] As early as 1929, the North Dakota Supreme Court explained in *Miller v. Kraft*[18] that parents are not answerable for the acts of their child.[19] Thus, the father in *Miller* could not be held liable for damages caused by his child's negligent use of an automobile unless the child was using the vehicle in the father's business.[20]

Thirty-seven years later, the North Dakota Supreme Court again entertained the notion that parents are not liable for the acts of their minor children.[21] Interestingly, the court recognized that, based on a child's act, parents may be liable due to their own negligence.[22] However, the court suggested that parental liability arose only when the parents' negligence made it possible and probable for the child to cause the injury.[23]

Nearly every state has recognized in its common law that parents are not liable for the acts of their minor children,[24] and both Oklahoma and South Dakota have enacted statutes abrogating parental liability.[25] However, the Oklahoma Supreme Court has also recognized that despite the fact that parents are not answerable for the acts of their child, parents may be held liable for their own negligence.[26] This is true for most

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law tradition was that paternity was not sufficient grounds for liability. *See id.*; *see also* Wintercorn v. Rybicki, 397 N.E.2d 485, 487 (Ill. App. Ct. 1979) (stating that parents are not liable for the torts of their minor child merely because of the parent-child relationship);White v. Seitz, 174 N.E. 371, 372 (Ill. 1930) (stating accordance with the universal rule of the common law, that a parent is not liable for the tort of his or her minor child merely because of the relationship).

15. *See* Snow v. Nelson, 450 So. 2d 269, 271 (Fla. Dist. Ct. App. 1984).

> One of the more inscrutable holdovers from the ancient establishments of the common law is the historically ubiquitous idea that a parent who has visited upon the world a tort-inflicting child ought not to be held financially responsible for the torts that the child has in turn visited upon those of us unfortunate enough to have gotten in the way.

Id.

16. *See* DAKOTA REVISED CODES § 105, at 222 (1877) ("[N]either parent nor child is answerable, as such, for the act of the other").

17. *See* N.D. CENT. CODE § 14-09-21 (1997) ("[N]either parent nor child is answerable as such for the act of the other").

18. 223 N.W. 190 (N.D. 1929).

19. *See* Miller v. Kraft, 223 N.W. 190, 191 (N.D. 1929) ("[U]nder section 4439, C. L. 1913, neither parent nor child is answerable as such for the act of the other").

20. *See id.* "The liability of the owner of a motor vehicle for damages caused by the negligent operation thereof by another rests upon the doctrine of agency express or implied." *Id.*

21. *See* Peterson v. Rude, 146 N.W.2d 555, 557 (N.D. 1966).

22. *See id.* A parent still may be held liable for his or her child's acts if the parent had knowledge that the child has committed previous acts of the same character and the parent failed to take reasonable steps to prevent the child from committing the similar act which caused the injury. *See id.*

23. *See id.*

24. *See* 59 AM. JUR. 2D *Parent and Child* § 116 n.96 (citing cases).

25. *See* OKLA. STAT. tit. 10, § 20 (1998) ("[N]either parent nor child is answerable, as such, for the act of the other"); *see also* S.D. CODIFIED LAWS § 25-5-14 (Michie 1999) ("[N]either parent nor child is answerable as such, for the act of the other").

26. *See* Sawyer v. Kelly, 153 P.2d 97, 98-99 (Okla. 1944). "That the parent of a minor child may

courts applying the principle that parents are not liable for the acts of their minor children, many of which have found an exception predicated upon parental negligence.[27] This parental negligence exception is most often based upon the *Restatement (Second) of Torts*, section 316.[28]

III. *RESTATEMENT* EXCEPTION TO THE COMMON LAW TRADITION

Over the years, the common law standard of parental liability for the acts of their minor children has been revisited and modified.[29] Four exceptions to the common law notion that parents are not liable for the acts of their minor children have developed.[30] However, this Note is specifically concerned with only one of those four exceptions: that parents may be liable for the acts of their minor children when the parents fail to exercise control over their minor child.[31] Today, many states follow this exception and, through the application of a test established in *Restatement (Second) of Torts*, section 316, hold parents liable if they fail to control the conduct of their minor children.[32] Liability under the *Restatement* is predicated upon parental negligence[33] and is delineated in a two-part test.

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be called on to respond for his own negligence in permitting the child to so something which the parent as a reasonably prudent person should know might be dangerous is well settled." *Id.* at 99.

27. *See* Barth v. Massa, 558 N.E.2d 528, 533-34 (Ill. App. Ct. 1990); *see also* Basler v. Webb, 544 N.E.2d 60, 62 (Ill. App. Ct. 1989) (explaining that section 316 of the *Restatement (Second) of Torts* represents an exception to the rule that parents are not liable for the torts of their child).

28. *See Barth*, 558 N.E.2d at 534.

29. *See* Parson v. Smithey, 504 P.2d 1272, 1275 (Ariz. 1973). "At common law it is well established that mere parental relationship will not impose liability upon the parents for the torts of their children .... But there have evolved in the law a few doctrines which impose liability upon the parents for their children's torts." *Id.*

30. *See* Wells v. Hickman, 657 N.E.2d 172, 176 (Ind. Ct. App. 1995).

> There are four common law exceptions to the general rule that a parent is not liable for the tortious acts of her child: 1) where the parent entrusts the child with an instrumentality which, because of the child's lack of age, judgment, or experience, may become a source of danger to others; 2) where the child committing tort is acting as the servant or agent of its parents; 3) where the parent consents, directs, or sanctions the wrongdoing; and 4) where the parent fails to exercise control over the minor child although the parent knows or with due care should know that injury to another is possible.

Id. (citing K. C. v. A. P., 577 So. 2d 669, 671 (Fla. Dist. Ct. App. 1991)).

31. *See id.*

32. RESTATEMENT (SECOND) OF TORTS § 316 (1965). Duty of Parent to Control Conduct of Child. This section provides:

> A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent
> (a) knows or has reason to know that he has the ability to control his child, and
> (b) knows or should know of the necessity and opportunity for exercising such control.

Id.

33. *See Parsons*, 504 P.2d at 1275.

A. THE TWO-PART TEST

As written, the *Restatement* enunciates a two-part test to establish parental liability.[34] The *Restatement* requires first that parents either know or have reason to know that they have the ability to control their minor child.[35] Second, parents must know or should know of the necessity and opportunity to exercise control over their minor child.[36] To understand the *Restatement* more completely, an examination of each part of the test is essential.[37]

The first part of the test concentrates on the parents' ability to control their child.[38] The comments following the *Restatement* suggest that parents have a duty to exercise their ability to control their child, assuming they have such ability, at the time the parents have the opportunity to exercise such control and when the parents know it is necessary to do so.[39] The comments further suggest that it is not necessary that the actions of the child be such that they would make the child subject to liability.[40] This would be the case if the child were so young as to be incapable of negligence.[41] Also, the younger the child, the greater the parent's ability to control the child.[42] This comment suggests that the word "ability" means the physical ability to control.[43] In fact, it is often more necessary for the parent to control the acts of the child when the child is younger.[44] Since the youth of the child may necessitate more control of the child by the parent, an analysis is required of the second part of the *Restatement* test, the necessary element.[45]

The second part of the *Restatement* test focuses on the necessity and opportunity to exercise parental control.[46] Here, the comments to the

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34. *See* RESTATEMENT (SECOND) OF TORTS § 316.
35. *See id.*
36. *See id.*
37. *See id.*
38. *See id.*
39. *See id.* cmt. b.
40. *See id.* cmt. c; *see also* Vance v. Thomas, 716 P.2d 710, 713 (Okla. Ct. App. 1986). "The comments to section 316 specifically state that a parent may be liable under the rule although the child himself is not subject to liability." *Vance*, 716 P.2d at 713.
41. *See* RESTATEMENT (SECOND) OF TORTS § 316 cmt. c; *see also* Mastland, Inc. v. Evans Furniture, Inc., 498 N.W.2d 682, 684 (Iowa 1993) (upholding a district court's determination that a two-year-old child is of such a tender age that he or she is incapable of negligence).
42. *See* RESTATEMENT (SECOND) OF TORTS § 316 cmt. c; *see also* Jarboe v. Edwards, 223 A.2d 402, 404 (Conn. Super. Ct. 1966). "The modern view holds that the very youth of the child is likely to give the parent more effective ability to control the actions of the child and to make it more often necessary to exercise it." *Id.*
43. *See* RESTATEMENT (SECOND) OF TORTS § 316 cmt. c.
44. *See id.*
45. *See id.*
46. *See* RESTATEMENT (SECOND) OF TORTS § 316.

Restatement overlap.[47] The comments suggest that parents should use their ability to control their child when they have the opportunity to exercise their control and when they know or should have known of the necessity of doing so.[48] These elements are stated such that the elements seem both individually important and dependent on one another to form parental liability.[49] As such, it is not exactly clear from the *Restatement* or its comments what this test really means.[50]

It seems as though *Restatement (Second) of Torts*, section 316, is really a three-part test.[51] The first part remains the ability to control, but the second part may be broken into two separate parts: 1) the necessity to control and 2) the opportunity to control.[52] The modified test would then be whether the parents knew or should have known of the 1) ability, 2) need, and 3) opportunity to control their minor child.[53]

Even with the test divided into three parts, understanding it may still be complex.[54] Part of the complexity is determining the difference between the ability to control[55] and the opportunity to control.[56] Courts that have adopted the *Restatement* have used the terms in a confusing manner.[57] Some courts have equated the term "ability" to mean physical presence, which gives parents the ability to control their child.[58] Similarly, other courts have explained that the parents' absence leaves them no opportunity to control their child.[59] Therefore, following the logic of these cases, if parents are present, they have the ability to control their

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47. *See id.*

48. *See id.* cmt. b.

49. *See id.*

50. *See* RESTATEMENT (SECOND) OF TORTS § 316.

51. *See* Dinsmore-Poff v. Alvord, 972 P.2d 978, 981 (Alaska 1999) (suggesting that the *Restatement* is not a two-part test, but rather a three-part test).

52. *See id.*

53. *Id.*

54. *See id.* (explaining that case law does not support literal application of the three-part test).

55. *See* RESTATEMENT (SECOND) OF TORTS § 316 cmt. a. Parents are responsible for their children's conduct insofar as they have the ability to control the conduct. *See id.*

56. *See* RESTATEMENT (SECOND) OF TORTS § 316 cmt. b. Parents have a duty to exercise their ability to control their children at the time when they have the opportunity to control them. *See id.*

57. *See* Campbell v. Haiges, 504 N.E.2d 200, 203 (Ill. App. Ct. 1987). The court stated that if the parent is at work when the child commits an intentional tort, the parent is not able to control his or her minor child. *See id.* Parents are thus not liable under *Restatement (Second) of Torts*, section 316, if they were not at home at the time of the alleged tort. *See id.* at 203. *But see* Barth v. Massa, 558 N.E.2d 528, 534-35 (Ill. App. Ct. 1990) (citing *Cooper v. Meyer*, 365 N.E.2d 201, 203 (Ill. App. Ct. 1977), which explains that if the parents were not at home at the time of the tort, they had no opportunity, rather than no ability, to control the conduct of their child).

58. *See Campbell*, 504 N.E.2d at 203; *see also* Basler v. Webb, 544 N.E.2d 60, 62 (Ill. App. Ct. 1989). The court held that plaintiffs sufficiently pleaded a cause of action since the guardians of the child were home at the time of the incident and had the ability to control the minor child. *See Campbell*, 504 N.E.2d at 203.

59. *See Barth*, 558 N.E.2d at 534. The court held that since the parents were not present at the time their son shot the police officer, the parents never had the opportunity to prevent the shooting. *See id.*

child;[60] contrarily, if the parents are not present, they did not have the opportunity to control their child.[61] To add to the confusion, another court has suggested that absent parents have no immediate control over their child.[62] By doing so, that court failed to address whether absent parents lacked the opportunity, or lacked the ability, to control their minor child.[63] It may be that the terms "opportunity" and "ability" are so closely intertwined that they could possibly be combined to create a different form of the *Restatement*, as opposed to combining the terms "opportunity" and "necessity."[64]

The necessity to control element of the *Restatement* test is also confusing.[65] Courts require that the parents of the minor child who commits the tortious act are aware of specific acts of conduct sufficiently similar to place the parents on notice that such injury may occur.[66] If parents do have such knowledge, it then becomes necessary that they control their minor child.[67] Stating the test in this way, the courts closely link necessity with knowledge in a way that makes the knowledge element the primary element.[68]

The confusion between the actual *Restatement* and the application of the *Restatement* results in the *Restatement* being applied under a different two-part test than what is written.[69] Instead of applying the written *Restatement* test, courts actually look to see if parents had knowledge that their child's conduct could foreseeably cause the harm at issue.[70] The courts then determine whether parents had the opportunity to control their child's actions.[71] An analysis of how the test is applied may provide some guidance in determining the status of parental liability.

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60. *See Basler*, 544 N.E.2d at 62.

61. *See Barth*, 558 N.E.2d at 534.

62. *See* Seibert v. Morris, 32 N.W.2d 239, 240 (Wis. 1948). The court explained that since the father was out of town and had no immediate control of the situation when his child committed the act, there were no grounds for imposing liability. *See id.*

63. *See id.*

64. *See* RESTATEMENT (SECOND) OF TORTS § 316 (1965).

65. *See id.*

66. *See Barth*, 558 N.E.2d at 534 (explaining that establishing negligence under the *Restatement* requires a showing "that the parents were aware of specific instances of prior conduct sufficient to put them on notice that the act complained of was likely to occur"); *see also* Kosrow v. Smith, 514 N.E.2d 1016, 1019 (Ill. App. Ct. 1987) (suggesting that parental liability under the Restatement arises when a complaint alleges "specific instances of prior conduct sufficient to put the parents on notice that the act complained of was likely to occur").

67. *See Barth*, 558 N.E.2d at 534.

68. *See generally* Dinsmore-Poff v. Alvord, 972 P.2d 987, 981 (Alaska 1999). Instead of looking for the elements of the *Restatement* test, the courts first examine whether the parents had knowledge of their child's past conduct similar to that at issue to put the parents on notice. *See id.*

69. *Compare* RESTATEMENT (SECOND) OF TORTS § 316 (providing a two-part test for parental liability), *with Barth*, 558 N.E.2d at 534 (applying only the knowledge and opportunity elements of the *Restatement*).

70. *See Barth*, 558 N.E.2d at 534.

71. *See id.*

B. APPLICATION OF THE *RESTATEMENT (SECOND) OF TORTS*, SECTION 316

The confusion generated by the *Restatement* is even more evident when reviewing the case law from states that have adopted the *Restatement* test in determining parental liability.[72] Alaska has recently reviewed the complexity surrounding the *Restatement (Second) of Torts*, section 316, in the 1999 case of *Dinsmore-Poff v. Alvord*.[73] A juvenile named Brian Hall murdered Mickey Dinsmore.[74] The relatives of the victim and his estate (collectively known as Dinsmore) brought a wrongful death suit against various people, including the parents of Brian Hall (collectively known as the Alvords), claiming liability based on negligent supervision.[75] The lower court granted summary judgment to the Alvords through the application of the *Restatement* test.[76] The Supreme Court of Alaska declined to address whether Alaska should adopt the *Restatement (Second) of Torts*, section 316.[77] However, in an effort to determine whether the grant of summary judgment was appropriate, the Alaska Supreme Court examined out-of-state precedent.[78]

The Alaska Supreme Court specifically analyzed case law from states that adopted the *Restatement (Second) of Torts*, section 316.[79] The court noted that instead of applying the three-part test, most courts first ask whether the parents of the minor child "knew of past conduct enough like that at issue to put them on notice of the need to correct

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72. *See Dinsmore-Poff*, 972 P.2d at 981 (stating that the case law does not bear out the three-part test).

73. 972 P.2d 978, 981 (Alaska 1999).

74. *See* Dinsmore-Poff v. Alvord, 972 P.2d 978, 979 (Alaska 1999).

75. *See id.* at 980. The victim's relatives also filed a wrongful death suit against his companion who was with him at the time of the murder, the Anchorage Police Department, Hall's probation officer, the Alaskan Youth Corrections, and Hall's parents. *See id.* The court dismissed a vicarious liability claim against Hall's parents, and Dinsmore amended the complaint to allege negligent supervision. *See id.* Hall's parents successfully moved for summary judgment, and Dinsmore appealed. *See id.*

76. *See id.*

77. *See id.* at 981.

> The parties have agreed that [section] 316 is the law of the case; thus they have made the determination the [section] 316 should apply between them. In view of their agreement, we see no need either to adopt or reject [section] 316. The issue must slumber until awakened by parties who present us with adversarial expressions of 'reason, policy, and precedent' for or against adoption of [section] 316.

See id.

78. *See id.* (considering the Alvord's claim that they were entitled to judgment by reviewing out-of-state precedent on section 316 and determining how to apply the rule).

79. *See id.* (citing Robertson v. Wentz, 232 Cal. Rptr. 634 (Cal. Ct. App. 1986); Gellner v. Abrams, 390 S.E.2d 666 (Ga. Ct. App. 1990); Brahm v. Hatch, 609 N.Y.S.2d 956 (N.Y. App. Div. 1994)).

their child's dangerous propensity."[80] If a court finds that the parents had knowledge of past similar conduct, then the court generally determines whether the parents had the opportunity or ability to control their child.[81] However, neither similar conduct nor opportunity and ability to control one's minor child are easily defined.

1. Similar Conduct Analysis

A similar conduct standard is somewhat perplexing because the boundaries have not been clearly defined.[82] However, the *Restatement* has been interpreted narrowly.[83] For liability to attach, parents of the minor who committed the intentional tort must have knowledge of their child's propensity to commit such acts.[84] This knowledge is predicated on prior specific acts of the child.[85]

If the child has committed the same act before, then it is highly likely that a court will determine that the parents have actual knowledge of prior specific acts sufficient to justify imposing liability.[86] However, in situations in which a child's prior bad acts are not identical to the intentional tort committed, courts have held that the parents were not put on notice.[87] For example, in 1973, the Arizona Supreme Court considered *Parsons v. Smithey*,[88] in which the defendant parents had knowledge that their son once threatened a strange woman that he would throw rocks at her if she did not remove her clothes.[89] Their son later entered a woman's home and beat her over the head with a hammer in an effort to force her to take off her clothes.[90] The court determined at trial that, looking at the evidence in the light most favorable to the plaintiff,[91] there was insufficient evidence to send the issue of parental knowledge of their

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80. *Id.*

81. *See id.* (explaining that the courts generally determine whether the parents made some effort to prevent a recurrence).

82. *See* Wells v. Hickman, 657 N.E.2d 172, 179 (Ind. Ct. App. 1995) (explaining that a parent should not be held liable for either behavior that is not reasonably foreseeable or for general incorrigibility).

83. *See* Kohn v. Ross, No. C0-97-198, 1997 WL 423579, at *2 (Minn. Ct. App. 1997) (explaining that the duty of a parent to control the conduct of a child is narrow and arises when parents have both the opportunity and the ability to control their child).

84. *See* Barth v. Massa, 558 N.E.2d 528, 534 (Ill. App. Ct. 1990) (explaining that to establish liability under the *Restatement (Second) of Torts*, section 316, the plaintiffs must show both that the parents were aware of specific instances of prior conduct and that the parents had the opportunity to control the child).

85. *See id.*

86. *See id.*

87. *See generally* Parsons v. Smithey, 504 P.2d 1272, 1275-76 (Ariz. 1973).

88. 504 P.2d 1272 (Ariz. 1973).

89. *See* Parsons v. Smithey, 504 P.2d 1272, 1275 (Ariz. 1973).

90. *See id.* at 1273.

91. *See id.* at 1277 (including all evidence offered by the plaintiffs, either admitted or excluded).

child's propensity to commit such acts to the jury.[92] The court stated that "[U]nder no view of the evidence is it proper to conclude Mr. and Mrs. Smithey should have reasonably foreseen that [their son] had a disposition to perform such a violent act."[93]

Similarly, in 1995 the Indiana Court of Appeals determined in *Wells v. Hickman*[94] that the defendant parent knew her child needed psychological help and had intentionally killed a pet dog by beating it over the head.[95] The defendant parent also had knowledge that her son previously killed a pet hamster by throwing it on the ground and that he had commented about committing suicide.[96] The *Wells* court nonetheless determined that despite this sort of behavior, it was not reasonably foreseeable that the child would beat a neighborhood friend to death while they played together.[97] The *Wells* court noted that since these boys had previously played together without incident, neither the victim nor the harm inflicted upon the victim was foreseeable, and the parents therefore were not liable.[98]

In 1955, the Florida Supreme Court in *Gissen v. Goodwill*[99] determined that the defendant parents knew of their child's propensity to strike the employees of the hotel where the family resided.[100] However, this knowledge was insufficient to place the parents on notice that their child would sever an employee's finger by slamming a door on the employee's hand.[101] The court suggested that an assessment of parental liability should occur when the child has a habit of engaging in the particular act that causes the injury.[102] Since it was not claimed that the child had a propensity to slam doors in an attempt to harm others, it did not appear as though the injury sustained was a result of the parent's negligence.[103]

A 1985 Florida Supreme Court case upheld this same narrow interpretation of the exception to parental liability by affirming an order directing a verdict for the defendants whose son struck another child with a croquet mallet.[104] The court explained that since it was not alleged that the defendant's minor child had ever previously engaged in

92. *See id.*
93. *Id.*
94. 657 N.E.2d 172 (Ind. Ct. App. 1995).
95. *See* Wells v. Hickman, 657 N.E.2d 172, 178 (Ind. Ct. App. 1995).
96. *See id.*
97. *See id.*
98. *See id.* (citing Parsons v. Smithey, 504 P.2d 1272, 1277 (Ariz. 1973)).
99. 80 So. 2d 701 (Fla. 1955).
100. *See* Gissen v. Goodwill, 80 So. 2d 701, 702 (Fla. 1955).
101. *See id.* at 705.
102. *See id.*
103. *See id.* at 705-06.
104. *See* Snow v. Nelson, 475 So. 2d 225, 226 (Fla. 1985) (per curiam).

the particular act of swinging a croquet mallet in an attempt to injure others, the trial court was correct in directing a verdict for the defendants.[105] The plaintiffs in that case, however, argued that applying the exception to parental liability so narrowly created an unjust result.[106] Despite plaintiff's argument, the court saw no reason to depart from this narrow exception.[107]

In *Dinsmore-Poff*, Brian Hall's parents knew their son was emotionally disturbed and was prone to uncontrollable violence.[108] Brian's parents also knew that he was involved in a shooting incident in which he used a stolen gun to shoot another boy in the hand during an altercation only twenty-one months prior to the murder.[109] However, the Alaska Supreme Court found this evidence insufficient to place the Alvords on notice of the need to intervene in order to protect the victim from any imminent or foreseeable harm.[110] The *Dinsmore-Poff* court held "that a plaintiff must show more than a parent's general notice of a child's dangerous propensity."[111] Instead, "a plaintiff must show that the parent had reason to know with some specificity of a present opportunity and need to restrain the child to prevent some imminently foreseeable harm."[112] The *Dinsmore-Poff* court also rejected an argument that the Alvords should have known that their son had a gun because they had a duty to search his possessions periodically.[113]

From the foregoing discussion, it is apparent that most courts resolve the parental knowledge issue in the parent's favor by finding either that there was not similar past conduct or, if there was similar past conduct, the parents did not have knowledge of such misconduct.[114] However, if a court determines that the parents did have knowledge of their child's dangerous propensities based on past similar conduct, the court will next determine whether the parents made a reasonable attempt

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105. *See id.*

106. *See id.* (arguing that the narrow application works an injustice); *see also Snow*, 475 So. 2d at 227 (Ehrlich, J., concurring). "[W]here parents have actual or constructive notice of their offspring's propensity to commit a general class of malicious acts, the child's creativity in developing new ways to bring about injury should not absolve parents from the duty to attend to and discipline the child." *Id.*

107. *See Snow*, 475 So. 2d at 226.

108. *See* Dinsmore-Poff v. Alvord, 972 P.2d 978, 979 (Alaska 1999).

109. *See id.*

110. *See id.* at 987.

111. *Id.* at 986.

112. *Id.* (stating that knowledge of past misconduct is insufficient for parental liability).

113. *See id.* at 987. "Even if a plaintiff could show no reason that the parents should have known of a specific need to control the child, the plaintiff could almost always posit some stricter regime of discipline and surveillance under which the parents might have discovered that need." *Id.*

114. *See id.* at 981.

to prevent another occurrence by examining the opportunity and ability to control elements of the *Restatement* test.[115]

2. *Parental Opportunity and Ability to Control*

Generally, once a court finds parental knowledge of past misconduct, it will examine whether the parents had the opportunity and ability to control their minor child.[116] Generally, at this stage of its analysis, the court has not yet made a demanding, detailed inquiry.[117] In analyzing the opportunity and ability to control elements, courts usually ask only if the parents made some reasonable effort to prevent a recurrence.[118] These types of cases can often be grouped into one of four categories: 1) cases reversing dismissals under Rule of Civil Procedure 12(b)(6) or its equivalent; 2) cases finding parents liable; 3) cases finding that parents made adequate disciplinary efforts; and 4) cases in which the parents had no opportunity to prevent the harm.[119]

A 12(b)(6) dismissal or its equivalent is based upon a failure to state a claim upon which relief can be granted. Therefore, reversal of such a dismissal only determines that there was a claim upon which relief can be granted and will not necessarily determine whether parents are liable, making such cases less instructive for purposes of this analysis.[120] However, the other three categories are important to this note: cases in the court finds the parents liable, where the court exonerates parents who made adequate efforts at disciplining their child, or when the court exonerates those parents who did not have the chance to prevent the harm.[121] The opinions finding parental liability are often based upon a parent's actual knowledge, or encouragement, of a child's dangerous propensities.[122] Further, the opinions finding adequate discipline illustrate that courts are generally lenient when it comes to determining the reasonableness of parents' efforts to correct a vicious child.[123] Finally, those opinions that exonerate parents who did not have the chance to prevent the harm rely on an inability to control their child at the time the crime was committed.[124]

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115. *See generally id.* at 982.
116. *See* RESTATEMENT (SECOND) OF TORTS § 316 (1965).
117. *See Dinsmore-Poff*, 972 P.2d at 982.
118. *See id.*
119. *See id.*
120. *Cf.* FED. R. CIV. P. 12(b)(6).
121. *See id.*
122. *See id.* (citing Mitchell v. Wiltfong, 604 P.2d 79 (Kan. Ct. App. 1974)).
123. *See id.* Courts have been far from demanding in judging the reasonableness of parental efforts to correct a vicious tendency. *Id.*
124. *See id.*

As discussed earlier, the courts that adopted the *Restatement* test have used the terms "opportunity" and "ability" interchangeably.[125] Some courts equate "ability" with physical presence, thereby giving parents the ability to control their child whenever they are present,[126] and other courts similarly explain that the parents' absence leaves them no "opportunity" to control their child.[127] Therefore, if parents are present, it is likely that a court may find they had the ability to control their child,[128] whereas if the parents are not present, they did not have the opportunity to control their child.[129] Still other courts simply have not addressed whether an absent parent lacked opportunity or lacked the ability to control his or her minor child.[130]

The courts may possibly be leaning towards holding parents harmless for the torts of their minor children. Since minors closer to age eighteen generally commit the more heinous intentional torts, there has been a reluctance to impose parental liability for an inability to control serious conduct in their older children.[131] At least three state supreme courts have declined to adopt the *Restatement* test as a source for parental liability in situations where a teenage child has committed a serious crime such as rape or murder.[132] As one court says, "The opinions rejecting [section] 316 may thus reflect at least in part a judicial disinclination to hold parents liable for being unable to stop serious delinquency in older children."[133] It is likely that the transformation

125. *See* Campbell v. Haiges, 504 N.E.2d 200, 203 (Ill. App. Ct. 1987). If the parent is at work when the child commits an intentional tort, the parent is not able to control his or her minor child. *See id.* Parents are not liable under *Restatement (Second) of Torts*, section 316, if they were not at home at the time of the alleged tort. *See Campbell*, 504 N.E.2d at 203. *But see* Barth v. Massa, 558 N.E.2d 528, 534-35 (Ill. App. Ct. 1990) (citing *Cooper v. Meyer*, 365 N.E.2d 201, 203 (Ill. App. Ct. 1977), which explains that if the parent was not at home at the time of the tort, he or she had no opportunity, rather than no ability, to control the conduct of the child).

126. *See Campbell*, 504 N.E.2d at 203; *see also* Basler v. Webb, 544 N.E.2d 60, 62 (Ill. App. Ct. 1989). The court held that plaintiffs sufficiently pleaded a cause of action since the guardians of the child were home at the time of the incident and had the ability to control the minor child. *See Campbell*, 504 N.E.2d at 203.

127. *See Barth*, 558 N.E.2d at 534. The court held that since the parents were not present at the time their son shot the police officer, the parents never had the opportunity to prevent the shooting. *See id.*

128. *See Basler*, 544 N.E.2d at 62.

129. *See Barth*, 558 N.E.2d at 534.

130. *See* Seibert v. Morris, 32 N.W.2d 239, 240 (Wis. 1948). The court explained that since the father was out of town and had no immediate control of the situation when his child committed the act, there were no grounds for imposing liability. *See id.*

131. *See* Dinsmore-Poff v. Alvord, 972 P.2d 978, 981 (Alaska 1999).

132. *See id.* (citing Lanterman v. Wilson, 354 A.2d 432, 433 (Md. 1976) (declining to apply section 316 to a burglary committed by a 19-year-old); J.L. v. Kienenberger, 848 P.2d 472, 474 (Mont. 1993) (refusing to adopt section 316 in a rape case involving a 13-year-old); Rodriguez v. Spencer, 902 S.W.2d 37, 39-40 (Tex. Ct. App. 1995) (rejecting section 316 in a 17-year-old, hate-crime murder); Bell v. Hudgins, 352 S.E.2d 332, 333 (Va. 1987) (declining to apply section 316 to an assault and attempted rape committed by a 16-year-old)).

133. *Dinsmore-Poff*, 972 P.2d at 981.

the *Restatement* has taken through its application in current case law has led the way for the courts' disinclination to adopt it as the basis for holding parents liable for the intentional acts of their minor children.[134]

C. A POSSIBLE REVISION OF THE *RESTATEMENT*

One solution to the problem of the misinterpreted or misapplied *Restatement* test may be a revision.[135] A possible revised test may inquire first whether the parents either knew or should have known of the necessity to control their minor child, and second, whether the parents had the ability and opportunity to control their minor child.[136] This proposal would change the three-part test enunciated in *Dinsmore-Poff* back to a two-part test.[137] However, it would also change the original two-part test to a more plausible test by accenting the knowledge portion of the necessity-to-control element and by combining the opportunity and ability elements into one part.[138] This revised two-part test comports with the test applied by many courts that have adopted the *Restatement*.[139]

The first branch of the revision, requiring that the parents either know or should have known of the necessity to control their minor child, may be analyzed by looking to prior specific acts of the minor child.[140] This change would make the *Restatement* comport with current case law.[141] Assuming that a court finds conduct sufficiently similar to that at issue to place the parents on notice, it could move to the second branch of the revised test.[142]

The second branch of the revision would clarify the confusion surrounding the terms "opportunity" and "ability" by combining

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134. *See generally id.*

135. *Cf. id.* at 981 (suggesting that the *Restatement* is not applied as it is written).

136. *Cf. id.* at 981-82. (suggesting that the *Restatement* is applied first by looking for parental knowledge and second by looking to see if parents made an effort at preventing a recurrence).

137. *Cf. id.* at 981 (suggesting that the three-part written test is applied as a separate two-part test).

138. Compare RESTATEMENT (SECOND) OF TORTS § 316 (1965) (enunciating a two-part test), *with Dinsmore-Poff*, 972 P.2d at 981 (explaining a different two-part application of the *Restatement*).

139. *See* Barth v. Massa, 558 N.E.2d 528, 534 (Ill. App. Ct. 1990). Establishing negligence under the *Restatement (Second) of Torts*, section 316 requires that the plaintiffs show both that the parents were aware of specific instances of prior conduct adequate to put the parents on notice and that the parents had the opportunity to control their child. *See Barth*, 558 N.E.2d at 534; *see also* Parsons v. Smithey, 504 P.2d 1272, 1275, 1277 (Ariz. 1973) (adopting the *Restatement* and then applying a negligence standard predicated upon parental knowledge).

140. *See Barth*, 558 N.E.2d at 534 (explaining that establishing negligence under the *Restatement* requires that the plaintiffs show the parents were aware of specific instances of prior conduct adequate to put the parents on notice).

141. *See id.* (applying parental knowledge as a threshold question).

142. *See id.* (discussing that establishing negligence under the *Restatement* requires both parental knowledge and the opportunity to control the child).

them into one distinct element.[143] Opportunity would refer to the parents' physical presence, while ability would refer to whether the parents had the means or physical ability to control their child.[144] The revised *Restatement* test would hold parents liable if they knew, or should have known from prior specific acts, that their child had a dangerous proclivity to commit such intentional acts, and if the parents were present and had the means or physical ability to control their minor child.[145] Such a revision would relieve any confusion surrounding the current *Restatement* and would synchronize the *Restatement* and case law.[146] However, many states have also added to the development of parental liability by enacting state statutes making parents liable for damages caused by the willful, malicious, intentional, or unlawful acts of their minor children.[147]

IV. STATE STATUTES CREATING PARENTAL LIABILITY

Some states have enacted statutes that impose liability on the parents of minor children when their child willfully or maliciously destroys real or personal property.[148] The enactment of such statutes raises two more

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143. *See id.* The *Barth* court left out the ability element in the second part of the test it applied. *See id.*

144. *See* Campbell v. Haiges, 504 N.E.2d 200, 203 (Ill. App. Ct. 1987). The court stated that if the parent is at work when the child commits an intentional tort, the parent is not able to control his or her minor child. *See id. But see* Barth v. Massa, 558 N.E.2d 528, 534-35 (Ill. App. Ct. 1990) (citing *Cooper v. Meyer*, 365 N.E.2d 201, 203 (Ill. App. Ct. 1977), which explains that if the parent was not at home, he or she had no opportunity, rather than no ability, to control the conduct of the child at the time of the tort).

145. *Cf.* Lavin v. Jordon, No. 01A01-9709-CV-00455, 1998 WL 557653, at *7 (Tenn. Ct. App. Sept. 2, 1998). The Tennessee Court of Appeals applied section 37-10-103 of the Tennessee Code Annotated, which is similar to the proposed revision to the *Restatement*. *See Lavin*, 1998 WL 557653, at *1 (citing TENN. CODE ANN. § 37-10-103). The Tennessee Court of Appeals found that parents may be held liable when:

> 1) the parent has opportunity and ability to control the child, and 2) the parent has knowledge, or in the exercise of due care should have knowledge, of the child's habit, propensity or tendency to commit specific wrongful acts, and 3) the specific acts would normally be expected to cause injury to others, and 4) the parent fails to exercise reasonable means of controlling or restraining the child.

Id. at *7.

146. *See generally id.* (suggesting a different parental liability standard from the current *Restatement*).

147. *See* 59 AM. JUR. 2D *Parent and Child* § 123 (1987).

148. *See* N.D. CENT. CODE § 32-03-39 (1996). The code provides:

> Parental responsibility for minor children–Recovery limitations.
>
> Any municipal corporation, county, township, school district, or department of the state of North Dakota, or any person, partnership, corporation, limited liability company, association, or religious organization, whether incorporated or unincorporated, shall be entitled to recover damages in a civil action in an amount not to exceed one thousand dollars in a court of competent jurisdiction from the parents of any minor, living with a parent, who shall maliciously or willfully destroy property, real, personal, or mixed, belonging to such municipal corporation, county, township, school district, or department of the state of North Dakota, or person, partnership, corporation, limited liability company, association, or religious organization.

questions, the first concerning their constitutionality and the second about their validity and structure. First, parental liability statutes have generally been upheld against constitutional attack.[149] Second, those states that have enacted parental liability statutes have followed the same general form.[150] However, it is not clear whether parental liability statutes will severely limit recovery or expressly expand recovery by including or excluding such things as personal injury, medical expenses, or pain and suffering.[151] The following sections address these issues and questions.

A. CONSTITUTIONALITY

Parental liability statutes have generally been upheld as constitutional;[152] however, there are cases that have held to the contrary.[153] The main constitutional argument opposing parental liability statutes asserts that they violate substantive due process under either a particular state constitution or the Constitution of the United States.[154] In *Corley v.*

> Recovery shall be limited to actual damages in an amount not to exceed one thousand dollars, in addition to taxable court costs.

See id.; see also ARK. CODE ANN. §9-25-102 (Michie 1998); FLA. STAT. ANN. § 741.24 (West 1997); MISS. CODE ANN. § 93-13-2 (1999); OKLA. STAT. ANN. tit. 23, § 10 (1987 & Supp. 2000); OR. REV. STAT. § 30.765 (1997).

149. *See* Stang v. Waller, 415 So. 2d 123, 124 (Fla. Dist. Ct. App. 1982). Many states have parental liability statutes, and the weight of authority favors a finding of constitutionality. *See id.*

150. *See* B. C. Rickets, Annotation, *Validity and Construction of Statutes Making Parents Liable for Torts Committed by Their Minor Children*, 8 A.L.R.3d 612 § 1(a) (1966). While revealing some variation in language, these parental liability statutes are substantially similar in their tenor and effect. *See id.*

151. *See* ARIZ. REV. STAT. § 12-661 (West 1992 & Supp. 1999); *see also* CAL.CIV. CODE § 1714.1 (West 1998); CONN. GEN. STAT. ANN. § 52-572 (West 1991 & Supp. 1999); IDAHO CODE § 6-210 (1998 & Supp. 1999); MASS. GEN. LAWS ANN. ch. 231, § 85G (West 1985 & Supp. 1999); S.D. CODIFIED LAWS § 25-5-15 (Michie 1999).

152. *See Stang*, 415 So. 2d at 124.

153. *See generally* Corley v. Lewless, 182 S.E.2d 766, 770 (Ga. 1971) (holding that parental liability statutes violate due process of law); *see also* Owens v. Ivey, 525 N.Y.S.2d 508, 516 (1988) (holding that New York's parental liability statute violated the United States Constitution, Article I, § 10 because it is, in intent and in effect, a bill of attainder). The Owens court explained:

> [W]hile legislating a monetary penalty for a parent on account of damage caused by the deliberate and malicious acts of his child may have a sound rational basis in history, and in logic, as an effective deterrent, or preventive threat, and thereby pass muster in the face of a constitutional challenge on due process or equal protection grounds, such a statute does pose, at once, the question of whether it is, in essence, a forbidden bill of attainder—particularly where, as here, the sole basis for the liability is the blood relationship, or its legal equivalent, of parent and child.
>
> For, it is one thing, constitutionally, to predicate vicarious tort liability on a consensual, at will, economic relationship; but quite another, to predicate such liability solely on the blood relationship of parent and child.

Owens, 525 N.Y.S.2d at 514 (1988).

154. *See generally* Kelly v. Williams, 346 S.W.2d 434, 437 (Tex. Ct. App. 1961). The Court of Civil Appeals of Texas rejected the argument that a statute making parents liable for the willful destruction of property by minors violates the right to due process enumerated in either the Constitution of Texas or the Constitution of the United States. *See id.*

Lewless,[155] the Georgia Supreme Court struck down a parental liability statute as unconstitutional.[156] The court stated that "to allow any recovery on the basis stated by the statute would deprive the defendant of property without due process of law, would authorize a recovery without liability, and would compel payment without fault."[157] However, eleven years later the Georgia Supreme Court found a revised version of the parental liability statute to be constitutional.[158]

To meet the requirements of substantive due process, a state statute must not be unreasonable, arbitrary, or capricious, and the means utilized to achieve the statute's goal must have a real and substantial relation to the object sought to be obtained.[159] In *Stang v. Waller*,[160] the District Court of Appeals of Florida analyzed the constitutionality of a Florida statute that imposed strict vicarious liability upon parents when their minor child willfully destroyed the property of another.[161] The *Stang* court held that enacting a statute intended to reduce juvenile delinquency by imposing parental liability is neither arbitrary, unreasonable, nor capricious.[162] The court further held that the state had a legitimate interest in controlling juvenile delinquency, and there was a rational relationship between imposing liability upon parents and controlling

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155. 182 S.E.2d 766 (Ga. 1971).

156. *See* Corley v. Lewless, 182 S.E.2d 766, 770 (Ga. 1971). The parental liability statute "contravenes the due process clauses of the state and federal constitutions." *Id.* The statute at issue provided:

> Every parent or other person in loco parentis having the custody and control over a minor child or children under the age of 17 shall be liable for the willful and wanton acts of said minor child or children resulting in death, injury or damage to the person or property, or both, of another. This section shall be cumulative and shall not be restrictive of any remedies now available to any person, firm or corporation for injuries or damages arising out of the acts, torts or negligence of a minor child under the 'family-purpose car doctrine' or any statutes now in force and effect in the State of Georgia.

Id. at 768.

157. *Id.* (quoting Lloyd Adams, Inc. v. Liberty Mut. Ins. Co., 10 S.E.2d 46, 51 (Ga. 1940)). *But see* Stang v. Waller, 415 So. 2d 123, 124 (Fla. Dist. Ct. App. 1982) (suggesting that the Supreme Court of Georgia subsequently found the statute constitutional). Since the decision in *Corley*, the General Assembly of Georgia changed the intent of the statute from compensating victims for the conduct of children to aid in controlling juvenile delinquency and also limited the amount of liability imposed. *See Stang*, 415 So. 2d at 124.

158. *See* Hayward v. Ramick, 285 S.E.2d 697, 699 (Ga. 1982). The General Assembly passed a new parental liability statute with the express intent to aid in controlling juvenile delinquency as opposed to compensating victims. *See id.* at 698. The court held that the statute intended aid in reducing juvenile delinquency by imposing parental liability and that the statute was neither unreasonable nor arbitrary. *See id.* at 699. The court further held that the state had a legitimate state interest in the subject and that the law was rationally related to that interest. *See id.*

159. *See* Nebbia v. New York, 291 U.S. 502, 525 (1934).

160. 415 So. 2d 123 (Fla. Dist. Ct. App. 1982).

161. *See* Stang v. Waller, 415 So. 2d 123, 124 (Fla. Dist. Ct. App. 1982).

162. *See id.*

juvenile delinquency.[163] Accordingly, the District Court of Appeals of Florida found the statute constitutional.[164]

Similarly, the New Mexico Court of Appeals in *Alber v. Nolle*[165] held that a parental liability statute was sustainable as a proper exercise of police power if the statute was "reasonably necessary to prevent manifest evil or reasonably necessary to preserve the public safety or general welfare."[166] The court further held that a proper exercise of police power was not a violation of due process even though it may affect private property.[167] The New Mexico Court of Appeals thus held that New Mexico's parental liability statute did not violate a parent's due process property rights.[168] The *Alber* court determined that making parents liable for the willful torts of their minor children was not a violation of due process because the legislature was acting within the scope of its authority and the liability conformed with the legislative intent of reducing juvenile delinquency or preserving the public safety.[169]

Therefore, a parental liability statute would withstand a due process challenge if the state legislature, in enacting the statute, was not acting unreasonably, arbitrarily, or capriciously and if the statute was a reasonable way of achieving a legitimate state goal.[170] North Dakota's parental liability statute has no accompanying legislative history.[171] Therefore, it is not clear whether North Dakota's parental liability statute would be considered constitutional. However, the constitutionality of parental liability statutes has been comprehensively treated on a number of occasions, and well-reasoned authority suggests that such statutes are constitutional.[172] Furthermore, those states that have enacted parental liability statutes have followed the same general form.[173] Because these statutes have followed the same general form, and since the greater weight of authority suggests that parental liability statutes of that form

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163. *See id.*

164. *See id.*

165. 645 P.2d 456 (N.M. Ct. App. 1982)

166. *See* Alber v. Nolle, 645 P.2d 456, 461 (N.M. Ct. App. 1982) (citing *State v. Dennis*, 454 P.2d 276 (N.M. Ct. App. 1969), which explained that a state statute is a proper exercise of police power only if the enactment is reasonably necessary to preserve the public welfare).

167. *See id.*

168. *See id.* at 462.

169. *See id.* at 461-62.

170. *See generally* Stang v. Waller, 415 So. 2d 123 (Fla. Dist. Ct. App. 1982).

171. *See* N.D. CENT. CODE § 32-03-39 (1997). For the text of section 32-03-39, see *supra* note 148.

172. *See Stang*, 415 So. 2d at 124.

173. *See* Rickets, *supra* note 150, § 1(a). While there is some variation in language from state to state, parental liability statutes generally have substantially similar effects. *See* Rickets, *supra* note 150, § 1(a).

are constitutional, North Dakota's parental liability statute also likely would be considered constitutional.[174]

Most of the states that have enacted parental liability statutes have a general stated purpose of curbing juvenile delinquency, vandalism, and malicious mischief.[175] Almost all of the statutes identify those classes of individuals, including corporations, organizations, individuals, and political subdivisions, as having the right to be plaintiffs.[176] They generally require that the minor child live with the parent and also usually set the maximum dollar amount that can be recovered from the parents in a civil action for damages.[177] The maximum amount, however, varies significantly from state to state.[178]

There are different schools of thought surrounding the reasons for creating such statutes.[179] One view is that it is better to make the parents of a young tortfeasor liable to compensate a victim for damages than it is to let the loss fall upon the innocent victim.[180] Another view is that these types of statutes are enacted because of dissatisfaction with the common law rule of liability and may be an effort to assist in curbing juvenile delinquency, vandalism, and malicious mischief.[181] A third, but related, view is that the state legislatures intended to impose a penalty upon the parents of destructive children, rather than intending to compensate the injured party.[182] With those differing schools of thought, the extent or scope of liability imposed under state parental liability statutes varies.

B. SCOPE OF PARENTAL LIABILITY STATUTES

In addition to constitutional concerns, parental liability statutes also face the hurdle of strict construction. Statutes that are in derogation of the common law must be strictly construed.[183] Thus, since parental

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174. *Compare* Rickets, *supra* note 150, § 1(a) (suggesting that parental liability statutes are substantially similar), *with Stang*, 415 So. 2d at 124 (explaining that well-reasoned authority suggests that parental liability statutes are constitutional).

175. *See* Rickets, *supra* note 150, § 1(a).

176. *See* Rickets, *supra* note 150, § 1(a).

177. *See* Rickets, *supra* note 150, § 1(a).

178. *See* ARIZ. REV. STAT. ANN. § 12-661 (West 1992 & Supp. 1999) (explaining that liability shall not exceed $10,000 for each tort); *see also* CAL. CIV. CODE § 1714.1 (West 1998) (explaining that liability shall not exceed $25,000). *Compare* N.D. CENT. CODE § 32-03-39 (1996) (explaining that liability shall not exceed $1,000).

179. *See* Rickets, *supra* note 150, § 1(a).

180. *See* Kelly v. Williams, 346 S.W.2d 434, 438 (Tex. Ct. App. 1961). State legislatures have decided that it is better that the parents of the tortfeasor bear the loss instead of the victim. *See id.*

181. *See* Sutherland v. Roth, 407 So. 2d 139, 140 (Ala. Civ. App. 1981) (citing Rickets, *supra* note 150, § 1(a)).

182. *See* Rickets, *supra* note 150, § 1 (a).

183. *See Sutherland*, 407 So. 2d at 140. "Statutes in derogation of the common law are strictly construed and are presumed not to alter the common law in any manner not expressly declared." *Id.* (citing Arnold v. State, 353 So. 2d 524 (Ala. 1977)).

liability statutes are generally a derogation of the common law tradition against parental liability, they also must be strictly construed.[184] Strict construction of these statutes may result in parental liability for personal injuries inflicted by a minor child[185] or result in no liability for personal injuries.[186] To determine whether these results truly conform to the basic intentions of the individual state legislature in enacting such statutes, an analysis of a few individual state statutes is required.[187]

Some state parental liability statutes specifically provide any person the right to recover from the parents for personal injuries sustained by a willful or malicious act of a minor child.[188] For example, Idaho allows recovery of economic expenses, including medical expenses; however, Idaho's statute specifically excludes recovery for less tangible damages, such as pain and suffering and wrongful death.[189] New Mexico's parental liability statute, contrarily, has been interpreted to include pain and suffering as recoverable damages.[190] California's and Massachusetts' parental liability statutes specifically allow recovery when the willful misconduct of the minor results in an injury or death to another

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184. *See id.*

185. *See* ARIZ. REV. STAT. ANN. § 12-661 (West 1992 & Supp. 1999) (including injury to the person).

186. *See* N.D. CENT. CODE § 32-03-39 (1996) (covering all property, whether real, personal, or mixed).

187. *See* City of Dickinson v. Thress, 290 N.W. 653, 656 (N.D. 1940) (stating that legislative intent must be sought first in the language of the statute itself and that it must be presumed that the legislature intended what it expressly stated).

188. *See* ARIZ. REV. STAT. § 12-661 (imposing parental liability for a child's willful act which results in any injury to the person); *see also* S.D. CODIFIED LAWS § 25-5-15 (Lexis 1999). "Any person . . . suffering damages to real, personal or mixed property, or personal injury, through the malicious and willful act or acts of a minor child . . . shall have therefor a cause of action against and recover of the parents of such child . . . ." S.D. CODIFIED LAWS § 25-5-15; *see also* CONN. GEN. STAT. ANN. § 52-572 (West 1991) (allowing for recovery from parents when a minor willfully or maliciously causes injury to any person).

189. *See* IDAHO CODE § 6-210 (1993); *see also* Fuller v. Studer, 833 P.2d 109, 112 (Idaho 1992).

> [T]he Idaho Legislature recognized that it is contrary to public policy to hold parents vicariously liable for the torts of their children by enacting IDAHO CODE § 6-210. This section holds parents liable for economic losses 'willfully caused' by a minor child still living with the parents, but only up to a maximum of $2,500. Subsection (2) of the statute disallows recovery for 'less tangible damage such as pain and suffering, wrongful death, or emotional distress.' The effect of this statute is to prohibit imposing vicarious liability upon the parents for a child's negligent conduct.

See Fuller, 833 P.2d at 112.

190. *See* Alber v. Nolle, 645 P.2d 456, 463 (N.M. Ct. App. 1982) (stating that pain and suffering is recoverable under the parental liability statute), *see also* N.M. STAT. ANN. § 32A-2-27 (Michie 1997).

> Any person may recover damages not to exceed four thousand dollars ($4,000) in a civil action in a court or tribunal of competent jurisdiction from the parent, guardian or custodian having custody and control of a child when the child has maliciously or willfully injured a person or damaged, destroyed or deprived use of property, real or personal, belonging to the person bringing the action.

See N.M. STAT. ANN. § 32A-2-27.

person.[191] Thus, strictly construing each parental liability statute will either severely limit recovery or expressly expand recovery by either including or excluding such things as personal injury, medical expenses, or pain and suffering.[192]

Most of these statutes impose strict liability on parents for the intentional acts of their minor children.[193] For example, the Oklahoma Supreme Court has held that its parental liability statutes make parents absolutely liable.[194] In addition, a Florida court determined that the state's parental liability statute imposes strict vicarious liability upon parents for their minor children's malicious or willful destruction of property.[195] The Texas Court of Civil Appeals determined that the Texas parental liability statute does not require a showing of knowledge by the parent for liability to attach.[196] Arizona has statutorily enacted that the child's willful misconduct will be imputed to the parents whether or not such parents or guardian could have anticipated the misconduct.[197]

Therefore, it reasonably may be inferred from the foregoing discussion that parental liability statutes generally create strict liability for parents.[198] Interestingly, such a statutory enactment imposes parental liability in direct contradiction to the *Restatement,* since the *Restatement* imposes liability only if parents have knowledge of their child's propensity to commit the act at issue.[199] Accordingly, under parental liability statutes, parents may be strictly liable for damages to real and personal property, and possibly for personal injuries up to the maximum amount allowed under the respective state statute.[200]

IV. THE STATUS OF PARENTAL LIABILITY IN NORTH DAKOTA

The common law; the Restatement (Second) of Torts, section 316, and North Dakota's parental liability statute, North Dakota Century

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191. *See* CAL. CIV. CODE § 1714.1 (West 1998); MASS. GEN. LAWS ANN. ch. 231, § 85G (West 1985).

192. *See* ARIZ. REV. STAT. § 12-661; *see also* CAL. CIV. CODE § 1714.1; CONN. GEN. STAT. ANN. § 52-572; IDAHO CODE § 6-210; MASS. GEN. LAWS ANN. ch. 231, § 85G; S.D. CODIFIED LAWS § 25-5-15.

193. *See* Memorial Lawn Cemeteries Ass'n, v. Carr, 540 P.2d 1156, 1157-58 (Okla. 1975) (explaining that section 10 of title 23 of the Oklahoma statute makes parents absolutely liable because no negligence of the parents needs to be shown).

194. *See id.*

195. *See* Stang v. Waller, 415 So. 2d 123, 123-24 (Fla. Dist. Ct. App. 1982).

196. *See* Kelly v. Williams, 346 S.W.2d 434, 437 (Tex. Ct. App. 1961). The court held that there was no requirement of knowledge, nor should one be read into the statute. *See id.*

197. *See* ARIZ. REV. STAT. § 12-661.

198. *See Memorial Lawn Cemeteries Ass'n,* 540 P.2d at 1158; *see also Stang,* 415 So. 2d at 123-24; *Kelly,* 346 S.W.2d at 437.

199. *See* RESTATEMENT (SECOND) OF TORTS § 316 (1965).

200. *See* ARIZ. REV. STAT. § 12-661; *see also* CAL. CIV. CODE § 1714.1 (West 1998); CONN. GEN. STAT. ANN. § 52-572 (West 1991); IDAHO CODE § 6-210 (1957); MASS. GEN. LAWS ANN. ch. 231, § 85G (West 1985); S.D. CODIFIED LAWS § 25-5-15 (Lexis 1999).

Code section 32-03-39, all play an important role in determining the status of parental liability in North Dakota. The common law tradition that parents are not liable for the acts of their minor children has been codified in North Dakota.[201] North Dakota has not specifically adopted the *Restatement* test; however, the North Dakota Supreme Court has applied a parental liability test similar to other courts' interpretations of the *Restatement*.[202] Finally, the extent of liability imposed under North Dakota's parental liability statute, North Dakota Century Code section 32-03-39, has yet to be defined.[203]

A. COMMON LAW CODIFIED

The common law tradition that parents are not liable for the acts of their minor children has been codified in North Dakota.[204] This law was first recognized in the Dakota Revised Codes of 1877,[205] and it is textually the same today in the North Dakota Century Code as it was in the Dakota Revised Code of 1877.[206] As discussed earlier, the common law tradition of no parental liability has only been recognized by the North Dakota Supreme Court twice, first in 1929[207] and again in 1966.[208] In 1929, the North Dakota Supreme Court addressed parental liability in *Miller v. Kraft*.[209] *Miller* involved an automobile accident between the plaintiff and the defendant's son.[210] The *Miller* court explained that under North Dakota law, parents are not answerable for the acts of their child.[211] Therefore, the defendant in *Miller* only could be held liable if such liability was based on an agency or servant relationship.[212]

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201. *See* N.D. CENT. CODE § 14-09-21 (1997) ("Neither parent nor child is answerable as such for the act of the other").

202. *Compare* Peterson v. Rude, 146 N.W.2d 555, 557 (N.D. 1966) (suggesting that parents may be liable if they knows their child has the disposition to do a particular act and fail to prevent a similar incident from occurring), *with* Barth v. Massa, 558 N.E.2d 528, 534 (Ill. Ct. App. 1990) (suggesting that a parent may be liable if he or she is aware of specific instances of prior conduct and had the opportunity to control the child).

203. *See* N.D. CENT. CODE § 32-03-39 (1997).

204. *See* N.D. CENT. CODE § 14-09-21 (1997).

205. *See id.*

206. *See id.*; *see also* DAKOTA REVISED CODES § 105 (1877).

207. *See* Miller v. Kraft, 223 N.W. 190, 191 (N.D. 1929) ("Under section 4439, C.L. 1913, 'neither parent nor child is answerable as such for the act of the other'").

208. *See* Peterson v. Rude, 146 N.W.2d 555, 557 (N.D. 1966) (citing N.D. CENT. CODE § 14-09-21 (1997)).

209. 223 N.W. 190 (N.D. 1929).

210. *See* Miller v. Kraft, 223 N.W. 190, 191 (N.D. 1929).

211. *See id.*

212. *See id.* The *Miller* court then proceeded to determine that the evidence did not support a verdict against the defendant father under the family purpose rule for automobiles; however, a majority of the court further determined that a new trial should be granted regarding the question of the father's liability. *See id.* at 192.

In 1966, the North Dakota Supreme Court again addressed the issue of parental liability in *Peterson v. Rude*.[213] *Peterson* involved an injury to a child's eye caused by a pellet shot from an air rifle while two boys struggled for possession of the air rifle.[214] The *Peterson* court also recognized that parents are not liable for the acts of their minor children.[215] Therefore, the plaintiffs in *Peterson* were required to show more than a mere relationship between the father and his child to establish liability.[216] However, the *Peterson* court did recognize that a parent may still be liable for his or her own negligence.[217]

As shown in *Miller* and *Peterson*, the North Dakota common law notion of no parental liability may still exist in its strictest form. The North Dakota courts have consistently held that parental liability must be predicated upon more than a mere parent-child relationship.[218] However, the requirement that something more than the parent-child relationship exist for liability may be fulfilled by a parental negligence standard founded on parental knowledge.[219]

B. THE *RESTATEMENT* TEST IN NORTH DAKOTA

North Dakota has not specifically adopted the *Restatement* test. However, the North Dakota Supreme Court has applied a test for parental liability that is similar to other courts' interpretation and application of the *Restatement* test.[220] *Peterson* involved a four-year old girl struck in the eye by a pellet when some neighborhood boys struggled for possession of a pellet gun.[221] The father of the boy who owned the gun was hospitalized at the time of the incident.[222] The court determined there was no evidence that the defendant's son had any vicious habits or was ever negligent in using the air rifle.[223] Therefore, the court held that "the motion for judgment notwithstanding the failure of the jury to return a verdict should have been granted as to the defendant father."[224]

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213. 146 N.W.2d 555 (N.D. 1966).

214. *See* Peterson v. Rude, 146 N.W.2d 555, 557 (N.D. 1966).

215. *See id.* at 557 (citing N.D. CENT. CODE § 14-09-21 (1997)).

216. *See id.*

217. *See id.* (suggesting that parents may be liable if they know their child has the disposition to do a particular act and fail to prevent a similar incident from occurring).

218. *See id.*

219. *See id.*

220. *Compare* Peterson v. Rude, 146 N.W.2d 555, 557 (N.D. 1966) (suggesting that parents may be liable if they has knowledge that their child is disposed to do a particular act but fail to prevent a similar incident from occurring), *with* Barth v. Massa, 558 N.E.2d 528, 534 (Ill. Ct. App. 1990) (suggesting that a parent may be liable if he or she is aware of specific instances of prior conduct and had the opportunity to control the child).

221. *See Peterson*, 146 N.W.2d at 557.

222. *See id.* at 556.

223. *See id.* at 558.

224. *Id.*

Peterson laid out the current test for parental liability in North Dakota, which states that "a parent may be held liable for the wrongful acts of his minor child if he has knowledge of the child's previous conduct of the same character, his disposition to do the act which he is charged with having committed, and where such parent, with such knowledge, fails to take reasonable steps to avoid an incident."[225] This test is similar to the Appellate Court of Illinois' interpretation of the *Restatement* test in *Barth*.[226] In *Barth*, the court explained that to establish liability under the *Restatement (Second) of Torts*, section 316, the plaintiffs must show that the parents were aware of specific instances of prior conduct and that the parents had the opportunity to control the child.[227] Therefore, the North Dakota Supreme Court may have implicitly adopted the *Restatement (Second) of Torts*, section 316.[228]

Those states that have adopted the *Restatement (Second) of Torts*, section 316, have not followed the *Restatement* as written and instead have created a two-part analysis based on the parents' knowledge of their child's propensity for malicious behavior and the parents' opportunity to control the child.[229] Therefore adopting the *Restatement* in North Dakota for a child's intentional tort may be of no applicable value.[230] Since the current *Restatement* test is not applied as it is written, a more appropriate approach may be to adopt an analysis similar to the proposed revision previously set forth in this Note. Thus, parental liability would be determined by deciding first whether the parents either knew or should have known of the necessity to control their minor child, and second whether the parents had the ability and opportunity to control their minor child.[231]

Another approach may be to adopt the analysis in *Dinsmore-Poff*.[232] In that case, the Alaska Supreme Court adopted a four-part test to determine whether the parents acted reasonably in light of the

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225. *Id.* at 557.

226. *Compare Barth*, 558 N.E.2d at 534 (suggesting that liability may attach if a parent is aware of specific instances of prior conduct and had the opportunity to control the child), *with Peterson*, 146 N.W.2d at 557 (suggesting that a parent may be liable if he or she knows the child has the disposition to do a particular act but fails to prevent a similar incident from occurring).

227. *See Barth*, 558 N.E.2d at 534.

228. *Compare Barth*, 558 N.E.2d at 534, *with Peterson*, 146 N.W.2d at 557.

229. *See* Dinsmore-Poff v. Alvord, 972 P.2d 978, 981 (Alaska 1999). The text of section 316 suggests a three-part analysis; however, states which have adopted the *Restatement* typically do not apply that test and ask instead whether the parents had notice of their child's propensity to commit such acts. *See id.*

230. *Cf. Peterson*, 146 N.W.2d at 557 (establishing a parental negligence standard).

231. *See* RESTATEMENT (SECOND) OF TORTS § 316 (1965) (requiring some revision from the actual text).

232. *Dinsmore-Poff*, 972 P.2d at 978.

knowledge of their child's propensity to commit such acts.[233] The four parts of this test are as follows: First, did the parents respond appropriately to the specific acts of prior violence? Second, have the subsequent efforts to control the child been reasonable? Third, should the parents have foreseen the need to prevent this specific incident? Finally, if so, did the parents make reasonable efforts to prevent this specific incident?[234] None of the questions asked under the Alaska four-part test is dispositive; rather, an affirmative answer to any may contribute to a finding of parental negligence.[235] Basically, the *Dinsmore-Poff* test for determining parental liability focuses on the reasonableness of the parents' response to their child's behavior.[236]

Either the proposed revised *Restatement* test or the Alaska four-part test from *Dinsmore-Poff* would provide a more understandable and workable parental liability standard for North Dakota.[237] Both tests provide a standard that comports with current case law. Since parental liability is not based solely on negligence, but also is based on strict parental liability statutes, an analysis of North Dakota's parental liability statute is appropriate.[238]

C. NORTH DAKOTA'S PARENTAL LIABILITY STATUTE

The North Dakota Supreme Court has yet to hear a case involving section 32-03-39 of the North Dakota Century Code.[239] Therefore, to predict the statute's likely interpretation, out-of-state cases involving similar statutes must be analyzed.[240] The issues surrounding this statute are whether it will be interpreted as imposing strict liability on parents; whether it allows for the recovery of damages for personal injuries or applies

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233. *See id.* at 985.
234. *See id.*
235. *See id.*
236. *See id.*
237. *See id.*
238. *See* N.D. CENT. CODE § 32-03-39 (1997).
239. *See id.* The statute states:

> Parental responsibility for minor children–Recovery limitations.
>
> Any municipal corporation, county, township, school district, or department of the state of North Dakota, or any person, partnership, corporation, limited liability company, association, or religious organization, whether incorporated or unincorporated, shall be entitled to recover damages in a civil action in an amount not to exceed one thousand dollars in a court of competent jurisdiction from the parents of any minor, living with a parent, who shall maliciously or willfully destroy property, real, personal, or mixed, belonging to such municipal corporation, county, township, school district, or department of the state of North Dakota, or person, partnership, corporation, limited liability company, association, or religious organization.
>
> Recovery shall be limited to actual damages in an amount not to exceed one thousand dollars, in addition to taxable court costs.

Id.

240. *Compare* N.D. CENT. CODE § 32-03-39, *with* IND. CODE ANN. § 34-31-4-1 (West 1999).

only to property damage; and finally, whether it would preclude further recovery in the event that the damages exceed the statutory maximum.[241]

North Dakota Century Code section 32-03-39 will likely be interpreted as creating strict parental liability.[242] Indiana has a parental liability statute similar to that of North Dakota.[243] The Indiana Court of Appeals interpreted its parental liability statute as giving rise to strict parental liability.[244] Further, a close look at North Dakota Century Code section 32-03-39 reveals that there is no statutorily required level of parental culpability necessary to impose liability on the parents for their child's willful or malicious acts.[245] Therefore, it reasonably may be inferred that the parental liability statute for North Dakota imposes strict liability on parents.[246]

The issue then is what type of damages are covered by North Dakota Century Code section 32-03-39.[247] As written, the statute allows recovery for willful or malicious destruction of property, real, personal, or mixed.[248] While some state parental liability statutes do allow for recovery of personal injury, the North Dakota statutory language does

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241. *See generally* Wells v. Hickman, 657 N.E.2d 172, 176-77 (Ind. Ct. App. 1995) (resolving similar issues).

242. *See id.* at 177 (stating that IND. CODE ANN. § 34-31-4-1 which is similar to N.D. CENT. CODE § 32-03-39 makes parents strictly liable).

243. *Compare* N.D. CENT. CODE § 32-03-39 (1996)

> (Any municipal corporation, county, township, school district, or department of the state of North Dakota, or any person, partnership, corporation, limited liability company, association, or religious organization, whether incorporated or unincorporated, shall be entitled to recover damages in a civil action in an amount not to exceed one thousand dollars in a court of competent jurisdiction from the parents of any minor, living with a parent, who shall maliciously or willfully destroy property, real, personal, or mixed, belonging to such municipal corporation, county, township, school district, or department of the state of North Dakota, or person, partnership, corporation, limited liability company, association, or religious organization.
> Recovery shall be limited to actual damages in an amount not to exceed one thousand dollars, in addition to taxable court costs),

with IND. CODE ANN. § 34-31-4-1 (West 1999)

> ((a) As used in this section, "child" means an unemancipated person who is less than eighteen (18) years of age.
> (b) A parent is liable for not more than three thousand dollars ($3,000) in actual damages arising from harm to a person or damage to property knowingly, intentionally, or recklessly caused by the parent's child if:
> 1) the parent has custody of the child; and
> 2) the child is living with the parent).

244. *See Wells*, 657 N.E.2d at 177 (Ind. Ct. App. 1995) (explaining that Indiana's parental liability statute holds a parent strictly liable for certain acts of his or her minor child).

245. *See* N.D. CENT. CODE § 32-03-39.

246. *See id.*

247. *See id.*

248. *See id.*

not specifically allow recovery for personal injury. [249] North Dakota's statute provides:

> [A]ny . . . person, . . . shall be entitled to recover damages in a civil action in an amount not to exceed one thousand dollars in a court of competent jurisdiction from the parents of any minor, living with a parent, who shall maliciously or willfully destroy property, real, personal, or mixed, belonging to such . . . person . . . .[250]

The language of the statute suggests that property damages such as a broken window are recoverable when a child willfully throws a rock through that window. However, it is not clear whether the statute allows recovery for injuries when the same rock flies through an open window and hits a person.[251]

New Mexico had a parental liability statute that closely paralleled North Dakota's current parental liability statute.[252] In *Ross v. Souter*,[253] the New Mexico Court of Appeals affirmed the dismissal of an action brought to recover damages to orthodontic work.[254] The action was brought against the parents of a boy who was involved in a fight with the plaintiff's son.[255] The plaintiff sought recovery under New Mexico's parental liability statute.[256] The court determined that damages to dental work as a result of a fight were not the type of property that was meant to be covered by the phrase, "property, real, personal, or mixed."[257] This phrase matches the phrase contained in North Dakota's current parental liability statute.[258] Therefore, North Dakota's parental liability statute likely would not cover personal injuries without some sort of legislative amendment specifically allowing recovery for personal injury.[259] Importantly, New Mexico has enacted a new parental liability

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249. *Compare* ARIZ. REV. STAT. § 12-661 (West 1992 & Supp. 1999) (including injury to the person), *with* N.D. CENT. CODE § 32-03-39.

250. N.D. CENT. CODE § 32-03-39.

251. *See id.*

252. *Compare* N.M. STAT. ANN. § 13-8-53.1 (1953) (repealed 1972) (explaining that a plaintiff may recover damages from a parent of a minor who maliciously or willfully destroys property, real, personal, or mixed), *with* N.D. CENT. CODE § 32-03-39 (explaining that a plaintiff may recover damages from a parent of a minor who maliciously or willfully destroys any property).

253. 464 P.2d 911 (N.M. Ct. App. 1970).

254. *See* Ross v. Souter, 464 P.2d 911, 913 (N.M. Ct. App. 1970).

255. *See id.* at 912.

256. *See id.*

257. *See id.* at 913. The court found no authority for holding that a child's teeth are property, real, personal, or mixed. *See id.*

258. *Compare* N.M. STAT. ANN. § 13-8-53.1 (repealed 1972) (replaced by N.M. STAT. ANN. § 32A-2-27 (Michie 1993)), *with* N.D. CENT. CODE § 32-03-39.

259. *See* N.D. CENT. CODE § 32-03-39.

statute that specifically allows for recovery of damages for personal injury when a child willfully or maliciously injures a person.[260]

North Dakota's parental liability statute would likely make parents strictly liable for the acts of their minor children.[261] However, case law suggests that the text of the statute limits recovery to property damages and not personal injury damages.[262] Interestingly, case law further suggests that North Dakota's parental liability statute likely would not preclude recovery of damages for parental negligence.[263] As such, an analysis of the interaction between these different parental liability standards is necessary.

D. THE INTERACTION OF NORTH DAKOTA LAW

The interaction of North Dakota law requires an analysis of how North Dakota Century Code section 32-03-39, which holds parents strictly liable for a child's willful destruction of property, and North Dakota Century Code section 14-09-21, which holds parents harmless for the acts of their minor children, affect one another.[264] Further, it is important to consider how North Dakota Century Code section 32-03-39 and North Dakota Century Code section 14-09-21 both interact with the *Restatement*.[265]

1. Section 14-09-21 v. Section 32-03-39

North Dakota has two statutes that affect the realm of parental liability.[266] It is not exactly clear how North Dakota Century Code section 32-03-39, which holds parents strictly liable for a child's willful destruction of property, would be interpreted in comparison to North Dakota Century Code section 14-09-21 which holds parents harmless for the acts of their minor children.[267] Generally a statute which is contrary to a common law principle is strictly construed.[268] However, since North Dakota enacted section 14-09-21, it is not exactly accurate to say that

260. *See* N.M. STAT. ANN. § 32A-2-27 (Michie 1993) (allowing for personal injuries); *see also* Alber v. Nolle, 645 P.2d 456, 463 (N.M. Ct. App. 1982) (stating that damages for pain and suffering are recoverable under the parental liability statute).

261. *See* N.D. CENT. CODE § 32-03-39.

262. *See* Ross v. Souter, 464 P.2d 911, 913 (N.M. Ct. App. 1970).

263. *See* Wells v. Hickman, 657 N.E.2d 172, 177 (Ind. Ct. App. 1995) (explaining that the parental liability statute does not preclude an action based on negligence).

264. *See* N.D. CENT. CODE § 14-09-21 (1997); N.D. CENT. CODE § 32-03-39.

265. *See id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 316 (1965).

266. *See* N.D. CENT. CODE §§ 14-09-21, 32-03-39.

267. *See* N.D. CENT. CODE §§ 14-09-21, 32-03-39.

268. *See* Sutherland v. Roth, 407 So. 2d 139, 140 (Ala. Civ. App. 1981). "Statutes in derogation of the common law are strictly construed and are presumed not to alter the common law in any manner expressly declared." *Id.* (citing Arnold v. State, 353 So. 2d 524 (Ala. 1977)).

applying North Dakota Century Code section 32-03-39, which is contrary to section 14-09-21, is a derogation of the common law. Nonetheless, section 14-09-21 may be considered a common law principle, meaning the application of section 32-03-39 would probably be strictly construed.[269]

North Dakota likely would still recognize the general rule that parents are not liable for the acts of their children.[270] However, the court may not overlook North Dakota Century Code section 32-03-39.[271] Most cases that have dealt with the common law notion that parents are not liable for the torts of their minor children, while interpreting a parental liability statute, have generally recognized the common law notion of no parental liability.[272] After recognizing this common law notion, the courts likely will then apply the parental liability statute.[273] North Dakota likely would follow this method of recognizing section 14-09-21 as the general law of North Dakota and would then determine, based on the facts of the case, whether North Dakota Century Code section 32-03-39 provides an applicable exception to the common law notion by imposing parental liability.[274]

2. *Section 14-09-21 v. the Restatement*

While North Dakota likely will continue to recognize the general rule that parents are not liable for the acts of their children,[275] the North Dakota Supreme Court could not completely overlook the *Restatement* exception to this general rule.[276] Since the court applied a test similar to the *Restatement* tests applied by other courts which have adopted the *Restatement*,[277] it is probable that the North Dakota Supreme Court would review out-of-state precedent to determine the current interpretation of the *Restatement*.[278] The North Dakota Supreme Court likely would adopt a parental liability standard predicated upon some sort of

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269. *See Wells*, 657 N.E.2d at 176 (Ind. Ct. App. 1995) ("[S]tatutes in derogation of the common law must be strictly construed").

270. *See* N.D. CENT. CODE § 14-09-21; *see also* Peterson v. Rude, 146 N.W.2d 555, 557 (N.D. 1966).

271. *See* N.D. CENT. CODE § 32-03-39.

272. *See generally Wells*, 657 N.E.2d at 176-77.

273. *See generally id.*

274. *See* N.D. CENT. CODE §§ 14-09-21, 32-03-39.

275. *See* N.D. CENT. CODE § 14-09-21; *see also Peterson*, 146 N.W.2d at 557.

276. *See* RESTATEMENT (SECOND) OF TORTS § 316 (1965).

277. *See Peterson*, 146 N.W.2d at 557. The court applied a test predicated upon parental knowledge of a child's disposition to commit the act with which the child is charged and a parental failure to act. *See id.*

278. *See id.* at 558 (looking to out-of-state case law to determine whether an air rifle is a dangerous weapon).

parental negligence.[279] The standard adopted would probably be more similar to the case law interpretation of the *Restatement (Second) of Torts,* section 316 than it would be to the actual language of the *Restatement.*[280]

3. *Section 32-03-39 v. Restatement*

The final interplay is that between North Dakota Century Code section 32-03-39 and the *Restatement (Second) of Torts*, section 316. The Supreme Court of North Dakota probably will adopt either the *Restatement* or a reasonable interpretation of the *Restatement.*[281] Therefore, the main issue when comparing these two parental liability principles is whether a case allowing recovery under North Dakota Century Code section 32-03-39 would preclude recovery under the *Restatement.*[282] Generally, recovery under a parental liability statute does not preclude recovery under another exception to the common law tradition of no parental liability.[283] Thus, parents in North Dakota may be liable above the statutory limit imposed by North Dakota Century code section 32-03-39, if the plaintiffs are able to prove that the parents failed to control the conduct of their minor child under the interpretation of the *Restatement* test that the North Dakota Supreme Court ultimately chooses to adopt.[284]

Parental liability has undergone significant changes since the common law notion was codified in Dakota Revised Codes of 1877. The law in North Dakota has only begun to develop in this area. Currently, North Dakota has not yet expressly adopted the *Restatement (Second) of Torts*, section 316. However, North Dakota has enacted a parental liability statute that is limited in scope to allow only for recovery of damages to real or personal property.[285]

North Dakota will most likely recognize section 14-09-21 as the general law of the state.[286] However, the North Dakota Supreme Court could not overlook completely the *Restatement* exception to this general rule.[287] Theoretically, the North Dakota Supreme Court would recog-

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279. *See generally id.* at 557 (explaining that parental negligence may create parental liability).

280. *See* Dinsmore-Poff v. Alvord, 972 P.2d 978, 981 (Alaska 1999) (explaining that case law does not bear out the three-part test suggested by the *Restatement*).

281. *See Peterson*, 146 N.W.2d at 557 (applying a test similar to the *Restatement*).

282. *See generally* Wells v. Hickman, 657 N.E.2d 172, 177 (Ind. Ct. App. 1995) (explaining that parental liability statute does not preclude recovery on an action based upon parental negligence).

283. *See id.* (suggesting that parental liability statutes do not preclude recovery on an action based upon parental negligence).

284. *See id.*

285. *See* N.D. CENT. CODE § 32-03-39 (1996).

286. *See Peterson*, 146 N.W.2d at 557.

287. *See* RESTATEMENT (SECOND) OF TORTS § 316 (1965).

nize section 14-09-21 and then determine, based on the facts of the case, whether section 32-03-39 provides a basis for imposing parental liability.[288] Further, the court likely would also recognize that recovery under a parental liability statute generally does not preclude recovery under a parental negligence theory such as the *Restatement* test.[289]

There are two ways in which North Dakota can raise the level of parental liability. The first avenue is through the state legislature. By amending North Dakota Century Code section 32-03-39 to include parental liability for personal injuries received from a child's willful or malicious acts, North Dakota could effectively increase the level of parental liability. The North Dakota legislature could also increase the level of parental liability effectively by amending North Dakota Century Code section 32-03-39 to increase the dollar amount of damages allowed. The second way that North Dakota could increase parental liability would be through the North Dakota State Supreme Court. By adopting the *Restatement (Second) of Torts*, section 316, or a version of the *Restatement* test, the North Dakota Supreme Court could clarify the extent of liability for parents in North Dakota.

V. CONCLUSION

As discussed earlier, there are three major stages in the development of the law with respect to parental liability.[290] First, the common law tradition purported that a mere parent-child relationship was insufficient grounds for establishing liability,[291] and therefore parents were not held liable for the torts of their minor children.[292]

Second, the *Restatement* exception asserts that parents may be liable for the acts of their minor child when the parent fails to exercise control over that child.[293] Currently, many states hold parents liable should

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288. *See* N.D. CENT. CODE §§ 14-09-21 (1997), 32-03-39.

289. *See Wells*, 657 N.E.2d at 177 (suggesting that parental liability statutes do not preclude recovery on an action based upon parental negligence).

290. *See* 59 AM. JUR. 2D *Parent and Child* § 116 (1987) (discussing the common law tradition, statutory exception, and case law development of parental liability).

291. *See id.* Reflecting the age of this notion, the common law tradition was that *paternity* was not sufficient grounds for liability. *See id.* (emphasis added).

292. *See id.; see also* White v. Seitz, 174 N.E. 371, 372 (Ill. 1930) (stating that the court has held, in accordance with the universal rule of the common law, that a parent is not liable for the tort of his or her minor child based solely on the relationship between them); Wintercorn v. Rybicki, 397 N.E.2d 485, 487 (Ill. App. Ct. 1979) (stating that parents are not liable for the torts of their minor child merely because of the parent-child relationship).

293. *See* Wells v. Hickman, 657 N.E.2d 172, 176 (Ind. Ct. App. 1995).

> There are four common law exceptions to the general rule that a parent is not liable for the tortious acts of her child: 1) where the parent entrusts the child with an instrumentality which, because of the child's lack of age, judgment, or experience, may become a source of danger to others; 2) where the child committing the tort is acting as the servant or agent of its parents; 3) where the parent consents, directs, or sanctions the wrong

they fail to control the conduct of their minor children under a test established *in Restatement (Second) of Torts*, section 316.[294] Liability under the *Restatement* is predicated upon parental negligence[295] and is delineated as a two-part test,[296] although most courts apply a three-part variation of it.[297]

The final stage is parental liability statutes. The constitutionality of such statutes has been treated comprehensively on a number of occasions, and well-reasoned authority suggests that such statutes should be considered constitutional.[298] Those states that have enacted parental liability statutes have followed the same general form and effect,[299] which generally creates strict liability for the parents.[300] However, the kind and amounts of damages recoverable vary widely from statute to statute.[301]

After the Columbine massacre, the *New York Times* interviewed neighbors and acquaintances of the teenage killers and their families and described the relationship that Eric Harris and Dylan Klebold had with their parents.[302] The article suggests that there was a fundamental disconnection between Eric and Dylan's lives and the lives their parents believed they were living.[303] The article further suggests that the Harrises and the Klebolds were "caring, conscientious parents who structured their lives around supporting their children . . . and who believed, from all accounts, that they were on the right track."[304] However, these

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doing; and 4) where the parent fails to exercise control over the minor child although the parent knows or with due care should know that injury to another is possible.

Id. (citing K. C. v. A. P., 577 So. 2d 669, 671 (Fla. Dist. Ct. App. 1991)).

294. RESTATEMENT (SECOND) OF TORTS § 316 (1965). The *Restatement* states:

> Duty of Parent to Control Conduct of Child
>
> A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent
>
> (a) knows or has reason to know that he has the ability to control his child, and
>
> (b) knows or should know of the necessity and opportunity for exercising such control.

Id.

295. *See* Parsons v. Smithey, 504 P.2d 1272, 1275 (Ariz. 1973).

296. *See* RESTATEMENT (SECOND) OF TORTS § 316 (1965).

297. *See Dinsmore-Poff*, 972 P.2d at 981.

298. *See* Stang v. Waller, 415 So. 2d 123, 124 (Fla. Dist. Ct. App. 1982).

299. *See* Rickets, *supra* note 150, § 1(a). Despite some variation in language, these parental liability statutes are substantially similar in their tenor and effect. *See* Rickets, *supra* note 150, § 1(a).

300. *See* Memorial Lawn Cemeteries Ass'n v. Carr, 540 P.2d 1156, 1158 (Okla. 1975); *see also* Stang v. Waller, 415 So. 2d 123, 123-24 (Fla. Dist. Ct. App. 1982); Kelly v. Williams, 346 S.W.2d 434, 437 (Tex. Ct. App. 1961).

301. *See* ARIZ. REV. STAT. § 12-661 (West 1992); *see also* CAL.CIV. CODE § 1714.1 (West 1998); CONN. GEN. STAT. ANN. § 52-572 (West 1991); IDAHO CODE § 6-210 (Michie 1998); MASS. GEN. LAWS ANN. ch. 231, § 85G (West 1985); S.D. CODIFIED LAWS § 25-5-15 (Lexis 1999).

302. *See* Pam Belluck & Jodi Wilgoren, *Caring Parents, No Answers, in Columbine Killers' Pasts*, N.Y. TIMES, June 29, 1999, at A14.

303. *See id.*

304. *Id.*

parents are now involved in a multimillion dollar lawsuit,[305] in which the parents of one child killed at Columbine allege that the Harrises and the Klebolds failed to supervise their children.[306] Whether these parents are liable in tort for the acts of their children is yet to be decided.

The shift from no liability to liability for negligence, and now the creation of strict statutory liability for parents, suggests that this area of law is still developing. The events at Columbine may provide some insight into the future of parental liability. Colorado has recognized the common law notion of no parental liability as well as a parental negligence standard.[307] Further, Colorado does have a parental liability statute covering both property damage and personal injury.[308] Therefore, the future of parental liability likely may be shaped by the litigation surrounding the events at Columbine.

Jeffrey L. Skaare

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305. *See Court Decisions, supra* note 3, at 5.

306. *See id.*

307. *See* Hall v. McBryde, 919 P.2d 910, 913 (Colo. Ct. App. 1996), which states:

> A parent is not liable for the torts committed by his or her child merely because of the parent-child relationship. However, when a child has a known propensity to commit a potentially harmful act, the parent has a duty to use reasonable care to prevent the child from causing such harm if the parent knows or should know of the propensity and has the ability and opportunity to control the child.

Id.

308. *See* COLO. REV. STAT. ANN. § 13-21-107 (West 1997). The statute provides:

> Damages for destruction or bodily injury caused by minors
>
> (1) The state or any county, city, town, school district, or other political subdivision of the state, or any person, partnership, corporation, association, or religious organization, whether incorporated or unincorporated, is entitled to recover damages in an amount not to exceed three thousand five hundred dollars in a court of competent jurisdiction from the parents of each minor under the age of eighteen years, living with such parents, who maliciously or willfully damages or destroys property, real, personal, or mixed, belonging to the state, or to any such county, city, town, or other political subdivision of the state, or to any such person, partnership, corporation, association, or religious organization or who maliciously or willfully damages or destroys any such property belonging to or used by such school district. The recovery shall be the actual damages in an amount not to exceed three thousand five hundred dollars, in addition to court costs and reasonable attorney fees.
>
> (2) Any person is entitled to recover damages in an amount not to exceed three thousand five hundred dollars in a court of competent jurisdiction from the parents of each minor under the age of eighteen years, living with such parents, who knowingly causes bodily injury to that person, including bodily injury occurring on property belonging to or used by a school district. The recovery shall be the actual damages in an amount not to exceed three thousand five hundred dollars, in addition to court costs and reasonable attorney fees.

Id.

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