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Parental Liability for a Child's Tortious Acts

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I. The Parent-Child Relationship

The parent-child relationship has been historically subjected to extensive and close scrutiny by the American judicial system and by legal scholars.[1] The duties the law places on a parent are among the most demanding it places on any individual. Parenthood is a twenty-four hour-a-day task that embraces such far-reaching concepts as love, protection and support.[2] Realistically, the duty to love is too abstract an idea to find much applicability in the courts. The more visible manifestations of that love, the protection and support of the child, however, are well-defined cornerstones of the parent-child relationship.[3]

Naturally there are limits to the broad duties placed upon the parent. When the child is the aggressor in a tortious situation, the parent is not automatically deemed liable as an insurer of the child's behavior.[4] The question becomes under what circumstances will the parent be judged liable for the child's act. This comment seeks to answer that question by carefully examining the current law. The considerations of parental supervision, infant capacity, parent-child immunity, and damages incurred by an injured child are discussed as each operates within the framework of the parent-child relationship. For the sake of comparison, the situation is considered in which the child is the victim of the offense. It is argued that the liability of parents for their children's tortious acts should be expanded beyond its present limitations.

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1. *See, e.g.*, J. GOLDSTEIN & J. KATZ, THE FAMILY AND THE LAW 831 (1965); Coburn, *Child-Parent Communications: Spare the Privilege and Spoil the Child*, 74 DICK. L. REV. 599 (1969); Note, *Voluntary Relinquishment of Parental Rights in South Dakota*, 16 S.D. L. REV. 203 (1971); Note, *Stanley v. Illinois: Expanding the Rights of the Unwed Father*, 34 U. PITT. L. REV. 303 (1972); 39 U. CIN. L. REV. 785 (1970).

2. Appeal of Diane B., 456 Pa. 429, 321 A.2d 618 (1974).

3. The duty to protect the child is a vital one. It is a primary responsibility of the parent to see that the child's behavior will not place him in a situation that could prove dangerous. Driscoll v. C. Rasmussen Corp., 35 Ill. 2d 74, 219 N.E.2d 483 (1966); Styer v. City of Reading, 360 Pa. 212, 61 A.2d 382 (1948).

4. Assurance Co. of America v. Bell, 108 Ga. App. 766, 134 S.E.2d 540 (1963). Here, the defendant insurance company refused to indemnify the plaintiff for losses sustained when the plaintiff's three-year-old son released the emergency brake on a car owned by a friend of the plaintiff's wife. The court overruled the defendant's demurrer saying, "But the parent is not an insurer that the child will not harm another." *Id.* at 774, 134 S.E.2d at 545.

II. The Capacity of the Child

Before a victim can recover for an injury received at the hands of a child, he must prove that the child had the capacity to commit the tort. The best approach to understanding the legal treatment of a child's capacity is to divide the discussion of the topic into two categories, intentional and negligent torts.

A. Intentional Torts

One of the leading cases in the examination of a child's capacity to form a tortious intent is *Garratt v. Dailey*.[5] Five-year-old Brian Dailey allegedly pulled a lawn chair out from under Ruth Garratt, an adult neighbor's sister. When she brought an action against Brian for battery, an intentional tort, the Washington Supreme Court was confronted with the problem of what mental state must be shown in a five-year-old to hold him responsible for an intentional tort. The test they devised is simply that if the child knew to a substantial certainty the nature of his act, he will have formed the requisite intent. Brian had only to know to a substantial certainty that if he moved the chair, Mrs. Garratt would fall.[6] Clearly, the *Garratt* court was concerned only with the child's understanding of the physical nature of the act and not of all its possible ramifications. Nothing was said to indicate that Brian must have understood that Mrs. Garratt would suffer dire consequences because of his act.

The child's appreciation of the wrongfulness of his act is generally not considered when he is alleged to have committed an intentional tort. In *Ellis v. D'Angelo*[7] a four-year-old boy was held capable of committing a battery upon the babysitter he had violently attacked and injured. This case asserts that while a child need understand only the physical nature of his act and not all its possible consequences, the wrongfulness of the act still may be an important consideration. *Ellis* indicated that a showing that the child understood the wrongfulness of his act would entitle the plaintiff to exemplary damages. Proof of a specific wrongful intent on the part of the child may also be a necessary element of the alleged offense, as in the case of malicious assault.[8]

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5. 46 Wash. 2d 197, 279 P.2d 1091 (1955). In Jorgensen v. Nudelman, 45 Ill. App. 2d 350, 195 N.E.2d 422 (1963), a nine-year-old girl was struck by a stone thrown by a six-year-old boy and suffered a loss of sight in one eye. The complaint was dismissed by the trial court for failure to state a cause of action. The appellate court affirmed the dismissal of the count alleging negligence because the boy was too young. It reversed on the count alleging assault, however, because that was considered an intentional tort. Citing the *Garratt* "substantial certainty" test, the court recognized that a child too young to be negligent "may have the capacity to intend an injurious act." *Id.* at 354, 195 N.E.2d at 425.

6. The court in *Garratt* wrote, "A battery would be established if, in addition to plaintiff's fall, it was proved that, when Brian moved the chair, he knew with substantial certainty that the plaintiff would attempt to sit down where the chair had been." 46 Wash. 2d at 202, 279 P.2d at 1094.

7. 116 Cal. App. 2d 310, 253 P.2d 675 (1953).

8. Walker v. Kelly, 6 Conn. Cir. Ct. 715, 314 A.2d 785 (1973).

B. *Negligent Torts*

Although the plaintiff is burdened to prove the child knew the nature of his act, intentional torts are generally more easily proved against a child than are negligent acts.[9] Several reasons exist for the greater difficulty an injured party experiences in trying to prove a defendant child was capable of negligence. The first of these is the troublesome standard of care. The wide divergence of competence among children of different ages and even within the same age group requires a standard more flexible than the "reasonable man" standard. The civil courts borrowed presumptions used by the criminal courts to achieve some uniformity.

The presumptions are threefold. First, a child under seven years of age is presumed incapable of negligence. Second, from age seven to fourteen the presumption of incapacity becomes easier to rebut as the child grows older. Last, at age fourteen, there is a rebuttable presumption that the child is capable of negligence.[10] These presumptions are a starting point but the child's conduct in any particular case still must be examined and evaluated. The best and most common approach to this task is that followed in the Pennsylvania case of *Kuhns v. Brugger*.[11] In *Kuhns*, a twelve-year-old accidentally shot his cousin while they were staying at their grandfather's vacation cottage. Quoting a prior case,[12] the court stated, "The standard by which actions of children are to be measured is the child's capacity to appreciate the danger involved. This capacity is usually determined by the understanding expected from children of like age, intelligence and experience."[13] Although this is obviously a subjective standard, it is more effective than an objective standard could possibly be when utilized to judge such a non-uniformly developed group as children. The adaptability of this subjective standard to the case at hand accounts for its widespread acceptance.[14]

There is one occasion when the courts will hold a child to the objective standard of a "reasonable man": When the child is engaged in an adult activity. The court in *Dellwo v. Pearson*[15] did so in holding a twelve-year-old boy responsible for negligently driving a motorboat. They wrote, "[M]inors are entitled to be judged by standards commensurate with age, experience, and wisdom when engaged in activities appropriate to their age, experience, and wisdom . . . ."[16] The chief problem arises in determining what constitutes an adult activity.[17]

9. *See* Jorgensen v. Nudelman, 45 Ill. App. 2d 350, 195 N.E.2d 422 (1963).
10. W. PROSSER, LAW OF TORTS § 32, at 155-56 (4th ed. 1971).
11. 390 Pa. 331, 135 A.2d 395 (1957).
12. Koenig v. Flaherty, 383 Pa. 187, 117 A.2d 719 (1955).
13. 390 Pa. at 341, 135 A.2d at 401 (citation omitted).
14. *See, e.g.*, Overlock v. Ruedemann, 147 Conn. 649, 165 A.2d 335 (1960); Audet v. Convery, 55 Del. 336, 187 A.2d 412 (1963).
15. 259 Minn. 452, 107 N.W.2d 859 (1961).
16. *Id.* at 458, 107 N.W.2d at 863.
17. In Purtle v. Shelton, 251 Ark. 519, 474 S.W.2d 123 (1971), a seventeen-year-old boy accidentally shot his friend while deer hunting. The court held him to a subjective rather

In addition to the subjective standard, the child, like everyone else, is also benefitted by the greater number of defenses available in negligence actions as opposed to suits for intentional torts. Thus, in many states, the plaintiff's contributory negligence will excuse a negligent child for the harm he causes.[18] Conversely, in cases in which the child is the victim of negligence, he may by virtue of his age be incapable of contributory negligence that the adult defendant could use as a defense. The age at which a child may be insulated by this incapacity varies from jurisdiction to jurisdiction.[19]

In summary, the capacity of a child is a vital consideration whenever liability is in issue. Although the courts have attempted to formulate guidelines that will create uniformity, the area is still subject to a great deal of individual interpretation. This must be remembered when discussing the child as either actor or victim in a tort situtation.

III. Parental Liability for the Child as Actor

A. The Child's Intentional and Negligent Torts

1. General Rule: Parental Non-Liability.—The victim of a child's tort is usually left without recompense since children are normally judgment-proof. The French Civil Code remedied this situation by holding the parent vicariously liable unless he could establish that the injurious act was unpreventable. The concept was adopted in Louisiana and intensified by eliminating the parent's chance of avoiding liability.[20] Thus, the Louisiana parent is strictly and vicariously liable for the torts of his child.[21]

At common law, however, the evolution of parental liability was quite dissimilar. There was no parental liability for a child's tort unless the parent participated to some degree in the harmful act.[22] Unlike the civil-law approach, liability could not be predicated solely on the relationship between parent and child.[23] Nor would the negligence of the child be imputed to the parent. A leading case in this area arose when a father left his golf club lying on the lawn. His young son, while playing

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than the "reasonable man" standard. The rationale was that deer hunting could not be characterized by the courts as an adult activity and that such a determination must be made by the legislature. The case is given detailed discussion in Note, *Torts—The Standard of Care Required of a Minor Using Dangerous Instrumentalities*, 26 ARK. L. REV. 243 (1972).

18. 65A C.J.S. *Negligence* § 130, at 101 (1966).

19. *See, e.g.*, Red Top Cab Co. v. Cochran, 100 Ga. App. 707, 112 S.E.2d 229 (1959) (six); Romine v. City of Watseka, 34 Ill. App. 370, 91 N.E.2d 76 (1950) (seven); Meineke v. Hollowell, 136 Ind. App. 324, 200 N.E.2d 541 (1964) (five); Farley v. Yerman, 231 Md. 444, 190 A.2d 773 (1963) (four).

20. Annot., 54 A.L.R.3d 974, 1025 (1973).

21. Scott v. Behrman, 273 So. 2d 661 (La. Ct. App. 1973).

22. *See* Bonner v. Surman, 215 Ark. 301, 220 S.W.2d 431 (1949); LaBonte v. Federal Mut. Ins. Co., 159 Conn. 252, 268 A.2d 663 (1970).

23. Rovin v. Connelly, 291 A.2d 291 (Del. Super. Ct. 1972); National Dairy Prods. Corp. v. Freschi, 393 S.W.2d 48 (Mo. Ct. App. 1965); Condel v. Savo, 350 Pa. 350, 39 A.2d 51 (1944).

with the club, accidentally injured a playmate. An action for damages was brought against the father and the child. The court held that since a golf club was not so intrinsically dangerous as to be a "dangerous instrumentality," the father was not negligent and the case against him should be dismissed.[24] As a result of these barriers existing at common law, many individuals were left uncompensated for injuries caused by children. To provide deserving plaintiffs with some form of redress, the courts began to carve out exceptions whereby the parent could be held liable for his child's tort. Eventually four of these exceptions were accepted into general use.[25] Three are discussed in the following section. The fourth, which focuses directly on the parent's own tortious conduct in the form of negligent supervision, will be considered at a later point.[26]

2. Exceptions to the Non-Liability Rule.—The first exception concerns entrusting a child with a dangerous instrumentality. This raises an initial question of what is a dangerous instrumentality. Unfortunately there is no definitive answer, as the determination often depends upon the circumstances of the particular case, including the child's age, judgment, and experience.[27] The court's determination frequently appears to be randomly arrived at and based upon its own predilections.[28] The predominant pattern of the dangerous instrumentality cases is that it is rare that

24. Lubitz v. Wells, 19 Conn. Supp. 322, 113 A.2d 147 (Super. Ct. 1955).

25. In Gissen v. Goodwill, 80 So. 2d 701 (Fla. 1955), the eight-year-old daughter of hotel guests slammed a door on the hand of a hotel employee, severing one of his fingers. The court outlined the four exceptions and illustrated them with other cases before holding that the plaintiff did not state a cause of action against the parents. The court wrote,

> However, there are certain broadly defined exceptions wherein a parent may incur liability: 1. Where he intrusts his child with an instrumentality which, because of the lack of age, judgment, or experience of the child, may become a source of danger to others. 2. Where a child, in the commission of a tortious act, is occupying the relationship of a servant or agent of its parents. 3. Where the parent knows of his child's wrongdoing and consents to it, directs or sanctions it. 4. Where he fails to exercise parental control over his minor child, although he knows or in the exercise of due care should have known that injury to another is a probable consequence.

Id. at 703.

26. *See* notes 60-73 and accompanying text *infra*. The fourth exception listed in *Gissen* predicated parental liability upon a failure to control the child. This is a comparatively large topic that is interwoven throughout the other three exceptions as well. At this point it will be most fruitful to hold discussion of parental supervision in abeyance.

27. Some objects, such as rifles, are so intrinsically dangerous that there can be little dispute that they are dangerous instrumentalities. Giguere v. Rosselot, 110 Vt. 173, 3 A.2d 538 (1939). Others, such as matches, become dangerous instrumentalities only in particular situations. Jarboe v. Edwards, 26 Conn. Supp. 350, 223 A.2d 402 (Super. Ct. 1966).

28. The air rifle or BB gun is illustrative of this point. For example, in 1960 a Mississippi case concluded that it was a dangerous instrumentality. Tatum v. Lance, 238 Miss. 156, 117 So. 2d 795 (1960). Just a year earlier in Lane v. Chatham, 251 N.C. 400, 111 S.E.2d 598 (1959), an air rifle was judged not to be a dangerous instrumentality per se. The two-year age difference between the actors did not appear to be a significant distinction. An air rifle was even held to be a "toy" in a case in which the court found no parental duty to warn the eight-year-old who used it of its hazards. Thus in Highsaw v. Creech, 17 Tenn. App. 573, 69 S.W.2d 249 (1933), there was no recovery for the young playmate who lost his eye to a shot from the "toy." Although this case was decided forty years ago, it still appears to be the law in Tennessee. *See* Saunders v. State, 208 Tenn. 347, 345 S.W.2d 899 (1961). Citing *Highsaw*, the court in *Saunders* stated, "of course, air rifles are classed as toys and are bought for small boys." 208 Tenn. at 370, 345 S.W.2d at 909.

a parent is automatically ruled liable. The courts tend to look for improper action on the parent's part, usually inadequate supervision, before declaring him liable.[29] This is virtually a requirement of parental participation in the offense through an error of omission or some other parental misconduct.

The second exception, turning on principles of agency, requires an even more overt element of parental participation. The cases employing this exception are very straightforward. In one instance a father told his son to kill trespassing dogs that were decimating their turkey flock. When the son unjustifiably shot the plaintiff's foxhound, the father was judged responsible on the theory of agency.[30] On the other hand, another parent was not liable when her son, who was told to sprinkle the grass, turned the hose on a horse, which stampeded causing great damage. Here, the injurious act was outside the scope of the son's employment.[31]

Perhaps the most frequent use of this exception is provided by the "family purpose doctrine," which was spawned by a fictional agency relationship within the family.[32] The doctrine requires the responsible person to be the head of the household[33] and to have given his consent, either expressly or impliedly, to the driver of the vehicle who has caused the injury.[34] Furthermore, the car must be available for general use, not merely on a particular occasion.[35] Some courts dispute the agency theory and view the family purpose doctrine solely as the result of public policy demands.[36] Of course, the owner of the vehicle is not always held liable for the injury if, for example, the minor's use of the car substantially departs from that which is authorized. Thus, when the owner permits his car to be driven to a nearby dance, he is not responsible for damage done on an out-of-state joyride.[37] While the family purpose doctrine is not

29. In Jarboe v. Edwards, 26 Conn. Supp. 350, 233 A.2d 402 (Super. Ct. 1966), the defendant's four-year-old son was permitted access to matches, which he used to start a fire in a young friend's trousers. Emphasizing the child's known fascination with fire and the lack of proper parental supervision, the court found liability. Clearly the two factors that the court stressed were vital to the plaintiff's success and the dangerous instrumentality exception merely served as a convenient rationale for the decision. Conversely, in White v. Page, 61 Ohio Abs. 498, 105 N.E.2d 652 (Ct. App. 1950), the court found neither of the above factors and held that a bow and arrow with which an eleven-year-old inflicted injury was simply not a dangerous instrumentality.

30. Harrington v. Hall, 22 Del. 72, 63 A. 875 (Super. Ct. 1906).

31. Evers v. Krouse, 70 N.J.L. 653, 58 A.181 (Ct. Err. & App. 1904).

32. Finnocchio v. Lunsford, 129 Ga. App. 694, 201 S.E.2d 1 (1973).

33. Lee v. Degler, 169 Colo. 226, 454 P.2d 937 (1969).

34. Gotcher v. Rowell, 2 Wash. App. 615, 468 P.2d 1004 (1970).

35. Costanzo v. Sturgill, 145 Conn. 92, 139 A.2d 51 (1958).

36. In Peterson v. U-Haul Co., 409 F.2d 1174 (8th Cir. 1969), the court stated,

> [The] doctrine is not based on the common law rules of agency as generally understood and applied, but is rather a legal fiction utilized as an instrument of public policy in imposing vicarious liability on those whom the courts think should bear the responsibility for negligence committed by a member of the family.

Id. at 1178. The valuable lesson contained in the *Peterson* case is not its criticism of the doctrine's agency origins but rather its recognition of policy that favors placing the loss where it can be fairly borne.

37. In Cross v. Whitley, 319 F. Supp. 1099 (E.D.N.C. 1967), the court, applying North

universally followed,[38] there is a recognizable trend to broaden its scope.[39] This is one area in which courts have discovered that sound public policy has demanded expansion of parental liability.

The third exception to the general non-liability rule occurs when the parent approves the act by direction, consent or ratification. In one Texas case, the plaintiff recovered sixty dollars from the father of the boys who killed his hog. The court decided that the father had counselled and abetted his sons in the act and was therefore responsible.[40] A North Carolina court did not find the same liability in a case in which a fifteen-year-old took indecent liberties with his date. Although the father had instructed his son to engage in illicit sexual intercourse, he did not encourage the type of assault complained of and could not be held responsible.[41]

Consent differs from direction in that it may be tacit. An illustration of this facet of the exception occurred in the case of *Langford v. Shu*.[42] Here, the mother of a twelve-year-old boy stood silently by while he played a practical joke on a neighbor woman with a known fear of exotic animals. When the boy sprang a foxtail at her, she thought it was alive and her resulting flight culminated in a serious fall. The court found potential parental liability, declaring that the parent's failure to restrain the child could amount to consent to his act. The parental consent that produced the potential liability in the *Langford* case closely parallels the parental participation that is often an important factor in the dangerous instrumentality cases.[43]

Ratification differs from the previous examples in that it occurs after the act in question has taken place.[44] This aspect of the exception was mentioned in the 1930 case of *Ryley v. Lafferty*.[45] Here, a sixteen-year-old habitually tricked younger children into accompanying him to a secluded spot where he would beat them up. The court found that one young victim had stated a cause of action against the bully's parents. The *Ryley* case not only exemplifies ratification but also reinforces the notion

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Carolina law, held that the family purpose doctrine was not applicable against the owner of the automobile when the driver exceeded his authorized use of the vehicle.

38. *See, e.g.*, Williams v. Wheeler, 252 Md. 75, 249 A.2d 104 (1969); Grimes v. Labreck, 108 N.H. 26, 226 A.2d 787 (1967); Huskey v. Williams, 360 Pa. 78, 60 A.2d 32 (1948).

39. Note, *The Child Driver Under the Kentucky Family Purpose Doctrine*, 55 KY. L.J. 502 (1967). "The very nature of the family purpose doctrine will lead the [Kentucky] Court [of Appeals] to broaden its scope and thereby extend relief to a greater number of injured litigants." *Id.* at 512.

40. Trahan v. Smith, 239 S.W. 345 (Tex. Civ. App. 1922).

41. Bowen v. Mewborn, 218 N.C. 423, 11 S.E.2d 372 (1940).

42. 258 N.C. 135, 128 S.E.2d 210 (1962).

43. *See* notes 27-29 and accompanying text *supra*.

44. "The primary meaning of the word 'ratify' is to confirm; and in its clearest connotation it means to confirm or approve of something which has already been said or done." 75 C.J.S. *Ratify* at 609 (1952).

45. 45 F.2d 641 (D. Idaho 1930).

that some form of parental participation, even of a passive variety, is needed before the courts will affix liability.[46] This demonstrates that in actuality these exceptions have not made much of a dent in the common-law requirement of parental participation in the tortious act.

3. The Vandalism Statutes.—Although the courts have not moved far from the common law in affixing parental liability, the state legislatures have made an attempt to do so through enactment of vandalism statutes. This has been a concerted effort to expand parental liability on a limited basis as forty-six states have enacted laws that seek to find a source of recompense for a child's offense.[47] The one passed by the Pennsylvania legislature is typical:[48]

> Any parent whose child under the age of eighteen years is found liable or is adjudged guilty by a court of competent jurisdiction of a wilful, tortious act resulting in injury to the person, or theft, destruction or loss of property of another, shall be liable to the person who suffers the injury, theft, destruction or loss to the extent hereinafter set forth.

Of course there are variations in approach among the states.[49] Yet, regardless of the type of statute a legislature enacts, the purpose behind vandalism statutes appears to be uniform throughout the country. That purpose is to place upon the parent the obligation to control his minor child and to prevent the child from intentionally harming others.[50] Since any law in derogation of the common law is construed strictly, however, these vandalism statutes are far from a bonanza for the injured party.[51]

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46. To make this point the court wrote,

> Having full knowledge of their child's habits, traits, and vicious disposition, and encouraging him in the manner charged to continue such acts, would constitute assent and participation on the part of the parents in the tort alleged, and, if so, it would be regarded as negligence upon the parents' part.

Id. at 642.

47. Comment, *The Iowa Parental Responsibility Act*, 55 IOWA L. REV. 1037 (1970).

48. PA. STAT. ANN. tit. 11, § 2202 (Purdon Supp. 1977).

49. The Georgia legislature enacted a vandalism statute in 1956. Later the Georgia Supreme Court held that since it contained the word "vandalism," the act did not pertain to personal injuries. Vort v. Westbrook, 221 Ga. 39, 142 S.E.2d 813 (1965). The legislature quickly amended the act, deleting the word "vandalism" and extending coverage to personal injuries. They also extended liability to persons *in loco parentis* as pointed out in Corley v. Lewless, 227 Ga. 745, 182 S.E.2d 766 (1971). For a discussion of the unfortunate subsequent history of the amended act, see notes 54-56 and accompanying text *infra*.

Another state's approach may be seen in a New Mexico plaintiff's attempt to seek recovery for the loss of his teeth and expensive orthodonture. The court in Ross v. Souter, 81 N.M. 181, 464 P.2d 911 (Ct. App. 1970), decided this was not property under the statute, and recovery was denied. A narrow approach favored by a legislature is evidenced by New Jersey's vandalism statute, N.J. STAT. ANN. § 2A: 53A-15 (Supp. 1977). The only change it makes from the common law is to dispense with the requirement that the parent be aware of the need to control his child. Note, *The New Jersey Parental Liability Statute*, 39 TEMP. L.Q. 177, 183 (1966). Nevertheless, in many cases this narrow alteration could be determinative of whether the plaintiff ultimately recovers.

50. Town of Groton v. Medbery, 6 Conn. Cir. Ct. 671, 301 A.2d 270 (1972).

51. In McKinney v. Caball, 40 Mich. App. 389, 198 N.W.2d 713 (1972), a seventeen-year-old girl went for an unauthorized joyride in the plaintiff's car. She had an accident that caused considerable damage to the car. The plaintiff was denied recovery since she could not affirmatively prove the damage was caused by willful or malicious property destruction as required by the vandalism statute.

Another limiting factor the plaintiff faces is that vandalism statutes are usually limited to minimal recoveries in the approximate range of three hundred dollars.[52] This feature encourages increased parental supervision to some degree but the minimal amounts recovered by the plaintiff prevents the parent from ever becoming his child's insurer. Despite these limitations, it should be remembered that the dollar limitations can multiply in cases in which several children are responsible for the damage.[53]

The constitutionality of these statutes has been attacked in five states. These challenges rested heavily on alleged violations of the equal protection and due process clauses of the United States Constitution.[54] Only once was the statute struck down as unconstitutional. This occurred in the Georgia case of *Corley v. Lewless*.[55] Here, a shopkeeper told her young son to ask a twelve-year-old boy not to ride his bicycle so close to the shop window because an accident might happen. A fight ensued and her son was badly injured. His father brought action against the twelve-year-old, his mother and the uncle with whom they both lived. The defendants' motion for summary judgment was denied and the ruling was certified for direct appeal. The Georgia Supreme Court decided that the due process clause was violated because liability was automatically placed upon the parent or one *in loco parentis* without regard for any mitigating circumstances. The court distinguished the three unsuccessful challenges on the ground that each of the other states placed dollar limits on liability. Since Georgia's statute imposed no limit, the court viewed it as compensatory in nature rather than penal. Thus, in the court's opinion, the statute created tort liability that otherwise would not exist, merely because of the parent-child relationship. The Georgia legislature has since

52. W. PROSSER, LAW OF TORTS § 123, at 871 (4th ed. 1971).

53. *See* Lewis v. Martin, 16 Ohio Misc. 18, 240 N.E.2d 913 (C.P. Clermont 1968). In *Lewis*, since four of the parent's children were involved, the potential liability was increased from the statutory maximum of $250 to $1,000.

54. In Kelly v. Williams 346 S.W.2d 434 (Tex. Civ. App. 1961), the court upheld the constitutionality of the Texas statute, relying heavily on the reasonableness of the enactment. It quoted Comment, *Parent and Child—Civil Responsibility of Parents for the Torts of Children—Statutory Imposition of Strict Liability*, 3 VILL. L. REV. 529, 530 (1958), saying, "[I]t is better that the parents of these young tortfeasors be required to compensate those who are damaged, even though the parents be without fault, rather than to let the loss fall upon the innocent victims." 346 S.W.2d at 438. Texas, using a rationale similar to that supporting the inroads made by the family purpose doctrine, is clearly ratifying what it perceives to be the fairer course of action—making the parent, regardless of his participation, insurer of his child up to the statute's limit.

In General Ins. Co. of America v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963), the North Carolina court upheld the state vandalism statute simply as within the police power of the state. This case has received further notation: Annot., 8 A.L.R. 3d 601 (1966). The third attack failed when the Supreme Court of Wyoming synthesized *Kelly* and *Faulkner* to support its conclusion in Mahaney v. Hunter Enterprises Inc., 426 P.2d 442 (Wyo. 1967). Referring to the previous two out-of-state decisions, the court said, "In the light of such holdings and being furnished no persuasive authority to the contrary, we cannot here determine the statute before us to be clearly unconstitutional on the grounds charged." *Id.* at 444.

55. 227 Ga. 745, 182 S.E.2d 766 (1971).

removed the court's primary objection by placing a five hundred dollar liability limit in the act.[56]

The only constitutional attack on a state's vandalism statute subsequent to the decision in *Corley* took place in Maryland in *In re Sorrell*.[57] Two juvenile brothers took part in assaulting another child. The trial judge ordered their parents to make restitution in the amount of two thousand dollars to the parents of the injured boy.[58] On appeal, one basis of attack was that the statute violated due process protection. The Maryland court, after reviewing the previous four attacks upon vandalism statutes, upheld the constitutionality of the one in its state, viewing the vandalism statute as within the police power. Further, the court pointed out that liability without fault, as charged in the instant case, was not novel to the law. The *Corley* decision was distinguished because Georgia's vandalism statute had placed no limit on liability.[59]

B. Negligent Supervision by the Parent

The fourth exception through which a parent may be judged liable for the tort of his child is the parent's negligent supervision of his child.[60] This exception differs from the previous three in that it does not require parental participation in the child's offending act. The focal point is instead the parent's own actions in supervising his child. The Restatement of Torts helps explain exactly what constitutes negligent supervision:

> A parent is under a duty to exercise reasonable care to control his minor child so 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.[61]

The initial requirement, the ability to control the child, is one that the courts are able to decide comparatively easily on the facts of a given case. Obviously, the younger the child, the more effectively the parent will be able to control him and the more he will need that control.[62] Naturally there are a few fine distinctions the courts may have to make. For

56. GA. CODE ANN. § 105-113 (1976).

57. 20 Md. App. 179, 315 A.2d 110 (1974).

58. This amount was double the $1,000 limit set out in the statute because the parents had two children implicated in the assault. *Id.* at 183, 315 A.2d at 113.

59. The court did not find *Corley's* reasoning sound but chose easily to distinguish it rather than dispute it. They remarked, "Even acceptance of the inference suggested by *Corley*, that limitations upon the *amount* of vicarious parental liability would affect the constitutionality of a legislative *right* to impose it, the appellants here are not aided." *Id.* at 187, 315 A.2d at 115.

60. *See* notes 25-26 and accompanying text *supra*.

61. RESTATEMENT (SECOND) OF TORTS § 316 (1966).

62. Jarboe v. Edwards, 26 Conn. Supp. 350, 223 A.2d 402 (Super. Ct. 1966). "[T]he 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." 26 Conn. Supp. at 355, 223 A.2d at 404.

example, when the family is separated, only the parent who exercises physical custody and control can be determined to be responsible for the child's actions.[63]

The issue of parental control is usually clear and seldom presents much of an obstacle to the injured plaintiff. The same cannot be said of the second hurdle imposed by the Restatement, the parent's knowledge of the necessity and opportunity to exercise his control. This hurdle is composed of two factors. The first is that the parent must know that a danger exists. Thus, when a mother did not know that her nine-year-old had obtained a slingshot she could not be held responsible for the injury he caused to a young playmate's eye.[64] The second element, the parent's knowledge of his child's propensity to harm others,[65] is even more difficult to prove. A sampling of some of the cases on this point demonstrates the difficulty a plaintiff will likely encounter.[66] The courts seem to

63. In Mazzilli v. Selger, 13 N.J. 296, 99 A.2d 417 (1953), the court decided that the father was not responsible for controlling his son even though his separate domicile was on the same three-acre tract as that of his ex-wife, with whom the boy lived. *Contra*, Repko v. Serianni, 3 Conn. Cir. Ct. 374, 214 A.2d 843 (1965), holding the father liable even though his son was technically in state custody and had run away from home, where he had been sent on an experimental basis.

64. Hatch v. O'Neill, 133 Ga. App. 624, 212 S.E.2d 11 (1974).

65. Bocock v. Rose, 213 Tenn. 195, 373 S.W.2d 441 (1963).

66. An excellent illustration is provided by the recent case of Parsons v. Smithey, 109 Ariz. 49, 504 P.2d 1272 (1973). Fourteen-year-old Michael Smithey entered Mrs. Parsons' home and began beating her with a hammer. When questioned about his motive, Michael replied that she should take her clothes off and lie down on the floor. Mrs. Parsons' two daughters arrived and tried to help their mother. When one attempted to leave and call the police, Michael beat her with the hammer. He also used a knife and a belt buckle in his attack, almost severing Mrs. Parsons' ear. He then departed in return for a small sum of money but threatened all three women with death if they notified the police. This was not Michael's first indiscretion. His parents were aware of the following acts: Michael had thrown rocks at a strange woman on the street when she refused his order to take off her clothes; his teacher had to move him because he punched and poked the other students; and he once followed a classmate home, forced his way into her home, and shoved her around. His counsellors had recommended psychiatric treatment. Yet this is not the total picture. Michael's police record included apprehension for arson at ages eight and eleven, for running away from home at nine, for stealing his father's watch at ten and three times for joyriding at age fourteen. Despite these warnings, the court ruled that Michael's parents could not foresee that he had the propensity to commit such a violent act on Mrs. Parsons. They put it succinctly: "In this case it appears that the evidence of Michael's past behavior would not have led a reasonable parent to conclude that Michael could commit such a violent and vicious act." *Id.* at 54, 504 P.2d at 1277. This case has received further notation: Annot., 54 A.L.R.3d 964 (1973). Certainly the *Parsons* case casts doubt on an injured party's ability realistically to expect recovery from the minor tortfeasor's parent. The case is more the rule than the exception.

In Dunaway v. Kaylor, 127 Ga. App. 586, 194 S.E.2d 264 (1972), a fourteen-year-old stabbed his neighbor with an icepick. The plaintiff was unable to prove parental knowledge of a propensity for violence even though the parent had previously admitted that his son was troublesome. The court said, "Merely admitting that he knew he would have 'problems' could not be a reasonable basis for inference of previous knowledge of violent traits." *Id.* at 587, 194 S.E.2d at 265.

A Missouri case offers a hint on what the courts require before they will recognize parental knowledge of a child's tortious propensity. National Dairy Prods. Corp. v. Freschi, 393 S.W.2d 48 (Mo. Ct. App. 1965). Here, a three-year-old wandered away from home as he had done before. On this occasion he started a lawfully parked milk truck, which caused a collision and $500 damages. The court found that the plaintiffs had failed to state a cause of action against the boy's parents. They wrote,

be looking for some form of habitually improper behavior that the child has previously exhibited to his parent[67]—a matter that is often difficult to prove. The court in *Linder v. Bidner*[68] presented a concise statement of the rule:[69]

> The rule would seem to be that a parent is negligent when there has been a failure to adopt reasonable measures to prevent a *definite* type of harmful conduct on the part of the child, but that there is no liability on the part of the parents for the general incorrigibility of a child.

Thus proof of parental knowledge of the child's habitually antisocial behavior is necessary to recovery. The establishment of that knowledge will not, however, guarantee satisfaction to the plaintiff. For instance, if a parent is aware of his child's propensity for wrongdoing but takes a proper course of action, such as chastisement, any claim of lax parental supervision is negated. This was the result in *Horton v. Reaves.*[70] Here, the mother of an infant that was dropped off a bed brought an action against the mother of the young neighbor boys who did it. Mrs. Reaves testified that Mrs. Horton had previously reprimanded her sons for pushing another Horton child off a bed. The court rejected this argument remarking, "This latter testimony indicates that Mrs. Horton exercised due care in watching over Johnny and Keith."[71] The court's decision in *Horton* was just, because the parent had acted reasonably in terms of supervising her children. It is more difficult to accept the New Jersey decision of *Zuckerbrod v. Burch*.[72] In *Zuckerbrod* the mother was aware of her child's tendency to throw rocks and sticks at other children. One day, while playing "knights-in-armor," he injured a playmate by throwing a metal rod that was serving as a sword. Several witnesses, including his mother, testified as to Harvey's dangerous habit of repeatedly throwing objects at other children. Nevertheless, the court excused the child's mother from all liability because she had warned and punished Harvey, and the problem was not considered drastic enough to require either confinement or constant supervision.[73] This case is harsher

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> If plaintiffs are unable to prove that said minor child had climbed into and started automobiles or trucks before, they certainly cannot prove that the parents of said minor child failed and refused to restrain the said minor child in that propensity.

Id. at 55.

67. This point was brought out in Gissen v. Goodwill, 80 So. 2d 701 (Fla. 1955), discussed earlier. *See* notes 25-26 *supra*. After reviewing several cases along similar lines, the Florida Supreme Court wrote, "One common factor from the foregoing cases appears salient in the assessment of liability to the parents, that the child had the *habit* of doing the particular type of wrongful act which resulted in the injury complained of." *Id.* at 705 (emphasis added). Like the owner of a dog, a parent appears to be entitled to one worry. The *Smithey* case indicates that the parent is entitled to many worries if they are dissimilar. *See* note 66 *supra*.

68. 50 Misc. 2d 320, 270 N.Y.S.2d 427 (Sup. Ct. 1966).

69. *Id.* at 323, 270 N.Y.S.2d at 430.

70. 186 Colo. 149, 526 P.2d 304 (1974).

71. *Id.* at 154, 526 P.2d at 307.

72. 88 N.J. Super. 1, 210 A.2d 425 (Super. Ct. App. Div. 1965).

73. *Id.* at 6, 210 A.2d at 427.

to the plaintiff than *Horton* because it suggests that ineffective supervision is not sufficient to open recovery to the injured plaintiff. Obviously this erects one more obstacle in the injured party's path. He must not only prove that the parent was aware of his child's dangerous habit but also that the situation could have been ameliorated by proper parental supervision.

With regard to the child as actor, the main point to be stressed is how thoroughly both the offending child and his parent are insulated from liability. This applies with equal force to both intentional and negligent torts. The few exceptions the courts have carved out of the common-law rule of parental non-liability are often strictly construed and do not stray far from the common law. The statutory approach generally finds parental liability more readily, but usually this liability is limited. Vandalism statutes, while beneficial, certainly cannot be characterized as a gold mine for the plaintiff. If the plaintiff is able to overcome the many obstacles that confront him, his best source of recovery continues to be a parent who is guilty of negligent supervision. At the present time, the courts protect the parent-child relationship at the expense of the injured party by effectively absolving the parent from responsibility for his child's tort. This notion of protecting the parent-child relationship is also an important rationale behind the doctrine of parent-child immunity.

IV. Parent-Child Immunity

Parent-child immunity consists of the child's disability to sue his parent for wrongs the parent has inflicted upon the child.[74] It is an expansive subject that has inspired a great deal of comment.[75] The doctrine did not exist at common law but was first devised in Mississippi in 1891.[76] Despite its novelty, parent-child immunity was rapidly embraced throughout the country. This was even accomplished emotionally as one court looked beyond the common law to find its origins in the tablets handed down atop Mount Sinai.[77] This point of view notwithstanding, three rationales are commonly cited as supportive. One is a

74. Comment, *Parental Immunity: Mississippi's Gift to the American Family*, 7 WAKE FOREST L. REV. 597 (1971).

75. *See, e.g.*, Comment, *Parental Immunity: California's Answer*, 8 IDAHO L. REV. 179 (1971); Comment, *Torts—Parent and Child Immunity—Suit Against Parent's Estate*, 59 KY. L.J. 205 (1970); Comment, *Parent-Child Tort Immunity: A Rule in Need of Change*, 27 U. MIAMI L. REV. 191 (1972); Comment, *Parental-Immunity: Mississippi's Gift to the American Family*, 7 WAKE FOREST L. REV. 597 (1971); Comment, *Parental Immunity and Respondeat Superior, 1970*, 28 WASH. & LEE L. REV. 242 (1971).

76. In Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891), the court refused to allow a married minor living at home to recover from her mother for her unjustified commitment to an asylum. The court wrote,

> The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent.

Id. at 711, 9 So. at 887.

77. Small v. Morrison, 185 N.C. 577, 585-86, 118 S.E. 12, 16 (1923).

broad public policy that regards the family as the primary unit of government, analogizing the father as head of the family to a sovereign. The second, an offshoot of the first, is to protect the family unit from the disruption that litigation would bring. The third is the danger of fraud and collusion between family members to dupe the insurance company.[78] Another ground for support less frequently advanced is that without the doctrine the parental privilege of employing physical force in disciplinary matters would be undermined.[79]

Despite these rationales and the fervent support immunity sometimes engendered, exceptions to it were carved out. An emancipated minor could maintain an action against his parent, presumably because the purposes of the immunity doctrine did not forcefully apply.[80] Nor did immunity apply to intentional torts.[81] Some jurisdictions even permitted an action to be maintained when the relationship at the time of the accident was business- rather than family-oriented.[82] These exceptions to the doctrine of parental immunity were harbingers of the general erosion of the doctrine that has accelerated recently.

An early New Hampshire case held that the doctrine did not apply because of the presence of insurance in that particular case.[83] Later, the prevalence of insurance coverage in society led toward the total abrogation of parent-child immunity in New Hampshire.[84] The national trend toward complete abrogation of the doctrine began in 1963 with the

78. Comment, *Parent-Child Tort Immunity: A Rule in Need of Change*, 27 U. MIAMI L. REV. 191 (1972).

79. *Id.* at 196.

80. Martinez v. Southern Pac. Co., 45 Cal. 2d 244, 288 P.2d 868 (1955). In Weinberg v. Underwood, 101 N.J. Super. 448, 244 A.2d 538 (Essex County Ct. 1968), the court declared that once emancipation occurs, the state has no strong interest in maintaining a harmonious family unit: "[T]his Court declines to extend immunity from tort liability actions between parents and emancipated children." *Id.* at 451, 244 A.2d at 540.

81. Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955).

82. In Trevarton v. Trevarton, 151 Colo. 418, 378 P.2d 640 (1963), plaintiff was sleeping nearby while his father engaged in a tree felling business. It was alleged that the father had negligently allowed a felled tree to be dragged across the child. After reviewing the common rationales supporting the doctrine of immunity and several cases from sister states, the court ruled the trial court had erred in dismissing plaintiff's case for failure to state a cause of action. "Under the circumstances alleged here we find no sufficient reason for denying to the child the remedy sought." *Id.* at 423, 378 P.2d at 643.

Contra, Barlow v. Iblings, 261 Iowa 713, 156 N.W.2d 105 (1968). Here, a six-year-old who accompanied his father to the cafe he owned had no cause of action against the parent when he mangled his hand in the meat grinder. The court emphasized the personal nature of the parent-child relationship even though at the time of the accident the family was engaged in a commercial pursuit.

83. In Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930), the court said that the immunity doctrine should not apply when an insurance company is the real party in interest. "It does not apply . . . to a case where liability in fact has been transferred to a third party." *Id.* at 372, 150 A. at 915.

84. New Hampshire finally abrogated the doctrine of immunity completely in Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966). The court wrote, "[A]s a practical matter, the prevalence of insurance cannot be ignored in determining whether a court should continue to discriminate against a class of individuals by depriving them of a right enjoyed by all other individuals." *Id.* at 435, 224 A.2d at 590.

Wisconsin case of *Goller v. White.*[85] *Goller* let stand two situations in which immunity would still be recognized: (1) when the negligent act involved an exercise of parental authority over the child, and (2) when parental discretion with respect to providing the child with necessaries is present.[86] Since *Goller* the trend has been to abolish parental immunity completely. Over ten states have done so, including Pennsylvania,[87] New York[88] and California.[89] It would be fair to speculate that its days are numbered in other states as well.[90] This trend, which expands the rights of a child who has suffered an injury, is an indication of the favorable treatment a child receives when he is the victim of the offense. It is unfortunate that the victim of a child's tort is not currently benefitted by an equivalent degree of judicial protection.

V. The Child as Victim

When the child is the victim of a tort inflicted by one other than his parent, there is, of course, no parental immunity bar to bringing a cause of action. Thus, the cases in this area, and the rules the courts have developed, provide further illustration of the unique treatment children receive in court.

Whenever a child is the victim of a tort, two causes of action arise. One is in behalf of the child and the other belongs to his parent. Each of them is entitled to recover specifically designated damages that are not available to the other.[91] The child is permitted to recover for the pain and suffering his physical injury causes him to endure.[92] While the child is also entitled to recover earnings that because of reduced capacity will be lost after he reaches majority,[93] any loss of earnings during his minority is recoverable by his parent.[94] The medical expenses incurred normally

85. 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

86. *Id.* at 413, 122 N.W.2d at 198.

87. Falco v. Pados, 444 Pa. 372, 282 A.2d 351 (1971).

88. Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969).

89. Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971).

90. In Schenk v. Schenk, 100 Ill. App. 2d 199, 241 N.E.2d 12 (1968), the court appraised the current status of the parent-child immunity doctrine: "[F]rom the time, however, of its general acceptance in this country, it has undergone a general erosion like the all-day sucker in the hands of a small child until there isn't much left but the stick itself." *Id.* at 204, 241 N.E.2d at 14.

91. Botelho v. Curtis, 28 Conn. Supp. 493, 267 A.2d 675 (Super. Ct. 1970); Orr v. Orr, 36 N.J. 236, 176 A.2d 241 (1961).

92. Schmidt v. Kratzer, 402 Pa. 630, 168 A.2d 585 (1961).

93. In Kleibor v. Rogers, 265 N.C. 304, 144 S.E.2d 27 (1965), the court described the action that arises in behalf of the child as "[a]n action on behalf of the child to recover damages for pain and suffering, permanent injury and impairment of earning capacity after attaining majority . . . ." *Id.* at 306, 144 S.E.2d at 29. *See* Schmidt v. Kratzer, 402 Pa. 630, 168 A.2d 585 (1961).

94. The court in Smith v. Hewett, 235 N.C. 615, 70 S.E.2d 825 (1952), wrote,

> The general rule is that an unemancipated minor cannot recover as an element of damage in an action for personal injury for loss of earnings or diminished earning capacity during his minority, but that the father is primarily entitled to his . . . earnings as long as the minor is legally in his custody or under his control.

Id. at 617, 70 S.E.2d at 827.

belong to the parent's cause of action since he is legally responsible for them as an element of his duty to support an unemancipated minor.[95] There are four recognized situations, however, in which the child may recover the medical expenses for himself: (1) when the minor has paid them himself; (2) when the minor is responsible for them because of emancipation or parental incompetence; (3) when the parent has waived any consequential damages in favor of the child; or (4) when the child is permitted to recover them by statute.[96]

Although this represents the major division of damages between the parent's and the child's causes of action, other types of damages may be recoverable in a particular state. Often, the parent is entitled to recover damages for the loss of the child's services or companionship.[97] Some states even permit the parent to recover for the mental distress he suffers if the injury to his child was willful or malicious.[98]

There are other variations, more procedural in nature, in which the proper course of action will depend solely upon the forum concerned. For example, some states, such as Virginia, hold that the parent's cause of action is a derviative one that is dependent upon the validity of the child's cause of action.[99] Other states take an opposite view.[100] Another situation subject to jurisdictional differences occurs when the parent brings suit in behalf of the child against the tortfeasor. Some courts hold that the

95. Faber v. Roelofs, 298 Minn. 16, 212 N.W.2d 856 (1973); Peer v. City of Newark, 71 N.J. Super. 12, 176 A.2d 249 (Super. Ct. App. Div. 1961); Schmidt v. Kratzer, 402 Pa. 630, 168 A.2d 585 (1961).

96. Moses v. Akers, 203 Va. 130, 132, 122 S.E.2d 864, 866 (1961).

97. Jacobs v. Jacobs, 99 N.J. Super. 84, 238 A.2d 512 (Super. Ct. Ch. Div. 1968); Savard v. Cody Chevrolet, Inc., 126 Vt. 405, 234 A.2d 656 (1967). In Leahy v. Morgan, 275 F. Supp. 424 (N.D. Iowa 1967), the court was confronted with a situation in which the Iowa courts had taken no definite position on whether loss of companionship was recoverable by the parent. Following what it believed to be the newer position, the court said, "There appears to be no clear Iowa stand on the issue of whether a parent may recover for loss of the society, companionship and affection of a minor child. . . . As a result, the court is not moved at this time to dismiss this claim from the plaintiffs' cause of action." *Id.* at 426. *See* Annot., 14 A.L.R.2d 485 (1950).

98. Bedard v. Notre Dame Hosp., 89 R.I. 195, 151 A.2d 690 (1959). The court wrote, "It is generally held that a parent is not entitled to recover for mental distress and anxiety on account of an injury to his child unless the injury is a willful or malicious one." *Id.* at 198, 151 A.2d at 692.

99. In Norfolk S. Ry. v. Fincham, 213 Va. 122, 189 S.E.2d 380 (1972), nine-year-old Danny Fincham's right leg was crushed by a railroad car and had to be amputated below the knee. Danny's father brought an action for the medical expenses he incurred, together with an action in Danny's behalf. Although the jury awarded the parent recovery for the medical expenses, the court reversed pending the return of a final verdict in Danny's case. It stated,

> The father's cause of action for medical and incidental expenses was a derivative action. The trial court instructed the jury that it must return a verdict for Danny before his father was entitled to recover. Since there was no verdict in Danny's case there could be none in the father's case.

Id. at 128, 189 S.E.2d at 384.

100. In Maccia v. Tynes, 39 N.J. Super. 1, 120 A.2d 263 (Super. Ct. App. Div. 1956), the court said, "The right to such services and to reimbursement for such expenses is not derivative, but independent and separate from his child's rights." *Id.* at 13, 120 A.2d at 269. *Accord*, Meisel v. Meisel, 407 Pa. 546, 180 A.2d 772 (1962).

undertaking constitutes a waiver by the parent of his own cause of action for consequential damages.[101] Other courts hold that it is not a waiver.[102] Still another split exists on whether the contributory negligence of one parent will serve as a bar to the other parent's recovery. Again, some states answer the question affirmatively,[103] while others say no.[104] These divisions leave the practitioner little recourse but to examine the rules of the particular jurisdiction in which he is confronted by the problem.

The final matter to analyze is the effect negligent parental supervision will have on the chances of recovery of both parent and child.[105] Today, parental negligence contributing to the injury of the child generally will not be imputed to that child.[106] This has not always been the rule. At one time many states would impute a parent's negligence to his child and deny recovery.[107] Naturally this often produced harsh results for

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101. In Kleibor v. Rogers, 265 N.C. 304, 144 S.E.2d 27 (1965), the court remarked,

> [W]here a father prosecutes an action on behalf of his minor child and *seeks to recover therein* the damages which the father himself otherwise would be entitled to recover in his own separate action therefor, and no objection is interposed by the defendant, the father thereby waives his individual rights against the defendant.

Id. at 307, 144 S.E.2d at 30 (emphasis in original).

102. Wales v. Howard, 164 Colo. 167, 433 P.2d 493 (1967).

103. The court in Price v. Seaboard Air Line R.R., 274 N.C. 32, 161 S.E.2d 590 (1968), disallowed the father's attempt to recover medical expenses incurred in the treatment of his two daughters after their mother's negligent driving caused them to be hit by a train. It wrote,

> [W]e have ruled that Bertha Price's legal contributory negligence was attributable to her husband, Brooks M. Price, and bars any recovery by him for the demolition of his automobile. In principle we can see no difference in Brooks M. Price's action to recover damages for the demolition of his automobile and his action to recover medical expenses incurred in the necessary treatment of his two minor, unemancipated children injured in the collision, and we hold that his action to recover such medical expenses incurred in the treatment of the injuries of his two minor, unemancipated daughters is barred.

Id. at 43, 161 S.E.2d at 598.

104. *See, e.g.*, Frankel v. United States, 321 F. Supp. 1331 (E.D. Pa. 1970) (applying Pennsylvania law); Idzojtic v. Catalucci, 222 Pa. Super. Ct. 47, 292 A.2d 464 (1972); RESTATEMENT (SECOND) OF TORTS § 494-A (1965).

105. The initial point to remember is that negligent parental supervision consists of a violation of the parent's duty to control his child as expressed by the RESTATEMENT (SECOND) OF TORTS § 316 (1965). *See* notes 60-73 and accompanying text *supra*. The determination must be made on an individual case basis since mere unattendance of the child is not necessarily improper supervision. The court in Marrero v. Just Cab Corp., 71 Misc. 2d 474, 336 N.Y.S.2d 301 (Sup. Ct. 1972), said, "[N]egligence of the parents in permitting a child in the street depends, amongst other things, on the age and intelligence of the child and the surrounding facts and circumstances of each case." *Id.* at 476, 336 N.Y.S.2d at 303.

106. In City & County of Denver v. Kennedy, 476 P.2d 762 (Colo. Ct. App. 1970), a five-year-old child was permitted to recover even though her parents may have been negligent in allowing her to get too close to the zebra cage at the zoo. The court wrote, "Because of her age at the time of injury, Denise, as a matter of law, could not have been guilty of contributory negligence. Nor is any possible negligence on the part of her parents imputable to Denise." *Id.* at 763.

107. Maryland is a good case in point. It originally imputed the parent's negligence to the child even though this denied recovery to a blameless child. Thus in Graham v. Western Md. Dairy, 198 Md. 210, 81 A.2d 457 (1951), a three-year-old was denied recovery for his injury because his mother was negligent in allowing him to play in an alley she knew was frequented by milk trucks. The imputation of parental negligence, which often resulted in an uncompensated, although innocent, child was subsequently abolished by statute in 1957. Farley v. Yerman, 231 Md. 444, 190 A.2d 773 (1963).

which the child was in no way responsible. Thus this severe approach, termed the New York Rule,[108] generally has been abolished. Nevertheless, it still may prevent a child from recovering for an injury in some jurisdictions.[109]

A recent development that may adversely affect the negligent parent occurred in *Sorrentino v. United States.*[110] The driver of a Department of Agriculture vehicle negligently struck the young plaintiff, who was riding his bicycle in the street. The government moved to amend its answer to include a counterclaim against the boy's parents as joint tortfeasors because of their negligent supervision. The court realized that granting this motion could create a situation in which the parent played three roles. He could simultaneously be an individual plaintiff, a third-party defendant and a guardian ad litem for the infant plaintiff. It also would indirectly make the parent liable to his child for negligent supervision if the defendant won his counterclaim, because the award would go from the parent's pocket through the joint tortfeasor to the child. Nevertheless, the court granted the motion despite the complexities it created.

It cannot yet be determined whether this holding represents a trend. In New York, *Sorrentino* has often been distinguished on its facts.[111] The only other state that currently permits this form of contribution is Hawaii, which allows even direct suit against the parent by his child.[112]

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108. Howe v. Central Vt. Ry., 91 Vt. 485, 493, 101 A. 45, 48 (1917). The rule has since been abolished in New York. Collazo v. Manhattan & Bronx Surface Transit Operating Auth., 72 Misc. 2d 946, 339 N.Y.S.2d 809 (Sup. Ct. 1972). The *Collazo* court wrote,

> The negligence of the parent may not be imputed to the infant . . . although the failure of the parent to act reasonably in the care and supervision of the infant immediately prior to an accident may amount to contributory negligence barring a derivative recovery by the parent.

Id. at 948, 339 N.Y.S.2d at 811 (citations omitted).

109. In Orr v. First Nat'l Stores, Inc., 280 A.2d 785 (Me. 1971), eight-year-old Rosselyn Orr was injured while swinging on the steel railing of a supermarket's doors. When Rosselyn brought action against the store, the defendant alleged that her mother's negligent supervision was a contributing factor. Recognizing that the negligence question was for the jury and that parental negligence, if found, would be imputed to the child, the court declared,

> Likewise correct were the court's rulings that the comparative causational negligence, if any, of the plaintiff, Rosselyn Orr, and of her mother—imputable to Rosselyn under Maine law even though Rosselyn might have been old enough to exercise some degree of care for her own safety . . .—were questions appropriate for jury decision.

Id. at 796 (citations omitted). Negligent parental supervision may affect the parent's recovery as well. In one case in which a negligent driver struck and injured a young child, both the child and the parent recovered at trial. Because the jury had also found negligent parental supervision of young Jeffrey in allowing him to stray from the beach onto the road, the parent's recovery was reversed on appeal. The court concluded that since parental negligence had been a proximate cause of the injury, the father was not entitled to recover any damages. Berner v. Yarborough, 456 S.W.2d 753 (Tex. Civ. App. 1970).

110. 344 F. Supp. 1308 (E.D.N.Y. 1972).

111. *See, e.g.*, Marrero v. Just Cab Corp., 71 Misc. 2d 474, 475-76, 336 N.Y.S.2d 301, 302-03 (Sup. Ct. 1972). "In *Sorrentino*, however, the court was quick to point out that its holding was limited . . . and was not to imply a sanctioning of direct suit by a child against his parent." Ryan v. Fahey, 43 App. Div. 2d 429, —, 352 N.Y.S.2d 283, 288 (1974).

112. In Petersen v. City & County of Honolulu, 51 Haw. 484, 462 P.2d 1007 (1970), a child was burned by the hot ashes of a barbecue pit. The trial court struck the municipality's counterclaim alleging negligence on the part of the parent. The Supreme Court reversed

In summary, an injury to a child gives rise to causes of action in favor of both the child and his parent. Although the procedure to follow in seeking recovery may differ from jurisdiction to jurisdiction, the child's welfare is of primary importance. The courts seek to provide him with redress, even in states that allow the tortfeasor to seek contribution from the parent for negligent supervision. This illustrates the great degree of compassion the courts feel for the child as victim of a tortious act.

VI. Conclusion

A child who becomes the victim of a tortious act is well protected by the law. He is entitled to recover damages for his injuries in almost every case regardless of whether improper parental supervision played a contributory role. Even those few courts that do allow contribution from the negligent parent do not hinder the child's recovery. Moreover, because of his age, the child commonly will be deemed incapable of contributory negligence that ordinarily would bar his recovery. Since the child is often either blame-free or too immature to appreciate the danger of his actions, this is the more prudent course. Whether he is the parent or a third party, the adult should be encouraged to be alert for the child's welfare and safety. In an age of ubiquitous insurance, it is foolish to deny a child recompense for an injury suffered at the hand of an insufficiently alert adult even if the child was improperly supervised.

The strong protection the courts afford the parent of a child who has committed a tortious act is not justified. The exceptions carved out of the common-law rule of parental non-liability have done little to aid the plaintiff's quest for compensation. The obstacles encountered by the plaintiff include not only questions of the child's capacity but also the requirement of proving parental knowledge of the child's offensive habit. Even then recovery may be denied if the parent's conduct in terms of supervision has been reasonable.

Although it is frequently declared that the parent is not the insurer of the child, placing the parent under the burden of serving as the child's insurer would be the better approach. The parent is in a position to appreciate the risk his child presents and to protect against the potential consequences. Just as immunity between parent and child has fallen because of the prevalence of insurance, so too should the protection the parent and child enjoy at an injured plaintiff's expense. The time has come to remove the unfair obstacles that effectively bar the victim of a child's tort from compensation by the parent.

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saying, "We therefore hold that the child can enforce liability against his parents, and that the counterclaim against the parents should have been allowed." *Id.* at 486, 462 P.2d at 1008.