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Lee v. Mowett Sales Co.: North Carolina Retains Its Partial Parent-Child Immunity Doctrine

Under North Carolina law an unemancipated minor child¹ who sustains injuries due to a parent's negligent operation of a motor vehicle can maintain a cause of action against the parent for damages.² An unemancipated minor child who sustains injuries as a result of parental negligence under any other circumstances, however, has no legally cognizable claim for damages against his or her parents.³ What differentiates the injured child's legal rights in these two situations is the parent-child immunity doctrine.⁴ This doctrine purportedly recognizes the uniqueness of the parent-child relationship and reduces intrafamily litigation in the interest of family unity.⁵

Although North Carolina judicially adopted parent-child immunity in 1923,⁶ the doctrine no longer exists in its original form. In 1975 the North Carolina General Assembly abrogated the application of parent-child immunity in situations in which a child's injuries arise out of a parent's negligent operation of a motor vehicle.⁷ Nevertheless, the North Carolina Supreme Court in *Lee v. Mowett Sales Co.*⁸ recently reinforced the applicability of the parent-child immunity doctrine in nonmotor vehicle cases.⁹ This decision comes amidst intense criticism of the rationale behind the doctrine and a general trend among other jurisdictions to abolish parent-child immunity.¹⁰

This Note briefly examines the development of the parent-child immunity doctrine and the major criticisms supporting its abrogation. It discusses parental immunity in North Carolina and analyzes the North Carolina Supreme Court's decision in *Lee*. The Note concludes that the policy reasons underlying

1. An unemancipated minor child is one who depends on his or her parents for support. *Warren v. Long*, 264 N.C. 137, 138, 141 S.E.2d 9, 10 (1965).

2. N.C. GEN. STAT. § 1-539.21 (Supp. 1985) (parent-child immunity abolished in motor vehicle cases).

3. *See, e.g., Lee v. Mowett Sales Co.*, 316 N.C. 489, 342 S.E.2d 882 (1986) (third party contribution action by manufacturer against parent of injured, unemancipated child barred by parent-child immunity). The bar to actions in tort by a child is lifted "by complete emancipation, which may be by act of the parent, by marriage, by arriving at the age of twenty-one, or by leaving the household and becoming self-supporting." *Warren*, 264 N.C. at 138, 141 S.E.2d at 10.

4. The parent-child immunity doctrine denies an unemancipated minor child a cause of action in tort against his or her parents for negligently inflicted personal injuries. *See* 3 R. LEE, NORTH CAROLINA FAMILY LAW §§ 248, 290-91 (4th ed. 1979).

5. *See infra* text accompanying notes 25-32 (discussing various rationales for parent-child immunity).

6. *See* *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12 (1923).

7. Act of June 19, 1975, ch. 685, § 1, 1975 N.C. Sess. Laws 911, 911 (codified at N.C. GEN. STAT. § 1-539.21 (1975)) provided: "The relationship of parent and child shall not bar the right of action by a minor child against a parent for personal injury or property damage arising out of the operation of a motor vehicle owned or operated by such parent." *Id.* The general assembly amended the statute in 1985. Act of May 17, 1985, ch. 201, § 1, 1985 N.C. Sess. Laws 167, 167. For a discussion of the recent amendment, *see infra* text accompanying notes 92-97.

8. 316 N.C. 489, 342 S.E.2d 882 (1986).

9. *Id.* at 495, 342 S.E.2d at 886 (holding that parent-child immunity doctrine will continue to be applied as it now exists in North Carolina).

10. *See infra* notes 39-40 and text accompanying notes 33-60.

the parent-child immunity rule do not support partial retention of the doctrine in North Carolina.

In *Lee* an unemancipated minor child received severe injuries when her feet came into contact with a lawn mower operated by her father.¹¹ The child brought suit against the manufacturer and seller of the lawn mower for negligence and breach of warranty, alleging that the lawn mower failed to stop when her father removed his foot from the accelerator.¹² Defendant Mowett Sales Company [Mowett] denied fault and filed a third-party complaint against plaintiff's father alleging that the father's negligent operation of the lawn mower proximately caused some of plaintiff's injuries.¹³ Defendant sought contribution for any damages plaintiff might recover.¹⁴ The trial court dismissed defendant's third-party complaint on the grounds that the complaint was barred by the parent-child immunity doctrine.¹⁵ The North Carolina Court of Appeals¹⁶ and the North Carolina Supreme Court¹⁷ affirmed the dismissal. The supreme court stated three reasons to support its decision. First, the court reiterated the viability of parent-child immunity in North Carolina in nonmotor vehicle cases, noting that because the doctrine barred plaintiff from maintaining a suit, it barred a third-party action against plaintiff's father.¹⁸ Second, the court recognized that approximately half of the states still apply the doctrine.¹⁹ Last, the court expressed its reluctance to carve out exceptions to the doctrine, deferring to the general assembly any further abolishment of parent-child immunity.²⁰ Two justices, however, dissented from the decision. Justice Martin urged total abrogation of the parent-child immunity doctrine in North Carolina and Justice Exum argued that the doctrine should not be extended to actions for contribution by third parties.²¹

11. *Lee v. Mowett Sales Co.*, 76 N.C. App. 556, 557, 334 S.E.2d 250, 251 (1985), *aff'd*, 316 N.C. 489, 342 S.E.2d 882 (1986).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* The trial court dismissed defendant's third party complaint pursuant to N.C.R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. *Lee*, 76 N.C. App. at 557, 334 S.E.2d at 251.

16. *Id.* Judge Becton dissented in an extensive argument for total abrogation of parental immunity in North Carolina. *See id.* at 559, 334 S.E.2d at 252 (Becton, J., dissenting).

17. *Lee*, 316 N.C. at 490, 342 S.E.2d at 883.

18. *Id.* at 492, 342 S.E.2d at 884 (citing *Watson v. Nichols*, 270 N.C. 733, 155 S.E.2d 154 (1967)).

19. *Id.* at 494, 342 S.E.2d at 885.

20. *Id.* at 494-95, 342 S.E.2d at 885-86. As stated by the court:

To judicially abolish the parent-child immunity doctrine after the legislature has considered and retained the doctrine would be to engage in impermissible judicial legislation. If the doctrine is to be abolished at this late date, it should be done by legislation and not by the Court. . . . We decline to adopt judicial "legislation" by abolishing the parent-child immunity doctrine. The doctrine will continue to be applied as it now exists in North Carolina until it is abolished or amended by the legislature.

Id.

21. Justice Martin indicated that *Lee* presented the court with an opportunity to abrogate parental immunity and "to move our jurisprudence forward with the mainstream of current judicial thought on the issue." *Id.* at 495, 342 S.E.2d at 886 (Martin, J., dissenting). Justice Exum argued

The doctrine of parent-child immunity originated in the United States without roots in English common law.²² In 1891 the Mississippi Supreme Court judicially created parental immunity in *Hewlett v. George*.²³ *Hewlett* involved a married, but unemancipated minor daughter who tried to sue her mother for wrongful confinement in an insane asylum.²⁴ The court refused to recognize plaintiff's cause of action against her mother, reasoning that

[t]he peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, 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. The state, through its criminal laws, will give the minor child protection from parental violence and wrong-doing, and this is all the child can be heard to demand.²⁵

Thus, *Hewlett* set forth the original rationale for parental immunity—maintenance of family harmony.

Later cases involving intentional parental torts crystallized the immunity doctrine and further defined its rationale.²⁶ In *Roller v. Roller*²⁷ the Washington Supreme Court dismissed a suit for civil damages brought by a fifteen-year-old girl against her father, who had been convicted of raping her.²⁸ The *Roller* court asserted two reasons for adopting the parent-child immunity doctrine. First, the court indicated that if a child were to recover a judgment from his or her parent, such parent could inherit the "very property which had been wrested by the law from him" in the event of the child's death.²⁹ Second, the court emphasized the injustice that could occur if an injured child recovered damages from his or her parents and imperiled the financial welfare of other family members.³⁰

As additional states adopted the parent-child immunity doctrine, two more justifications for the doctrine developed. Many courts cited interference with a parent's discipline and control in caring for a child as a reason to disallow per-

that the policy reasons justifying parent-child immunity do not apply to cross-claims by third-party plaintiffs who are not children of the defendant. *Id.* at 496, 342 S.E.2d at 886 (Exum, J., dissenting).

22. See *Small v. Morrison*, 185 N.C. 577, 579-80, 591, 118 S.E. 12, 13, 18 (1923) (Clark, J., dissenting) (discussing lack of English authority for negligence actions by children against parents).

23. 68 Miss. 703, 9 So. 885 (1891).

24. *Id.* at 704, 9 So. at 887.

25. *Id.* at 711, 9 So. at 887. Other courts have used the *Hewlett* rationale to justify parent-child immunity. See *Thomas v. Inmon*, 268 Ark. 221, 223, 594 S.W.2d 853, 854 (1980); *Pedigo v. Rowley*, 101 Idaho 201, 202, 610 P.2d 560, 561 (1980); *Barlow v. Iblings*, 261 Iowa 713, 722, 156 N.W.2d 105, 107-08 (1968); *Small v. Morrison*, 185 N.C. 577, 579-80, 118 S.E. 12, 13 (1923); *Chaffin v. Chaffin*, 239 Or. 374, 382, 397 P.2d 771, 775 (1964).

26. See, e.g., *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S.W. 664 (1903); *Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905).

27. 37 Wash. 242, 79 P. 788 (1905).

28. *Id.* at 243, 79 P. at 788-89.

29. *Id.* at 245, 79 P. at 789; see also *Barlow v. Iblings*, 261 Iowa 713, 722, 156 N.W.2d 105, 110 (1968) (if parent is compelled to pay money damages to a child, parent may recoup money in the event of child's death during minority).

30. *Roller*, 37 Wash. at 245, 79 P. at 789. Other courts have similarly reasoned that suits between child and parent deplete family funds. See *Barlow v. Iblings*, 261 Iowa 713, 722, 156 N.W.2d 105, 110 (1968); *Skinner v. Whitley*, 281 N.C. 476, 480, 189 S.E.2d 230, 232 (1972).

sonal injury actions by a child against a parent.³¹ In addition, courts often referred to the danger of collusion between parent and child leading to fraudulent claims against insurance companies as a basis to support parent-child immunity.³²

Although the majority of American courts followed *Hewlett* and adopted parental immunity, the doctrine did not long remain in its original, all-inclusive form. Courts often created exceptions to the doctrine when parents intentionally injured their children³³ or someone acted *in loco parentis*.³⁴ Some courts made exceptions when the child sustained injury while the parent acted in a business rather than a parental capacity,³⁵ or when injury resulted from a motor vehicle accident.³⁶ Partial abolishment of parent-child immunity first occurred in the Wisconsin Supreme Court decision, *Goller v. White*,³⁷ a full seventy-two years after promulgation of the doctrine. Since *Goller*³⁸ numerous jurisdictions have abolished or modified their parental immunity rules.³⁹ This trend toward

31. See, e.g., *Barlow v. Iblings*, 261 Iowa 713, 718, 156 N.W.2d 105, 107-08 (1968); *Luster v. Luster*, 299 Mass. 480, 481, 13 N.E.2d 438, 439 (1938), *overruled in Sorensen v. Sorensen*, 369 Mass. 350, 339 N.E.2d 907 (1975); *Small v. Morrison*, 185 N.C. 577, 584, 118 S.E. 12, 15 (1923).

32. See, e.g., *Luster v. Luster*, 299 Mass. 480, 483, 13 N.E.2d 438, 440 (1938), *overruled in Sorensen v. Sorensen*, 369 Mass. 350, 339 N.E.2d 907 (1975); *Hastings v. Hastings*, 33 N.J. 247, 252-53, 163 A.2d 147, 150 (1960), *overruled in France v. A.P.A. Transp. Corp.*, 56 N.J. 500, 267 A.2d 490 (1970); *Parks v. Parks*, 390 Pa. 287, 301, 135 A.2d 65, 73 (1957).

33. See, e.g., *Attwood v. Estate of Attwood*, 276 Ark. 230, 633 S.W.2d 366 (1982); *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955) (en banc); *Wright v. Wright*, 85 Ga. App. 721, 70 S.E.2d 152 (1952); *Nudd v. Matsoukas*, 7 Ill. 2d 608, 131 N.E.2d 525 (1956); *Teramano v. Teramano*, 6 Ohio St. 2d 117, 216 N.E.2d 375 (1966).

34. See, e.g., *Rayburn v. Moore*, 241 So. 2d 675 (Miss. 1970); *Nelson v. Johansen*, 18 Neb. 180, 24 N.W. 730 (1885). A person acting *in loco parentis* acts "in the place of a parent; charged, fictitiously, with a parent's rights, duties, and responsibilities." BLACK'S LAW DICTIONARY 708 (5th ed. 1979).

35. See, e.g., *Trevarton v. Trevarton*, 151 Colo. 418, 378 P.2d 640 (1963); *Foy v. Foy Elec. Co.*, 231 N.C. 161, 56 S.E.2d 418 (1949); *Signs v. Signs*, 156 Ohio St. 566, 103 N.E.2d 743 (1952).

36. See, e.g., *Hebel v. Hebel*, 435 P.2d 8 (Alaska 1967); *Ard v. Ard*, 414 So. 2d 1066 (Fla. 1982); *Nocktonick v. Nocktonick*, 227 Kan. 758, 611 P.2d 135 (1980); *Sorensen v. Sorensen*, 369 Mass. 350, 339 N.E.2d 907 (1975); *Smith v. Kauffman*, 212 Va. 181, 183 S.E.2d 190 (1971).

37. 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

38. For a discussion of Wisconsin's partial abolition of parental immunity, see *infra* text accompanying notes 121-31.

39. Seven states have entirely abolished parental immunity: Hawaii, Nevada, New Hampshire, New York, Ohio, Pennsylvania, and South Carolina. See *Peterson v. City of Honolulu*, 51 Haw. 484, 462 P.2d 1007 (1969); *Rupert v. Stienne*, 90 Nev. 397, 528 P.2d 1013 (1974); *Briere v. Briere*, 107 N.H. 432, 224 A.2d 588 (1966); *Gelbman v. Gelbman*, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969); *Holodook v. Spencer*, 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974) (New York does not recognize a duty to supervise, however, and parents cannot be held liable for failure to supervise); *Kirchner v. Crystal*, 15 Ohio St. 3d 326, 474 N.E.2d 275 (1984); *Falco v. Pados*, 444 Pa. 372, 282 A.2d 351 (1971); *Elam v. Elam*, 275 S.C. 132, 268 S.E.2d 109 (1980).

California and Minnesota have replaced parental immunity with a reasonable parent standard. See *Gibson v. Gibson*, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971) (en banc); *Anderson v. Stream*, 295 N.W.2d 595 (Minn. 1980).

One state, Oregon, has replaced parental immunity with the RESTATEMENT (SECOND) OF TORTS § 895G (1977) criteria for determining tortious and privileged parental conduct. See *Winn v. Gilroy*, 296 Or. 718, 681 P.2d 776 (1984).

Ten states have abrogated parental immunity except in situations involving parental authority or discretion: Arizona, Illinois, Iowa, Kentucky, Michigan, Missouri, New Jersey, Texas, Vermont, and Wisconsin. See *Sandoval v. Sandoval*, 128 Ariz. 11, 623 P.2d 800 (1981) (en banc); *Illinois Nat'l Bank & Trust Co. v. Turner*, 83 Ill. App. 3d 234, 403 N.E.2d 1256 (1980); *Turner v. Turner*, 304 N.W.2d 786 (Iowa 1981); *Rigdon v. Rigdon*, 465 S.W.2d 921 (Ky. 1970); *Plumley v. Klein*, 388

abolishing or minimizing parent-child immunity is based on a range of legal criticism and refutation of the policy underlying the doctrine.⁴⁰

The weakest of the five justifications for the parent-child immunity rule, the possibility that the tortfeasor parent will inherit any recovery in the event of the child's death,⁴¹ can be attacked in three respects. First, any compensatory damages recovered by the child are likely to be expended before the child's death.⁴² Second, the ultimate inheritance of a recovery by a tortfeasor is a possible outcome in any intrafamily suit,⁴³ yet other family members are allowed to sue one

Mich. 1, 199 N.W.2d 169 (1972); *Fugate v. Fugate*, 582 S.W.2d 663 (Mo. 1979) (en banc) (Missouri does not allow suit when it would seriously disturb family tranquility); *Stevens v. Scott*, 706 S.W.2d 278 (Mo. Ct. App. 1986); *Small v. Rockfeld*, 66 N.J. 231, 330 A.2d 335 (1974); *Felderhoff v. Felderhoff*, 473 S.W.2d 928 (Tex. 1971); *Wood v. Wood*, 135 Vt. 119, 370 A.2d 191 (1977); *Goller v. White*, 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

Fifteen states have abrogated parental immunity when injury arises from negligence in a motor vehicle accident: Alaska, Connecticut, Delaware, Florida, Kansas, Maine, Massachusetts, Montana, New Mexico, North Carolina, Oklahoma, Rhode Island, Virginia, Washington, and West Virginia. See *Hebel v. Hebel*, 435 P.2d 8 (Alaska 1967); CONN. GEN. STAT. ANN. § 52-572c (West Supp. 1985); *Dzenutis v. Dzenutis*, 200 Conn. 290, 512 A.2d 130 (1986) (Connecticut does not recognize immunity for parents who negligently injure their children while conducting business activity away from home); *Ooms v. Ooms*, 164 Conn. 48, 316 A.2d 783 (1972); *Schneider v. Coe*, 405 A.2d 682 (Del. 1979) (Delaware preserves parental immunity when parental discretion is involved); *Williams v. Williams*, 369 A.2d 669 (Del. 1976) (immunity abrogated only to extent of a parent's liability insurance coverage); *Ard v. Ard*, 414 So. 2d 1066 (Fla. 1982) (immunity abrogated only to extent of a parent's liability insurance coverage); *Nocktonick v. Nocktonick*, 227 Kan. 758, 611 P.2d 135 (1980); *Black v. Solmitz*, 409 A.2d 634 (Me. 1979); *Sorensen v. Sorensen*, 369 Mass. 350, 339 N.E.2d 907 (1975) (immunity abrogated only to extent of a parent's liability insurance coverage); *Transamerica Ins. Co. v. Royale*, 202 Mont. 173, 656 P.2d 820 (1983); *Guess v. Gulf Ins. Co.*, 96 N.M. 27, 627 P.2d 869 (1981); N.C. GEN. STAT. § 1-539.21 (1983); *Triplett v. Triplett*, 34 N.C. App. 212, 237 S.E.2d 546 (1977); *Unah v. Martin*, 676 P.2d 1366 (Okla. 1984) (immunity abrogated only to extent of a parent's liability insurance coverage); *Silva v. Silva*, 446 A.2d 1013 (R.I. 1982); *Smith v. Kauffman*, 212 Va. 181, 183 S.E.2d 190 (1971); *Merrick v. Sutterlin*, 93 Wash. 2d 411, 610 P.2d 891 (1980); *Lee v. Comer*, 159 W. Va. 585, 224 S.E.2d 721 (1976).

Thirteen states still retain parental immunity: Alabama, Arkansas, Colorado, Georgia, Idaho, Indiana, Louisiana, Maryland, Mississippi, Nebraska, Tennessee, Utah, and Wyoming. See *Hill v. Giordano*, 447 So. 2d 164 (Ala. 1984) (per curiam); *Attwood v. Estate of Attwood*, 276 Ark. 230, 633 S.W.2d 366 (1982) (Arkansas permits a child to sue a parent for willful and wanton conduct); *Thomas v. Inmon*, 268 Ark. 221, 594 S.W.2d 853 (1980); *Horton v. Reaves*, 186 Colo. 149, 526 P.2d 304 (1974) (en banc); *Coleman v. Coleman*, 157 Ga. App. 533, 278 S.E.2d 114 (1981); *Pedigo v. Rowley*, 101 Idaho 201, 610 P.2d 560 (1980); *Buffalo v. Buffalo*, 441 N.E.2d 711 (Ind. Ct. App. 1982) (Indiana does not recognize immunity for a noncustodial parent when marriage is dissolved prior to the child's injury); *Vaughan v. Vaughan*, 161 Ind. App. 497, 316 N.E.2d 455 (1974); *Boundurant v. Boundurant*, 386 So. 2d 705 (La. Ct. App. 1980) (Louisiana recognizes immunity for married or custodial parents); *Frye v. Frye*, 305 Md. 542, 505 A.2d 826 (1985); *McNeal v. Estate of McNeal*, 254 So. 2d 521 (Miss. 1971); *Pullen v. Novak*, 169 Neb. 211, 99 N.W.2d 16 (1959); *Campbell v. Gruttemeyer*, 222 Tenn. 133, 432 S.W.2d 894 (1968); *Elkington v. Foust*, 618 P.2d 37 (Utah 1980); *Oldman v. Bartshe*, 480 P.2d 99 (Wyo. 1971).

40. See, e.g., Berman, *Time to Abolish Parent-Child Tort Immunity: A Call to Repudiate Mississippi's Gift to the American Family*, 4 NOVA L.J. 25 (1980) (discussing history and rationales of parent-child immunity, urging total abrogation); Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, 50 FORDHAM L. REV. 489 (1982) (critically evaluating justifications for parent-child immunity and urging courts and legislatures to abandon doctrine); McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030 (1930) (discussing development of parent-child immunity and doctrine's shortcomings); Comment, *Parent-Child Immunity: The Case for Abolition*, 6 SAN DIEGO L. REV. 286 (1969) (undermining rationales for parent-child immunity doctrine).

41. See *supra* text accompanying note 29.

42. See Hollister, *supra* note 40, at 497.

43. See Hollister, *supra* note 40, at 498.

another.⁴⁴ Last, a state may statutorily prohibit inheritance of a child's recovery by a wrongdoing parent.⁴⁵

The depletion of family funds rationale⁴⁶ is weakened by the wide availability of insurance coverage in these actions.⁴⁷ Moreover, this rationale implies that an injured child does not deserve special compensation even though his or her needs become greater than other siblings by virtue of the injury.⁴⁸

The third justification for parent-child immunity, the danger of fraud and collusion,⁴⁹ has been refuted by courts and commentators alike. Both point out that fraudulent claims are possibilities in any suit,⁵⁰ yet the law does not prevent actions between other family members.⁵¹

The final two arguments in support of parental immunity, maintenance of parental discipline⁵² and promotion of family harmony,⁵³ are the only ones that currently lend some legitimacy to the immunity doctrine. Nonetheless, courts and commentators have also diluted the validity of these arguments. With respect to the maintenance of parental control, some courts have retained immunity when parents legitimately exercise their authority or discretion while fulfilling legal duties.⁵⁴ Other courts have developed flexible standards regarding the parental right to manage the household.⁵⁵ In addition, most parent-child suits arise in the context of motor vehicle accidents and therefore parental discipline or control is not at issue.⁵⁶

Many courts also have undermined the strongest argument in support of parental immunity, the protection of family harmony, for a variety of reasons.

44. See *infra* note 51.

45. See Hollister, *supra* note 40, at 498 (wrongful death statutes may prevent tortfeasor parent from recovering when child dies from tortious injury).

46. See *supra* note 30 and accompanying text.

47. See, e.g., *Nocktonick v. Nocktonick*, 227 Kan. 758, 768, 611 P.2d 135, 141-42 (1980); *Gelbman v. Gelbman*, 23 N.Y.2d 434, 438, 245 N.E.2d 192, 193-94, 297 N.Y.S.2d 529, 531-32 (1969); *Goller v. White*, 20 Wis. 2d 402, 412, 122 N.W.2d 193, 197 (1963).

48. See Hollister, *supra* note 40, at 499-500.

49. See *supra* text accompanying note 32.

50. See, e.g., *Gibson v. Gibson*, 3 Cal. 3d 914, 919-20, 479 P.2d 648, 652, 92 Cal. Rptr. 288, 292 (1971) (en banc); *Gelbman v. Gelbman*, 23 N.Y.2d 434, 438-39, 245 N.E.2d 192, 194, 297 N.Y.S.2d 529, 532 (1969); *Midkiff v. Midkiff*, 201 Va. 829, 833, 113 S.E.2d 875, 878 (1960); Hollister, *supra* note 40, at 500-02; *McCurdy*, *supra* note 40, at 1072-73.

51. See, e.g., *Overlock v. Ruedemann*, 147 Conn. 649, 165 A.2d 335 (1960) (permitting suit between siblings); *Midkiff v. Midkiff*, 201 Va. 829, 113 S.E.2d 875 (1960) (permitting suit between brothers). As one court stated:

"It would be a sad commentary on the law if we were to admit that the judicial processes are so ineffective that we must deny relief to a person otherwise entitled because in some future case a litigant may be guilty of fraud or collusion. Once that concept were accepted, then all causes of action should be abolished. Our legal system is not that ineffectual."

Gibson v. Gibson, 3 Cal. 3d 914, 920, 479 P.2d 648, 652, 92 Cal. Rptr. 288, 292 (1971) (en banc) (quoting *Klein v. Klein*, 58 Cal. 2d 692, 696, 376 P.2d 70, 73, 26 Cal. Rptr. 102, 105 (1962) (en banc)).

52. See *supra* text accompanying note 31.

53. See *supra* text accompanying note 25.

54. See *supra* note 39.

55. See *supra* note 39.

56. See, e.g., *Gibson v. Gibson*, 3 Cal. 3d 914, 920-21, 479 P.2d 648, 652, 92 Cal. Rptr. 288, 292 (1971); *Goller v. White*, 20 Wis. 2d 402, 406, 122 N.W.2d 193, 197 (1963).

First, courts have noted that it is the injury to the child that disturbs family harmony rather than a subsequent lawsuit.⁵⁷ Second, the family harmony rationale fails when insurance coverage funds the recovery.⁵⁸ In the context of a lawsuit, a parent's liability insurance coverage protects the parent, while compensating the injured child, and may even promote family harmony. Third, it is inconsistent to deny a personal injury suit between parent and child on the basis of family harmony when children can sue their parents in contract, property, and trespass actions.⁵⁹ Finally, maintenance of parental immunity based on family harmony is even less defensible in states that have abrogated interspousal immunity.⁶⁰

Despite the criticisms of the doctrine, North Carolina has retained some form of parental immunity since 1923. Almost every North Carolina case involving a suit between parent and child, however, has arisen in the context of a motor vehicle accident. Indeed, North Carolina judicially adopted the parent-child immunity doctrine in *Small v. Morrison*,⁶¹ a case involving a motor vehicle accident. Plaintiff in *Small*, a nine-year-old child, sustained injuries when the car in which she was riding collided with another vehicle.⁶² Plaintiff sued her father, who operated the car in which she was riding, his insurance company, and the driver of the second car, alleging that one or both drivers were negligent.⁶³ The North Carolina Supreme Court held that plaintiff had no right to sue her father in tort because of the parent-child immunity doctrine. The court dismissed plaintiff's action against the insurance company, whose obligation to pay derived from a judgment against the father.⁶⁴ In deciding to adopt parent-child immunity, the court relied on "practical considerations of public policy, which discourage causes of action that tend to destroy parental authority and to undermine the security of the home."⁶⁵ The majority further indicated that no

57. See, e.g., *Sorensen v. Sorensen*, 369 Mass. 350, 360, 339 N.E.2d 907, 913 (1975); *Falco v. Pados*, 444 Pa. 372, 380, 282 A.2d 351, 355 (1971).

58. See *Streenz v. Streenz*, 106 Ariz. 86, 88, 471 P.2d 282, 284 (1970) (en banc); *Gelbman v. Gelbman*, 23 N.Y.2d 434, 438, 245 N.E.2d 192, 193-94, 297 N.Y.S.2d 529, 531-32 (1969); *Goller v. White*, 20 Wis. 2d 402, 412, 122 N.W.2d 193, 197 (1963).

59. See, e.g., *Preston v. Preston*, 102 Conn. 96, 128 A. 292 (1925) (suit by adopted child against her mother to have trust agreement set aside); *Lamb v. Lamb*, 146 N.Y. 317, 41 N.E. 26 (1895) (suit by children against their mother for rental value of her use and occupation of their home); see also *Quinn v. Thigpen*, 266 N.C. 720, 147 S.E.2d 191 (1966) (suit by child against father to enforce contract); *Dunn v. Beaman*, 126 N.C. 766, 36 S.E. 172 (1900) (suit by child against parent for conversion of property); *Walker v. Crowder*, 37 N.C. 478 (1843) (action brought by children against father for property waste).

60. See *McCurdy*, *supra* note 40, at 1074-77 (suggesting that a suit between husband and wife is no less disruptive of family harmony than a suit between parent and child); Comment, *Intrafamily Tort Liability—A Situation of Confused Disparity*, 5 CUMB. L. REV. 273 (1974) (describing inconsistencies between parent-child and interspousal immunity doctrines).

61. 185 N.C. 577, 118 S.E. 12 (1923). In *Gillikin v. Burbage*, 263 N.C. 317, 139 S.E.2d 753 (1965), the North Carolina Supreme Court recognized the reciprocity of the parent-child immunity doctrine, indicating that unemancipated minor children are immune from personal tort actions by their parents. *Id.* at 321, 139 S.E.2d at 757.

62. *Small*, 185 N.C. at 578, 118 S.E. at 12.

63. *Id.*

64. *Id.* at 579, 118 S.E. at 12.

65. *Id.* at 584, 118 S.E. at 15. In an emotional outpouring, the court further stated:

In youth the currents of life are prodigal in their racing course, and we should be slow to

common law authority existed to support a personal injury action by a minor unemancipated child against a negligent parent.⁶⁶ In his voluminous dissent, however, Justice Clark disclaimed the majority's holding, referring to the absence of English common law precedent supporting parental immunity.⁶⁷ In addition, Justice Clark criticized the majority's reliance on *Hewlett* on the basis that the case created the parent-child immunity doctrine without any foundation in statutory or common law.⁶⁸

The immunity doctrine in North Carolina was next applied in *Goldsmith v. Samet*⁶⁹ to deny a wrongful death action brought on behalf of an unemancipated minor against his mother. The child died in an automobile accident arising from the negligent act of his father, who was driving the mother's automobile as her agent.⁷⁰ The court reasoned that no one could bring a wrongful death action on the child's behalf because parental immunity would have barred the child from suing his mother.⁷¹ Moreover, because the child died intestate, any recovery ultimately would be divided between his parents—the two wrongdoers.⁷² Although this outcome is precisely one that the parental immunity doctrine seeks to avoid, immunity is not necessary to achieve this end. Instead, wrongful death statutes can disallow recovery by those who precipitated the fatal injury.⁷³

During the next twenty years North Carolina courts had little occasion to apply the parent-child immunity doctrine, yet they did carve out an exception to its application. In *Wright v. Wright*⁷⁴ the North Carolina Supreme Court first considered the application of parental immunity to the doctrine of *respondent superior*.⁷⁵ In *Wright* a child sustained injuries while riding in a cab that his father drove negligently in the course of employment.⁷⁶ The court allowed suit

encourage or to permit a minor, in the household of its parents, unemancipated and who has not yet arrived at the age of discretion, . . . to run the risk of losing a priceless birthright and a rich inheritance in an effort to gain for the moment a mere mess of pottage, or a few pieces of silver. If this restraining doctrine were not announced by any of the writers of the common law, because no such case was ever brought before the courts of England, it was unmistakably and indelibly carved upon the tablets of Mount Sinai.

Id. at 585-86, 118 S.E. at 16.

66. *Id.* at 586, 118 S.E. at 16.

67. *Id.* at 591-92, 118 S.E. at 18-19 (Clark, J., dissenting) (noting that "no judge in England has ever at any time held that a child could not maintain an action against its father").

68. *Id.*

69. 201 N.C. 574, 160 S.E. 835 (1931).

70. *Id.* at 574, 160 S.E. at 835.

71. *Id.*

72. *Id.* at 575, 160 S.E. at 835.

73. Hollister, *supra* note 40, at 498.

74. 229 N.C. 503, 50 S.E.2d 540 (1948).

75. Under the doctrine of *respondent superior* a master (employer) is responsible for the negligence of a servant (employee) toward those to whom the master (employer) owes a duty to use care, provided the servant's (employee's) negligence occurred in the course of his employment. BLACK'S LAW DICTIONARY 1179 (5th ed. 1979). The doctrines of *respondent superior* and parental immunity arise together when a parent injures a child in the course of the parent's employment. As held in *Wright*, the employee's personal immunity from suit because of the domestic relation does not extend to the employer and therefore cancel his liability, because the employer is liable directly under the principle of *respondent superior*. *Wright*, 229 N.C. at 507-08, 50 S.E.2d at 543-44.

76. *Wright*, 229 N.C. at 504, 50 S.E.2d at 541.

by the child against the father's employer even though the child could not have sued his father.⁷⁷ Distinguishing *Small*,⁷⁸ the court held that the employer was directly, not derivatively, liable for acts of its employees.⁷⁹ The court further extended this reasoning in *Foy v. Foy Electric Co.*⁸⁰ by permitting a child, who was injured as a result of her father's negligent operation of a truck in the course of his employment, to sue the employer despite her father's fifty percent ownership of the corporate employer's outstanding stock.⁸¹

Less than thirty years after the doctrine's adoption, the North Carolina Supreme Court in 1952 heard the first argument to abrogate the parent-child immunity doctrine in *Redding v. Redding*.⁸² The court left the doctrine undisturbed, indicating that no other jurisdiction had yet abolished the doctrine and that the general assembly had not changed North Carolina's "common law."⁸³

By the early 1970s North Carolina courts had applied the parent-child immunity doctrine on numerous occasions.⁸⁴ Plaintiffs, however, continued to press for abrogation of the doctrine.⁸⁵ In *Skinner v. Whitley*⁸⁶ plaintiff urged the North Carolina Supreme Court to abolish parental immunity in the context of automobile accidents.⁸⁷ Noting the difficulties that would arise if it established an exception to the immunity doctrine,⁸⁸ the supreme court concluded that such partial abolition "would create more problems and inequities than it

77. *Id.* at 506-07, 50 S.E.2d at 543.

78. 185 N.C. at 577, 118 S.E. at 12. For a discussion of *Small*, see *supra* text accompanying notes 61-68.

79. *Wright*, 229 N.C. at 507, 50 S.E.2d at 543-44. The *Wright* court noted the absence of a master-servant relationship in *Small*, and also noted that the *Small* court predicated the insurance company's liability on a judgment against the child's father. *Id.*

80. 231 N.C. 161, 56 S.E.2d 418 (1949).

81. *Id.*

82. 235 N.C. 638, 70 S.E.2d 676 (1952).

83. *Id.* at 639-40, 70 S.E.2d at 677.

84. See *Watson v. Nichols*, 270 N.C. 733, 155 S.E.2d 154 (1967) (holding that because a parent is not liable in a direct action by his or her child due to parental immunity, parent cannot be held liable by cross action); *Lewis v. Farm Bureau Mut. Auto. Ins. Co.*, 243 N.C. 55, 89 S.E.2d 788 (1955) (child's estate administrator could not maintain an action for contribution against child's mother because parental immunity would have prevented child himself from suing); see also *Foster v. Foster*, 264 N.C. 694, 142 S.E.2d 638 (1965) (holding that minor child could not sue her mother for injuries sustained as result of her mother's negligent driving, but child's father could sue mother to recover medical expenses expended by him on behalf of daughter); *Cummings v. Locklear*, 12 N.C. App. 572, 182 S.E.2d 832, *cert. denied*, 279 N.C. 726, 184 S.E.2d 883 (1971) (wife has right to sue husband for personal injury regardless of fact that unemancipated children were beneficiaries of any recovery).

85. In three cases plaintiffs urged North Carolina courts to abrogate the parental immunity doctrine. See *Skinner v. Whitley*, 281 N.C. 476, 189 S.E.2d 230 (1972); *Mabry v. Bowen*, 14 N.C. App. 646, 188 S.E.2d 651 (1972); *Evans v. Evans*, 12 N.C. App. 17, 182 S.E.2d 227, *cert. denied*, 279 N.C. 394, 183 S.E.2d 242 (1971), *cert. denied*, 405 U.S. 925 (1972).

86. 281 N.C. 476, 189 S.E.2d 230 (1972) (action by estates of two minor daughters against estate of their father who allegedly caused their deaths by negligently operating an automobile).

87. *Id.* at 479, 189 S.E.2d at 232. In *Skinner* no family relationship remained for the court to protect. Nonetheless, the supreme court refused to limit or abolish parent-child immunity, noting "the troublesome difficulties encountered by those who seek to modify, but not repudiate, the parent-child immunity rule." *Id.* at 482, 189 S.E.2d at 234.

88. *Id.* at 482-83, 189 S.E.2d at 234.

[would cure]."⁸⁹ The court also rejected total abrogation of the doctrine because it "would lead to judicial supervision over the conduct of parent and child in the ordinary operation of the household."⁹⁰ The court deferred to the general assembly any alteration of parent-child immunity, asserting that legislative action would avoid "judicial piecemeal changes in a case-by-case approach."⁹¹

Following the decision in *Skinner*, the North Carolina General Assembly in 1975 adopted a legislative piecemeal approach and abolished parental immunity only in motor vehicle cases.⁹² The current version of North Carolina General Statutes section 1-539.21 provides: "The relationship of parent and child shall not bar the right of action by a person or his estate against his parent for wrongful death, personal injury, or property damage arising out of operation of a motor vehicle owned or operated by the parent."⁹³ Two implications underlie this statute. First, the general assembly essentially has repudiated the validity of most of the justifications traditionally advanced in support of parental immunity.⁹⁴ North Carolina's compulsory automobile liability insurance law⁹⁵ undoubtedly buttressed the general assembly's decision to abrogate immunity in motor vehicle cases. When a child sues a parent and the parent has adequate insurance coverage, the danger of disrupting family accord or depleting family funds is eliminated.⁹⁶ Unlike some states that limit an injured child's recovery to the amount of the parent's insurance policy,⁹⁷ however, section 1-539.21 has no such limitation. Thus, in North Carolina a child injured by a parent's negligent operation of a motor vehicle presumably can recover beyond the parent's policy limit. Therefore, the general assembly has impliedly rejected both the preservation of family harmony and assets rationales for recognizing parental immunity, at least in the context of motor vehicle accidents.

Second, by failing to abolish parental immunity completely, the general as-

89. *Id.* at 483, 189 S.E.2d at 234. The court also noted that the existence of automobile liability insurance was not a valid reason to abolish the immunity doctrine. *Id.*

90. *Id.* at 484, 189 S.E.2d at 235.

91. *Id.*

92. Act of June 19, 1975, ch. 685, § 1, 1975 N.C. Sess. Laws 911, 911 (codified at N.C. GEN. STAT. § 1-539.21 (1975)); *supra* note 7 (text of enactment); see *infra* text accompanying note 93 (amended version of statute).

The North Carolina Court of Appeals upheld the constitutionality of § 1-539.21 in *Ledwell v. Berry*, 39 N.C. App. 224, 249 S.E.2d 862 (1978), *cert. denied*, 296 N.C. 585, 254 S.E.2d 35 (1979). The statute, however, does not permit a parent to sue his or her minor child for negligently caused personal injury. *Id.*

93. N.C. GEN. STAT. § 1-539.21 (Supp. 1985). *Carver v. Carver*, 310 N.C. 669, 314 S.E.2d 739 (1984), expanded the statute to include wrongful death actions in addition to actions for personal injury or property damage. *Id.* at 672-73, 314 S.E.2d at 742.

94. For a discussion of these justifications, see *supra* notes 25-32 and accompanying text.

95. N.C. GEN. STAT. §§ 20-279.1 to -284 (1983). The North Carolina Motor Vehicle Safety and Financial Responsibility Act requires all owners of motor vehicles to carry automobile liability insurance, issued by an insurance company authorized to transact business in North Carolina, to insure against loss from liability imposed by law for damages arising out of the ownership, maintenance, or use of such motor vehicle. *Id.* § 20-279.21(a), (b)(2).

96. See *supra* text accompanying notes 46-48, 58.

97. See, e.g., *Williams v. Williams*, 369 A.2d 669, 673 (Del. 1976); *Ard v. Ard*, 414 So. 2d 1066, 1067 (Fla. 1982); *Sorensen v. Sorensen*, 369 Mass. 350, 352-53, 339 N.E.2d 907, 908-09 (1975); *Unah v. Martin*, 676 P.2d 1366, 1370 (Okla. 1984).

sembly accepted by implication that parents should be able to supervise and discipline their children without the threat of liability. The recent decision in *Snow v. Nixon*,⁹⁸ however, suggests that parents in North Carolina are not immune when they negligently supervise their children. In *Snow* defendant mother was driving her daughter around the neighborhood for the purpose of "trick-or-treating."⁹⁹ After stopping at one location, the daughter alighted from the car into the path of an oncoming vehicle.¹⁰⁰ The child sued the driver who hit her, who in turn sued the child's mother for contribution, alleging "negligent protection, control and supervision of plaintiff while [the mother] was operating a motor vehicle."¹⁰¹ The North Carolina Court of Appeals refused to apply parental immunity and upheld a cause of action for contribution against the child's mother on the ground that the child's injuries "arose out of the operation of a motor vehicle."¹⁰² Holding the mother liable, the court of appeals reasoned that the operator of a motor vehicle owes a duty to his or her passengers to unload them in a safe place, especially when the passengers are children.¹⁰³

The decision in *Snow* goes beyond the plain language of section 1-539.21. Under normal circumstances a parent operating a motor vehicle is not functioning in a supervisory capacity over his or her child. In *Snow*, however, the mother clearly was in a position to exercise supervision over her child's activity in exiting the car. Thus, the court's decision essentially extends abolition of immunity beyond a parent's mere negligent driving to include negligent supervision of passengers riding in the automobile. As a result, *Snow* impinges on the last viable rationale for retaining parental immunity—to protect the realm of parental supervision.¹⁰⁴

Based on the historical development of parental immunity in North Carolina, the decision in *Lee* presents three questions for legal analysis. First, did the court apply parent-child immunity properly to bar defendant's right to contribution under North Carolina's Uniform Contribution Among Tortfeasors Act?¹⁰⁵ Second, should North Carolina retain the parental immunity doctrine or further abrogate it? Third, did the court in *Lee* legitimately refrain from judicial legislation or should further abrogation of parental immunity come from the judiciary?

The first question presented by *Lee* is whether the court properly applied parental immunity to bar defendant Mowett's right to contribution under North Carolina's Uniform Contribution Among Tortfeasors Act. The majority relied

98. 52 N.C. App. 131, 277 S.E.2d 850 (1981).

99. *Id.* at 132, 277 S.E.2d at 851.

100. *Id.*

101. *Id.* at 131, 277 S.E.2d at 850.

102. *Id.* at 135, 277 S.E.2d at 853.

103. *Id.* at 134-35, 277 S.E.2d at 852-53 (citing *Colson v. Shaw*, 301 N.C. 677, 273 S.E.2d 243 (1981)).

104. See *supra* text accompanying notes 54-56.

105. N.C. GEN. STAT. § 1B-1(a) (1983). The statute provides that "where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them." *Id.*

on *Watson v. Nichols*¹⁰⁶ to dismiss defendant's action against plaintiff's father. Confronted with an issue identical to that in *Lee*, the North Carolina Supreme Court held in *Watson* that because a parent is not liable in a direct action by his or her child, the parent cannot be made liable by cross-action.¹⁰⁷ Although the *Watson* court cited no authority to support its holding, a prior North Carolina case reached the same conclusion.¹⁰⁸ Indeed, the majority of jurisdictions hold that a defendant has no claim for contribution against a parent when the injured child has no cause of action against such parent because of parental immunity.¹⁰⁹ To hold otherwise would afford a defendant greater rights than the injured child. Moreover, to allow a claim for contribution against a negligent parent ultimately would reduce the value of the child's recovery.¹¹⁰

In his dissenting opinion in *Lee*, Justice Exum criticized the majority's application of parental immunity to bar defendant Mowett's action for contribution against the child's allegedly negligent father.¹¹¹ Justice Exum emphasized that "[n]one of the policy reasons said to justify parental immunity against ordinary tort actions by children appertain to cross-claims by third-party plaintiffs who are not children of the defendant."¹¹² He deemed the decision an "unwarranted extension" of the immunity doctrine and argued that contribution actions by third parties against parents do not adversely affect harmonious family relations.¹¹³

Justice Exum's dissent reflects the conflict between the doctrine of parental immunity and the statutory right to contribution. North Carolina's contribution statute provides that "where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them."¹¹⁴ Thus, when a minor child sustains an injury due to the joint negligence of a parent and a third party, courts must balance the rights of the parent, the child, and the third party. The public policy to maintain family harmony and parental freedom of supervision competes with the inequity of permitting "the entire burden of a loss . . . to be shouldered onto one alone . . . while the [other] goes scot free."¹¹⁵ Conse-

106. 270 N.C. 733, 155 S.E.2d 154 (1967).

107. *Id.* at 735, 155 S.E.2d at 156.

108. *See* *Lewis v. Farm Bureau Mut. Auto. Ins. Co.*, 243 N.C. 55, 56-57, 89 S.E.2d 788, 789 (1955).

109. *See, e.g.,* *Jennings v. Franz Torwegge Mach. Works*, 347 F. Supp. 1288, 1290 (W.D. Va. 1972) (applying Virginia law); *Strahorn v. Sears, Roebuck & Co.*, 50 Del. 50, 54-55, 123 A.2d 107, 109-10 (1956); *Pedigo v. Rowley*, 101 Idaho 201, 205-06, 610 P.2d 560, 564 (1980); *Kendall v. Sears, Roebuck & Co.*, 634 S.W.2d 176, 179 (Mo. 1982).

110. *See* *Holodook v. Spencer*, 36 N.Y.2d 35, 47, 324 N.E.2d 338, 344, 364 N.Y.S.2d 859, 868-69 (1974) (noting that "[t]he reality of the family is that, except in cases of great wealth, it is a single economic unit and recovery by a third party against the parent ultimately diminishes the value of the child's recovery").

111. *Lee*, 316 N.C. at 496-97, 342 S.E.2d at 886 (Exum, J., dissenting).

112. *Id.* at 496, 342 S.E.2d at 886 (Exum, J., dissenting).

113. *Id.* at 496-97, 342 S.E.2d at 886 (Exum, J., dissenting).

114. N.C. GEN. STAT. § 1B-1(a) (1983).

115. PROSSER AND KEETON ON THE LAW OF TORTS § 50, at 337-38 (W. Keeton 5th ed. 1984).

quently, a minority of jurisdictions recognize the right of a third party to sue a joint tortfeasor parent for contribution despite the parent's immunity to suit by his or her child.¹¹⁶ These courts allow third-party contribution actions against parents on grounds of equity or public policy.¹¹⁷ Moreover, these same courts view immunity only as a procedural bar to suit by the child, while the parent remains substantively liable for contribution by third parties.¹¹⁸

By balancing conflicting rights in favor of parental immunity, the supreme court's decision in *Lee* represents a strengthening of the parental immunity doctrine in North Carolina. The court did not explore the competing rights of contribution and parental immunity, but implied that the social benefits of parental immunity outweigh society's interest in dividing liability among joint tortfeasors.

As a result of the outcome in *Lee*, the question arises whether North Carolina should retain the parental immunity doctrine as it now exists or should further limit or abrogate the doctrine. The abolition of parental immunity in motor vehicle cases essentially denies the logic of the doctrine and suggests that North Carolina should eliminate it altogether. The decision in *Snow*¹¹⁹ further illustrates that North Carolina courts are moving beyond abrogation only in pure motor vehicle cases involving negligent driving. If North Carolina further abolishes parental immunity, however, the courts or the general assembly must decide how far to abrogate the doctrine. The challenge will be to balance the desirability of parental freedom in childrearing against the child's right to just compensation.

Other jurisdictions that have partially or wholly abolished parental immunity provide alternatives to North Carolina's limited abrogation.¹²⁰ These jurisdictions seek to balance an injured minor child's right to recovery against a parent's right to exercise both authority and supervision over the child. One approach is that taken by the Wisconsin Supreme Court in *Goller v. White*.¹²¹ *Goller* involved a suit by a twelve-year-old boy against his foster father for negli-

116. See, e.g., *Perchell v. District of Columbia*, 444 F.2d 997 (D.C. Cir. 1971); *Joseph v. Quest*, 414 So. 2d 1063 (Fla. 1982); *Hartigan v. Beery*, 128 Ill. App. 3d 195, 470 N.E.2d 571 (1984); *Walker v. Milton*, 263 La. 555, 268 So. 2d 654 (1972); *Puller v. Puller*, 380 Pa. 219, 110 A.2d 175 (1955).

117. See *Perchell v. District of Columbia*, 444 F.2d 997, 998 (D.C. Cir. 1971) (holding that District of Columbia could seek contribution from a negligent parent because result of burdening one party with a joint tort "serv[ed] one equitable purpose but creat[ed] an inequity"); see also *Hartigan v. Beery*, 128 Ill. App. 3d 195, 199, 470 N.E.2d 571, 573 (1984) (use of parent-child immunity to insulate parents from contribution action not consistent with present system of equitable apportionment of fault); *Moon v. Thompson*, 127 Ill. App. 3d 657, 661, 469 N.E.2d 365, 368 (1984) (in negligent supervision case involving parents' violation of a statutory duty, public policy concerns supporting contribution must prevail over conflicting principle of immunity). But see *Duensing v. Tripp*, 596 F. Supp. 389 (S.D. Ill. 1984) (holding that an essential element of contribution is that third-party defendant parent must be liable to plaintiff for same injury).

118. See *Walker v. Milton*, 263 La. 555, 560-61, 268 So. 2d 654, 656 (1972) (citing *Deshotel v. Travelers Indem. Co.*, 257 La. 567, 243 So. 2d 259 (1971)); *Bishop v. Nielsen*, 632 P.2d 864, 866-67 (Utah 1981) (citing *Zarella v. Miller*, 100 R.I. 545, 217 A.2d 673 (1966)).

119. 52 N.C. App. at 131, 277 S.E.2d at 850. For a discussion of *Snow*, see *supra* text accompanying notes 98-104.

120. See *infra* text accompanying notes 121-45.

121. 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

gently permitting the child to ride on the drawbar of a tractor.¹²² The boy sustained injuries when a bolt protruding from one of the tractor's wheels caught the leg of his trousers.¹²³ In holding the father liable for negligence, the court abrogated the parental immunity doctrine in all but two situations. The court stated that immunity would apply when (1) the allegedly negligent act involves an exercise of parental authority over the child; or (2) the allegedly negligent act involves an exercise of ordinary parental discretion with regard to the provision of food, clothing, housing, medical and dental services, and other care.¹²⁴

The difficulty with the *Goller* approach is delineating which parental activities involve the exercise of authority or discretion over the child. Much litigation has centered around the meaning of "ordinary parental discretion with respect to the provision of . . . other care."¹²⁵ In *Lemmen v. Servais*¹²⁶ the Wisconsin Supreme Court concluded that a child's parents could not be held liable for their alleged negligent failure to instruct their child properly as to how to leave a bus and cross a highway.¹²⁷ This "parental activity" involved a failure to educate and fell within the scope of "discretion with respect to other care." However, the same court in *Thoreson v. Milwaukee & Suburban Transport Co.*¹²⁸ determined that negligent supervision of a child does not fall within the ambit of parental discretion, reasoning that the exclusion does not extend to "the broad care one gives to a child in day-to-day affairs."¹²⁹

There are two major weaknesses in the *Goller* approach to abrogating parental immunity. First, by immunizing two categories of parental behavior, the court implicitly recognized that any parental action that can be classified under either category is acceptable. Drawing lines between parental conduct that can be classified within the authority or discretion exceptions has also proved difficult, and the Wisconsin decisions provide little guidance to parents in assessing areas of potential liability.¹³⁰ Second, retention of certain categories of parental behavior is illogical because it suggests that the traditional justifications for immunity are still valid in specific situations.¹³¹

The California Supreme Court took an alternative approach in *Gibson v.*

122. *Id.* at 404, 122 N.W.2d at 193.

123. *Id.*

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

125. *Id.*

126. 39 Wis. 2d 75, 158 N.W.2d 341 (1968).

127. *Id.*

128. 56 Wis. 2d 231, 201 N.W.2d 745 (1972).

129. *Id.* at 247, 201 N.W.2d at 753. In *Thoreson* a mother incurred liability when she left her three-year-old son alone watching television in their living room. The child later ran out of the house into the path of a bus. *Id.* at 233, 201 N.W.2d at 747. Narrowly confining the scope of the "other care" exception, the court indicated that negligent supervision was not of the same legal nature as providing food, clothing, and the like. *Id.* at 247, 201 N.W.2d at 753; see also *Howes v. Hansen*, 56 Wis. 2d 247, 201 N.W.2d 825 (1972) (mother's failure to supervise and control her son's actions and movements does not fall within either immunity exception); *Cole v. Sears, Roebuck & Co.*, 47 Wis. 2d 629, 177 N.W.2d 866 (1970) (parental supervision of child's play does not fall within "other care" immunity exception).

130. Hollister, *supra* note 40, at 514.

131. Hollister, *supra* note 40, at 514-16.

*Gibson*¹³² by completely abrogating the immunity doctrine and adopting a reasonable parent standard.¹³³ The court in *Gibson* rejected "the implication of *Goller* that within certain aspects of the parent-child relationship, the parent has carte blanche to act negligently toward his child."¹³⁴ Instead, the California Supreme Court adopted the following test of parental conduct: "What would an ordinarily reasonable and prudent parent have done in similar circumstances?"¹³⁵ Under the *Gibson* test reasonableness is to be evaluated in light of the parental role.¹³⁶ This approach clearly balances the rights of an injured child more favorably than the *Goller* approach because all parental duties and activities fall under the purview of the test. The *Gibson* approach assumes there is a clear distinction between acceptable and unacceptable parental conduct regardless of the capacity in which a parent acts. However, the test presumably encompasses considerations of parental judgment, forgetfulness, and frailties inherent in household management.¹³⁷

The major criticism of the *Gibson* approach is that courts cannot and should not decide what constitutes reasonable parental behavior in the realm of supervision and discipline. As noted by one court, the result of a *Gibson* approach

would be to circumscribe the wide range of discretion a parent ought to have in permitting his child to undertake responsibility and gain independence. . . . Considering the different economic, educational, cultural, ethnic and religious backgrounds which must prevail, there are so many combinations and permutations of parent-child relationships that may result that the search for a standard would necessarily be in vain¹³⁸

All of these various parental and household characteristics, however, presumably are to be considered in a determination of reasonable behavior¹³⁹ because the standard is a flexible one to be developed on a case-by-case basis.¹⁴⁰ Nevertheless, courts are especially uncomfortable with allowing judicial review of negligent supervision cases because almost every accident could have been prevented by closer parental supervision.¹⁴¹

132. 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971) (en banc).

133. *Id.* at 921, 479 P.2d at 653, 92 Cal. Rptr. at 293; see also *Anderson v. Stream*, 295 N.W.2d 595 (Minn. 1980) (adopting reasonable parent standard).

134. *Gibson*, 3 Cal. 3d at 921, 479 P.2d at 652-53, 92 Cal. Rptr. at 292-93.

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

136. *Id.*

137. *Id.* The California courts have not had occasion to develop the reasonable parent test. In *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978) (en banc), the California Supreme Court did not apply the reasonable parent test but refused to dismiss a cross-claim brought against parents of an unemancipated minor boy for their alleged negligent failure to supervise. The parents had signed a consent form allowing their son to participate in a motorcycle race that resulted in the child's injury. *Id.*

138. *Holodook v. Spencer*, 36 N.Y.2d 35, 50, 324 N.E.2d 338, 346, 364 N.Y.S.2d 859, 871 (1974).

139. Comment, *The "Reasonable Parent" Standard: An Alternative to Parent-Child Tort Immunity*, 47 U. COLO. L. REV. 795, 810 (1976).

140. *Id.* at 809.

141. *Holodook v. Spencer*, 36 N.Y.2d 35, 45-46, 324 N.E.2d 338, 343, 364 N.Y.S.2d 859, 867

A final alternative to parental immunity is provided in the *Restatement (Second) of Torts*. The *Restatement* view advocates a parental reasonableness standard, but exemplifies the kind of parental activities that should not give rise to liability.¹⁴² The *Restatement* approach erases any immunity that exists solely by virtue of a familial relationship but recognizes that certain acts and omissions between parent and child should not be tortious even when injury ensues.¹⁴³ To impose liability under the *Restatement* view, parental conduct must reach the threshold of palpable unreasonableness.¹⁴⁴ This approach is preferable to the *Gibson* test because it provides guidelines to determine what constitutes unreasonable behavior.¹⁴⁵

The third question presented in *Lee* is whether the court should judicially legislate further abrogation of parental immunity or defer to the general assembly for any further action. In support of its decision in *Lee*, the supreme court stated that "[b]ecause the parent-child immunity doctrine is firmly embedded in our case law and the legislature has declined to enact its abolition, we do not disturb the doctrine as it now exists."¹⁴⁶ The court deemed judicial abolition to constitute "impermissible judicial legislation"¹⁴⁷ and declared that the doctrine will continue undisturbed until the general assembly acts to abolish or amend it. The supreme court characterized its position as one of impotence in changing common law or precedential doctrine.¹⁴⁸

The court, however, is not powerless to abrogate the parent-child immunity doctrine, as evidenced by its prospective action in analogous decisions.¹⁴⁹ North

(1974). One commentator has suggested that the proper test "would [hold] the parent liable only if the accident could have been prevented by closer supervision and it would have been reasonable for the parent to have more closely supervised the child at the time of the accident." Comment, *supra* note 139, at 812.

142. RESTATEMENT (SECOND) OF TORTS § 895G (1977).

143. *Id.* As stated in the Restatement:

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

Id. § 895G comment k.

144. *Id.*

145. *Id.* For example, when a parent "delays fixing a slightly broken step" and a child is consequently injured, liability will not arise under the Restatement approach because such an occurrence is commonplace in family life and usually treated as an accident. *Id.*

146. *Lee*, 316 N.C. at 490, 342 S.E.2d at 883.

147. *Id.* at 494, 342 S.E.2d at 885.

148. The supreme court stated that "[t]o judicially abolish the parent-child immunity doctrine after the legislature has considered and retained the doctrine would be to engage in impermissible judicial legislation." *Id.*

149. In *State v. Freeman*, 302 N.C. 591, 276 S.E.2d 450 (1981), the North Carolina Supreme Court modified a common-law rule preventing spouses from testifying against each other in a criminal proceeding. Claiming that absent a legislative declaration, the court had authority to alter judicially created common law, the supreme court restricted the prohibition of spousal testimony to confidential communication during the marriage. *Id.* at 593, 276 S.E.2d at 452.

In *Rabon v. Rowan Memorial Hosp., Inc.*, 269 N.C. 1, 152 S.E.2d 485 (1967), the North Carolina Supreme Court abolished the common law rule of charitable immunity as applied to hospitals. Explaining its departure from stare decisis, the court stated that "[t]here is no virtue in sinning against light or in persisting in palpable error, for nothing is settled until it is settled right." *Id.* at

Carolina courts have altered judicially-created common-law rules with public policy ramifications on numerous occasions.¹⁵⁰ Thus, the supreme court's deference to the general assembly on the issue of parental immunity is not mandated by judicial precedent. Indeed, in his dissent to the North Carolina Court of Appeals decision in *Lee*, Judge Becton opined that because North Carolina courts created parental immunity by relying on other states' decisions, they should be able to alter it in the same way.¹⁵¹ Moreover, other jurisdictions have indicated that the legislature is not the proper body to abolish the judicially-created parent-child immunity doctrine.¹⁵²

The erosion of the policy rationales for parental immunity that prompted the North Carolina General Assembly to abrogate the immunity doctrine in motor vehicle cases suggests that further abrogation is logically warranted. The argument for abrogation is further supported by the inequities potentially inflicted on negligent third parties who, unable to seek contribution from a jointly negligent parent, must bear the full burden of compensation regardless of relative fault. Although the majority of North Carolina cases have arisen in the context of motor vehicle accidents, this situation should neither retard change nor excuse judicial apprehension in abrogating the doctrine.

Both the "reasonable parent standard" and the *Restatement* view represent viable alternatives to retention of the immunity doctrine. These approaches more equally balance the rights of parent and child. In addition, these views allow for the consideration of all parental and household characteristics in the determination of parental negligence and therefore adequately protect freedom in childrearing.

It is time for the North Carolina Supreme Court to reconsider the benefits and inequities flowing from the parental immunity doctrine and use its judicial powers to instigate change. The advantage to judicial abolition is that courts may more readily accommodate the uniqueness of the parent-child relationship by reserving desired exceptions to total abrogation¹⁵³ or promulgating tests and

20-21, 152 S.E.2d at 498 (quoting *Spitzer v. Commissioners of Franklin County*, 188 N.C. 30, 32, 123 S.E. 636, 638 (1924)).

150. See, e.g., *Mims v. Mims*, 305 N.C. 41, 286 S.E.2d 779 (1982) (presumption of gift in interspousal property conveyances applied equally to husband and wife); *Nicholson v. Hugh Chatham Memorial Hosp.*, 300 N.C. 295, 266 S.E.2d 818 (1980) (recognizing cause of action for spouse's loss of consortium when joined with personal injury action); *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979) (recognizing that under certain circumstances the law authorizes an action for intentional infliction of emotional distress); *Sides v. Duke Hosp.*, 74 N.C. App. 331, 328 S.E.2d 818, cert. denied, 312 N.C. 331, 335 S.E.2d 13 (1985) (recognizing exception to at-will employment doctrine); *Hutchens v. Hankins*, 63 N.C. App. 1, 303 S.E.2d 584 (1983) (recognizing cause of action for selling or serving alcoholic beverages to visibly intoxicated tavern patrons).

151. *Lee*, 76 N.C. App. at 565, 334 S.E.2d at 256 (Becton, J., dissenting).

152. See, e.g., *Hebel v. Hebel*, 435 P.2d 8, 15 n.51 (Alaska 1967); *Williams v. Williams*, 369 A.2d 669, 673 (Del. 1976); *Nudd v. Matsoukas*, 7 Ill. 2d 608, 619, 131 N.E.2d 525, 531 (1956); *Turner v. Turner*, 304 N.W.2d 786, 787 (Iowa 1981); *Black v. Solnitz*, 409 A.2d 634, 639 (Me. 1979); *Fugate v. Fugate*, 582 S.W.2d 663, 668 (Mo. 1979); *Briere v. Briere*, 107 N.H. 432, 434, 224 A.2d 588, 590 (1966); *Gelbman v. Gelbman*, 23 N.Y.2d 434, 437, 245 N.E.2d 192, 193, 297 N.Y.S.2d 529, 530 (1969).

153. See, e.g., *Goller*, 20 Wis. 2d at 413, 122 N.W.2d at 198 (1963) (abrogating immunity with reserved exceptions); see *supra* text accompanying notes 121-24.

guidelines to replace the immunity doctrine.¹⁵⁴

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154. See, e.g., *Gibson*, 3 Cal. 3d at 921, 479 P.2d at 653, 92 Cal. Rptr. at 293 (1971) (adopting reasonable parent test); *Anderson v. Stream*, 295 N.W.2d 595, 601 (Minn. 1980) (adopting reasonable parent test); see *supra* text accompanying notes 132-37, 142-45.