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THE BALANCE BETWEEN INDIVIDUAL RIGHTS AND FAMILY PRESERVATION: THE FUTURE OF THE PARENT-CHILD IMMUNITY DOCTRINE IN TEXAS

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> The genius of the common law lies in its flexibility and its adaptability to the changing nature of human affairs and in its ability to enunciate rights and to provide remedies for wrongs where previously none had been declared.[1]

In considering the history of the parent-child immunity doctrine, the aforementioned statement appears to be peculiarly applicable. In many instances, the doctrine has not only been modified but completely abrogated. Recently, Texas has joined a growing majority of states in adopting a less rigid and inflexible approach to this doctrine which has previously equipped parents with an immunity from suits involving tort actions brought by their children.

In *Felderhoff v. Felderhoff*,[2] Texas altered its parent-child immunity doctrine, insofar as it permitted a child to sue a parent when the injury arose out of an employer-employee relationship. The direct holding of the court, along with important dicta in the case, indicates that the Texas Supreme Court may be willing to abolish the parent-child immunity doctrine with respect to most acts of ordinary negligence. A study of recent decisions in other jurisdictions, coupled with an analysis of this recent case, indicates the considerations which will be foremost in the thinking of the court when it is faced with this problem. These considerations can be more fully understood after evaluating the origin, development, and subsequent erosion of the parent-child immunity doctrine in other jurisdictions.

COMMON LAW VOID

> The issue is, and must remain, an insoluble mystery.[3]

This quote is an irrebuttable conclusion of any discussion of the English common law pertaining to torts between parent and child. The silence which the English courts maintained on the issue of a child's personal rights against a parent created this legal mystery.[4] The only

1 Rozell v. Rozell, 22 N.E.2d 254, 257 (N.Y. 1939).
2 473 S.W.2d 928 (Tex. Sup. 1971).
3 Dunlap v. Dunlap, 150 A. 905, 907 (N.H. 1930).
4 *Id.*

relevant source of what the law might have been is recorded by 19th century English text writers.[5] Reeve, in his treatise on domestic relations stated that he was of the opinion that a child may have an action for damages resulting from a battery:

> He may so chastise his child, as to be liable in an action by the child against him for a battery .... The true ground on which this ought to be placed, I apprehend, is that the parent ought to be considered as acting in a judicial capacity when he corrects; and, of course, not liable for errors of opinion.... But when ... it appears that the parent acted, *malo animo*, from wicked motives, under the influence of an unsocial heart, he ought to be liable to damages.[6]

In opposition to this view, Cooley believed the policy of permitting actions that invite a contest of the parent's authority was so questionable that he doubted if the right would ever be sanctioned.[7] Obviously in agreement with this statement, an American writer of the 19th century felt that even an action by an emancipated child against his parent was "... abhorrent to the idea of family discipline which all nations, rude or civilized, have so steadily inculcated, and the privacy and mutual confidence which should obtain in the household."[8]

AMERICAN ORIGIN

In 1891, the Mississippi Supreme Court, without citing authority, composed the first judicial rule that a child does not have a cause of action in tort against his parent. In *Hewellette v. George*,[9] a daughter sought a civil remedy against her mother for having her wrongfully and maliciously imprisoned in an insane asylum. Reversing and remanding to determine if the daughter had resumed her place in the home after being separated from her husband, the court stated:

> [S]o long as the parent is under obligation to care for, guide, and control, and the child is under reciprocal obligation to aid and comfort and obey, no such action as this can be maintained. The peace of society, and of the families composing society, and a sound

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5 Dunlap v. Dunlap, 150 A. 905, 907 (N.H. 1930); McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1059-1060 (1930).

6 T. REEVE, DOMESTIC RELATIONS 287 (1816), cited and quoted in McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1060 n.141 (1930). According to McCurdy, Addison, Pollock, and Clark and Lindsell concurred in this opinion. McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1060 (1930).

7 T. COOLEY, TORTS 171 (1879), cited by McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1060 (1930).

8 McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1060 n.147 (1930).

9 9 So. 885 (Miss. 1891).

> 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.[10]

Hewellette claimed that the minor daughter had adequate protection from parental violence and wrong-doing through the state's criminal laws.[11] The state has a duty to protect all of its citizens from violence and wrong-doing, and this would be no less applicable to violence committed upon a child by his parent. Thus was born a rule of law of exceptional character, based totally on public policy.[12] The problem of deciding exactly what this public policy is has led one eminent authority to say, "[W]e are in the realm of belief and emotion."[13]

In 1903,[14] the Tennessee Supreme Court was presented with the problem of a minor child who brought suit against her father and stepmother to recover damages for injuries inflicted by the latter with consent of the father. Though citing Judge Cooley's observation that ". . . in principle there seems to be no reason it [suit by minor against parent in tort] should not be sustained,"[15] the court was persuaded that the void of such cases indicated adherence to the immunity rule.[16] Relying upon the policy reasons set out in *Hewellette*,[17] the Tennessee court further imbedded the immunity rule in American jurisprudence.[18]

Despite facts that would tend to make promulgation of the rule an absurdity, the Supreme Court of Washington in 1905 also upheld the rule born in *Hewellette*.[19] Though recognizing merit in a suggestion to limit the rule, the court believed a limitation as to certain torts would only lead to confusion.[20]

Using these three cases as a foundation, many jurisdictions followed

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10 *Id.* at 887.

11 *Id.* at 887.

12 Though discussing another area of common law, the court said: "What these cases really did was to establish a new rule of exceptional character rather than enforce a rule already established." Chiuchiolo v. New England Wholesale Tailors, 150 A. 540, 542 (N.H. 1930).

13 McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1076 (1930).

14 McKelvey v. McKelvey, 77 S.W. 664 (Tenn. 1903).

15 *Id.*

16 *Id.*

17 Hewellette v. George, 9 So. 885 (Miss. 1891).

18 McKelvey v. McKelvey, 77 S.W. 664, 665 (Tenn. 1903).

19 Roller v. Roller, 79 P. 788 (Wash. 1905). This was an action brought by a child for civil redress from her father who had been criminally convicted of raping her.

20 *Id.* at 789. The court also believed that to allow the action would permit one child to gain to the detriment of other children in the family.

suit in adopting the parent-child immunity doctrine.[21] In spite of its prevalence the doctrine was not adopted without judicial criticism.[22]

A Foundation is Established

The public policy considerations as promulgated in *Hewellette*,[23] i.e., family harmony and parental discipline, are perhaps the leading arguments for retaining the parental immunity rule.[24] The California Supreme Court stated the general view as follows:

> The reason of the rule which deprives a minor child of a right of action against the parent for the tort of the latter is that proceedings of that nature tend to bring discord into the family and disrupt the peace and harmony of the household.[25]

A 1923 North Carolina case, *Small v. Morrison*,[26] considered most of the reasons expounded for retaining the rule. The majority, while espousing the family harmony theory advanced in *Hewellette*, also considered other reasons.[27] One of these is the theory that to permit a minor child to sue his father for a tortious wrong would allow the child to take from his parent that which is already dedicated to the support and maintenance of the family.[28]

> It would also allow one minor child to gain an advantage over his minor brothers and sisters at the expense of the common fund

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21 *See, e.g.*, Farrar v. Farrar, 152 S.E. 278 (Ga. App. 1930); Smith v. Smith, 142 N.E. 128 (Ind. App. 1924); Elias v. Collins, 211 N.W. 88 (Mich. 1929); Taubert v. Taubert, 114 N.W. 763 (Minn. 1908); Dunlap v. Dunlap, 150 A. 905 (N.H. 1930); Goldstein v. Goldstein, 134 A. 184 (N.J. 1926); Sorrentino v. Sorrentino, 162 N.E. 551 (N.Y. 1928); Small v. Morrison, 118 S.E. 12 (N.C. 1923); Wick v. Wick, 212 N.W. 787 (Wis. 1927).

22 *See, e.g.*, Small v. Morrison, 118 S.E. 12, 17 (N.C. 1923) (Clark, J., dissenting); Wick v. Wick, 212 N.W. 787, 788 (Wis. 1927) (Crownhart, J., dissenting).

Wells v. Wells, 48 S.W.2d 109 (Mo. Ct. App. 1932), appears to be an early decision directly contrary to the immunity rule, but it has been suggested that the presence of insurance and the fact that the minor son was acting as agent of the adult son was of significance in the decision. Comment, *Tort Actions Between Members of the Family—Husband and Wife—Parent and Child*, 26 Mo. L. Rev. 152, 184 n.170 (1961).

23 Hewellette v. George, 9 So. 885 (Miss. 1891).

24 *See, e.g.*, Trudell v. Leatherby, 300 P. 7 (Cal. 1931); Small v. Morrison, 118 S.E. 12 (N.C. 1923); Matarese v. Matarese, 131 A. 198 (R.I. 1925); Wick v. Wick, 212 N.W. 787 (Wis. 1927).

25 Trudell v. Leatherby, 300 P. 7, 8 (Cal. 1931). Another court stated: "Any justification for the rule of parental immunity can be found only in a reluctance to create litigation and strife between members of the family unit." Mudd v. Matsoukas, 131 N.E.2d 525, 531 (Ill. 1956).

26 Small v. Morrison, 118 S.E. 12 (N.C. 1923). In this case, the nine-year-old daughter of J.C. Small brought action against her father, his insurer, and the driver of the automobile which collided with the one her father was driving. She was a passenger in her father's automobile.

27 *Id.* at 14.

28 *Id.* at 14.

> which has been dedicated to a fair and equal support of them all. And further, even taking the plaintiff's view, a suit would do no more than award to the injured child that which the simple dictates of family life may have already impressed with a trust in its favor.[29]

The court in *Small* also believed that to allow such actions would destroy parental authority. This belief is illustrated by the following statement:

> [N]o greater disservice could be rendered to any child than to teach its feet to stray from the path of rectitude, or to suffer its mind to be poisoned by ideas of disloyalty and dishonor. . . . Hence, in a democracy or a polity like ours, the government of a well-ordered home is one of the surest bulwarks against the forces that make for social disorder and civic decay. It is the very cradle of civilization. . . .[30]

Finally, since the advent of insurance, the theory that to allow such suits would enhance the possibility of fraud and collusion between the injured party and the tort-feasor has been the concern of several courts.[31] However, this mere possibility has deterred few courts from freely making their decisions on other grounds.[32] The collusion theory was adequately dispelled in *Gelbman v. Gelbman*,[33] wherein the court countered:

> The argument fails to explain how the possibility of fraud would be magically removed merely by the child's attainment of legal majority. Nor does the argument pretend to present the first instance in which there is the possibility of a collusive and fraudulent suit. There are analogous situations in which we rely upon the ability of the jury to distinguish between valid and fraudulent claims. The effectiveness of the jury system will pertain in the present situation. The definite and vital interest of society in protecting people from losses resulting from accident should remain paramount.[34]

It can be concluded that the preservation of family harmony and pa-

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[29] *Id.* at 15.

[30] *Id.* at 15. Clark, J., countered in the dissent by offering the proposition that the immunity doctrine was not based on common law and was contrary to justice. He stated: "Justice should be done to all. The complaints of all should be heard and wrongs, if proven, redressed without distinction of race, of sex, or of age. 'For justice, all places are a temple and all seasons summer.'" *Id.* at 25.

[31] *See, e.g.*, Villaret v. Villaret, 169 F.2d 677 (D.D.C. 1948); Treachman v. Treachman, 61 N.E. 901 (Ind. 1901); Luster v. Luster, 13 N.E.2d 438 (Mass. 1938); Parks v. Parks, 135 A.2d 65 (Pa. 1957).

[32] McCurdy, *Torts Between Parent and Child*, 5 VILL. L. REV. 521, 546 (1960).

[33] 245 N.E.2d 192 (N.Y. 1969).

[34] *Id.* at 194.

rental authority, protection of the family exchequer, and the possibility of collusion and fraud are the primary reasons courts continue to uphold the rule.

THE FOUNDATION BEGINS TO CRUMBLE: EXCEPTIONS THAT DEVELOPED

In spite of the near-universal adoption of the rule,[35] a number of qualifications and exceptions began to appear almost at its inception.[36]

The Emancipated Child

Though it appears that the court in *Hewellette* distinguished between unemancipated and emancipated children,[37] this distinction is sometimes considered an exception.[38] The basis for this so-called exception is that once emancipation has occurred, there is no longer the risk that family harmony or discipline will be disrupted, since the child is considered to be on his own.[39]

Willful and Malicious Torts

The first true deviation from the rule was the allowance of suits by children against their parents for willful or malicious torts.[40] The basis of this exception was the belief that the family relationship had already been disrupted to such an extent by the willful tort that any reason for the immunity rule would no longer exist.[41]

Certainly, as most courts recognize, there is little reason and much injustice done by a rule that would bar a child's recovery from a mali-

[35] *See, e.g.*, Farrar v. Farrar, 152 S.E. 278 (Ga. App. 1930); Smith v. Smith, 142 N.E. 128 (Ind. App. 1924); Elias v. Collins, 211 N.W. 88 (Mich. 1929); Taubert v. Taubert, 114 N.W. 763 (Minn. 1908); Dunlap v. Dunlap, 150 A. 905 (N.H. 1930); Goldstein v. Goldstein, 134 A. 184 (N.J. 1926); Sorrentino v. Sorrentino, 162 N.E. 551 (N.Y. 1928); Small v. Morrison, 118 S.E. 12 (N.C. 1923); Wick v. Wick, 212 N.W. 787 (Wis. 1927). *See also* cases cited in Comment, *Child v. Parent: Erosion of the Immunity Rule*, 19 HASTINGS L.J. 201, 202 n.13 (1967).

[36] *See generally* Comment, *Child v. Parent: Erosion of the Immunity Rule*, 19 HASTINGS L.J. 201, 206-218 (1967) for a more complete development of exceptions to the immunity rule.

[37] The court said: "If by her marriage the relation of parent and child had been finally dissolved, insofar as that relationship imposed the duty upon the parent to protect and care for and control, and the child to aid and comfort and obey, then it may be the child could successfully maintain an action against the parent for personal injuries." Hewellette v. George, 9 So. 885, 887 (Miss. 1891).

[38] Comment, *Child v. Parent: Erosion of the Immunity Rule*, 19 HASTINGS L.J. 201, 207, 208 (1967). *See* Comment, *Tort Actions Between Members of the Family—Husband and Wife—Parent and Child*, 26 MO. L. REV. 152, 194-197 (1961), for a good discussion of emancipation as it relates to immunity.

[39] *See* Farrar v. Farrar, 152 S.E. 278, 279 (Ga. App. 1930).

[40] Cowgill v. Boock, 218 P.2d 445 (Ore. 1950).

[41] "When the reason for the rule ceases, the rule itself ceases." Cowgill v. Boock, 218 P.2d 445, 453 (Ore. 1950).

cious attack by a parent. There is some irony in the realization that the first three decisions invoking the parent-child immunity doctrine involved circumstances that would amount to a malicious tort, i.e., circumstances to which the first and most universal exception was applied.[42]

Employer-Employee Relationships

Negligent acts of parents in the course of business activities have often been distinguished from those which arise from the discharge of normal parental duties and responsibilities. Suits by a minor child against his parent have been allowed when the child was injured while (1) in his father's employment,[43] (2) a passenger in a bus driven by the father,[44] or (3) an invitee on the premises of his father's business.[45] The latter case reasoned, that, in lieu of growing complications in business and industry, it would be an anomaly to allow one minor child to recover for injuries received on the premises of a business, while denying another the same right on the basis of the fact that the business is owned by his parent.[46]

Thus, the flexibility of the common law is illustrated in the adaptation of the parent-child immunity rule to changing conditions in business and industry.

The Foundation Collapses: Jurisdictions which have Abolished the Immunity Rule

Since 1963, several jurisdictions have abolished the parent-child immunity doctrine. Some of these have abolished it in its entirety, while others have done so with exceptions or in specific circumstances.

Abrogations with Exceptions for Parental Authority and Parental Discretion

In *Goller v. White*,[47] a 1963 Supreme Court of Wisconsin decision, the first major breakthrough in the parent-child immunity rule was engineered. In this case, a child was allowed to recover damages against

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42 Roller v. Roller, 79 P. 788 (Wash. 1905); McKelvey v. McKelvey, 77 S.W. 664 (Tenn. 1903); Hewellette v. George, 9 So. 885 (Miss. 1891).

43 Dunlap v. Dunlap, 150 A. 905 (N.H. 1930).

44 Lusk v. Lusk, 166 S.E. 538 (W. Va. 1932).

45 Signs v. Signs, 103 N.E.2d 743 (Ohio 1952). A seven-year-old son was held to have a cause of action against his father's business partnership for burns sustained from a leaking gasoline pump.

46 *Id.* at 748. The court also believed the child should have the same right to maintain an action in tort against his father in the latter's business capacity as he would have to maintain an action in relation to his property rights.

47 122 N.W.2d 193 (Wis. 1963).

his foster parent[48] in a suit involving ordinary negligence, under circumstances not falling within any of the heretofore recognized exceptions. After analyzing the reasons for the doctrine, the court abrogated[49] the rule, except in two situations:

(1) Where the alleged negligent act involves an exercise of parental authority over the child; and
(2) where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care.[50]

Thus, the Wisconsin Supreme Court abrogated the immunity doctrine in all areas in which the court believed it was not supported by public policy.[51] However, there have been questions as to the extent to which the *Goller* exceptions are applied.

In *Lemmen v. Servais*,[52] the Wisconsin Supreme Court was first called upon to apply these exceptions. In that case, a six-year-old child was struck by an automobile while crossing in front of a school bus from which she had alighted. In an action against the driver of the automobile that struck the child, defendant filed a third party complaint against the child's parents for their negligent failure to properly instruct the child about safety procedures for leaving the school bus and crossing the highway. The court held that the parents could not be held negligent because they were acting within the scope of an exercise of ordinary parental discretion with respect to care of their child.[53] In so holding, the court stated:

> The immunity granted by these two exceptions is accorded the parent, not because he is a parent, but because as a parent he pursues a course within the family constellation which society exacts of him and which is beneficial to the state. The parental nonliability is not granted as a reward, but as a means of enabling the parents to discharge the duties which society exacts.[54]

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48 In reference to a foster parent the court said: "One who is possessed of those rights and duties [of a foster parent] possesses and exercises the rights and duties of a parent and the relationship existing, is, for all practical purposes, that of parent and child." Goller v. White, 122 N.W.2d 193, 196 (Wis. 1963).

49 The court did not believe a decision to change should be left up to the legislature when a court-created rule of law was involved. *Id.* at 198. *See also* Holytz v. Milwaukee, 115 N.W.2d 618 (Wis. 1962), for justification of the court in not leaving it up to the legislature to change a rule of law if it is in the interest of justice.

50 Goller v. White, 122 N.W.2d 193, 198 (Wis. 1963).

51 *Id.* The court concluded that the only reason presently existing for the rule is based on the possibility that such action would disrupt family harmony and parental authority.

52 158 N.W.2d 341 (Wis. 1968).

53 *Id.* at 343.

54 *Id.* at 344. The court further said: "The familial obligations imposed by nature because of the parental relationship, imperfect though they may sometimes be because of

In a subsequent case, the Wisconsin Supreme Court held that the supervision of a child's play does not involve the exercise of ordinary parental discretion with respect to provision of food, clothing, housing, medical and dental services and other care and would not come within the *Goller* exception.[55] The court reasoned that although supervision of a child's play involves an area which is essentially parental, society does not exact a legal duty with respect to such an obligation, as in the case of providing a child with food, housing, medical and dental services, and education.[56] This case, therefore, indicates a narrow construction of the exceptions set forth in *Goller*.[57]

A later Wisconsin case construing the exception relating to parental care is *Thomas v. Kells*.[58] The supreme court in this case intimated that there were many questions not previously answered as to the exact meaning of the two exceptions.[59] Further, the court found the invitation to apply the second exception concerning "an exercise of ordinary parental discretion" with respect to the provision of "housing" tempting, but abstained from dealing with these questions since the case was decided on procedural grounds.[60] Thus, Wisconsin and other jurisdictions which have not totally abrogated the doctrine can expect problems in defining and applying the parental authority and parental discretion exceptions.

Two states[61] have followed Wisconsin in abrogating the immunity rule with the exception stated therein, while two others[62] have commended this as a wise decision; and yet another,[63] while abrogating the doctrine, criticized the Wisconsin approach.[64] Although this approach

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the ever present common denominator of human behavior, are quite distinct from the general obligation which the law imposes upon everyone in all his relations to his fellow men, and for the breach of which it gives a remedy."

55 Cole v. Sears, Roebuck & Co., 177 N.W.2d 866 (Wis. 1970). "The term 'other care' is not so broad as to cover all acts intimately associated with the parent-child relationship." *Id.* at 869.

56 *Id.* at 869.

57 Goller v. White, 122 N.W.2d 193 (Wis. 1963).

58 191 N.W.2d 872 (Wis. 1971).

59 *Id.* at 874. *See* Cole v. Sears, Roebuck & Co., 177 N.W.2d 866 (Wis. 1970) and Lemmen v. Servais, 158 N.W.2d 341 (Wis. 1968) for previous discussion of the exceptions.

60 The decision of the trial court was reversed and the demurrer was overruled on the basis that the third party complaint against the child's mother did not plead where the accident took place with such exactitude as to determine the limits of the exception with respect to parental discretion in provision of housing. Thomas v. Kells, 191 N.W.2d 872, 875 (Wis. 1971).

61 Rigdon v. Rigdon, 465 S.W.2d 921 (Ky. 1971); Silesky v. Kelman, 161 N.W.2d 631 (Minn. 1968).

62 Felderhoff v. Felderhoff, 473 S.W.2d 928 (Tex. Sup. 1971); Streenz v. Streenz, 471 P.2d 282 (Ariz. 1970).

63 Gibson v. Gibson, 479 P.2d 648 (Cal. 1971).

64 *Id.* at 653. The California court stated: "First, we think that the *Goller* view will inevitably result in the drawing of arbitrary distinctions about when particular parental

does contain the inherent problem of defining the limits of the exceptions, it gives the courts an opportunity to apply the exceptions to cases in which the reasons for the rule might still exist. Total abrogation, the area subsequently discussed, leaves no such margin for error.

Total Abrogation

In 1966, the Supreme Court of New Hampshire abolished the immunity doctrine in its entirety.[65] After refuting the family harmony, parental authority, and danger of fraud reasons usually advanced in favor of the rule, the court stated:

> We further believe that family peace and parental authority, in the overwhelming majority of cases, will be threatened less by an unemancipated minor's suit for tort against a parent, where the latter is generally protected from loss by insurance, than by an action for breach of contract or to enforce property rights where the parent would ordinarily have to pay a verdict from his own pocket.[66]

The Supreme Court of New York in *Gelbman v. Gelbman*[67] abolished the immunity rule in 1969. The court believed that, in reality, the litigation was between the parent passenger and her insurance carrier; therefore, family harmony would not be enhanced by prohibiting the suit. The court took recognition of the compulsory requirement for automobile insurance in New York.[68] Does this imply that the doctrine should be invoked where insurance does not exist while abolishing it when insurance is present?

Following much the same reasoning, three other states—Hawaii,[69] California,[70] and Pennsylvania[71] have totally abrogated the immunity doctrine. This does solve the problem of future litigation in this area.

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conduct falls within or without the immunity guidelines. Second, we find intolerable the notion that if a parent can succeed in bringing himself within the 'safety' of parental immunity, he may act negligently with impunity."

65 Briere v. Briere, 224 A.2d 588 (N.H. 1966).

66 *Id.* at 591.

67 245 N.E.2d 192 (N.Y. 1969).

68 *Id.* at 194. The court stated: "The present litigation is, in reality, between the parent passenger and her insurance carrier. Viewing the case in this light, we are unable to comprehend how the family harmony will be enhanced by prohibiting this suit."

69 Peterson v. City & County of Honolulu, 462 P.2d 1007 (Hawaii 1969) (amended Jan. 7, 1970). The court's reasoning is as follows: "We think that when a wrong has been committed, the harm to the family relationship has already occurred; and to prohibit reparations can hardly aid in restoring harmony." *Id.* at 1009.

70 Gibson v. Gibson, 479 P.2d 648 (Cal. 1971). The California court's decision is based on the legal principle that "When there is negligence, the rule is liability, immunity the exception." *Id.* at 653. The court also considered the widespread use of insurance.

71 Falco v. Pados, 282 A.2d 351 (Pa. 1971). The court said: "[W]e have concluded that the doctrine of parental immunity has no rational purpose today, and henceforth will not be recognized in Pennsylvania." *Id.* at 353. Again, the prevalence of liability insurance was an important consideration in the decision. *Id.* at 355.

There will be none. But is a full swing of the pendulum better than a balance which allows the retention of the doctrine for public policy reasons in areas where family relationships—areas involving parental care and authority—still need protection from court interference?

Abrogation with Exception for Acts Involving Parental Relationships

In *Schenk v. Schenk*,[72] a 1968 Illinois appellate court decision, an action was allowed by a father against his seventeen-year-old unemancipated daughter for injuries he sustained when she negligently ran into him with an automobile while he was a pedestrian. The court was of the opinion that the conduct in this case was wholly unrelated to parental relationship but specified that cases falling within such relationship were to be barred by the immunity doctrine by stating the following:

> [T]here are no impelling reasons for eroding or emasculating the family immunity rule for conduct of either parent or child arising out of the family relationship and directly connected with the family purposes and objectives in those cases where it may be said that the carelessness, inadvertence or negligence is but the product of hazards incident to inter-family living and common to every family.[73]

Subsequent Illinois cases have upheld the *Schenk* decision.[74] The most recent Illinois decision allowed an action by two minor daughters against their mother's estate for injuries alleged to have been caused by the ordinary negligence of their mother in the operation of a motor vehicle.[75] The court allowed the action on grounds that policy reasons for maintaining immunity no longer existed since the mother was deceased.[76] Though decided on the above basis, the court did not necessarily agree with the plaintiff's contention that the operation of a motor vehicle is not a peculiarly parental function.[77] It believed the intimate

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72 241 N.E.2d 12 (Ill. App. 1968).

73 *Id.* at 15.

74 In Cosmopolitan Nat'l Bank of Chicago v. Heap, 262 N.E.2d 829 (Ill. App. 1970), another Illinois appellate court held that in spite of the presence of liability insurance, an unemancipated minor child was barred from maintaining an action against his father for personal injuries caused by his father's alleged negligence in permitting a loose, ill-fitting stairway rug to be used in the family home. Since the complaint alleged mere negligence, the court believed the parent-child immunity rule applied, it being consistent with Illinois Supreme Court dicta and sound public policy.

A later case reiterated that no cause of action would be allowed for mere negligence, though one would be allowed for willful torts. Aurora Nat'l Bank v. Anderson, 268 N.E.2d 552 (Ill. App. 1971).

75 Johnson v. Myers, 277 N.E.2d 778 (Ill. App. 1972).

76 *Id.* at 779.

77 The plaintiff made this contention on the theory that the parent owes the same duty

and necessary part that a motor vehicle plays in accomplishing many family purposes in today's society could bring ordinary negligence in the use of an automobile within the parental function exception.[78] This is a doubtful proposition, in that *negligence* in the use of an automobile hardly involves any parental discretion.

Abrogation Limited Solely to Automobile Accidents

Alaska,[79] Arizona,[80] New Jersey,[81] and Virginia[82] have abrogated the parent-child immunity doctrine only insofar as it relates to negligence in automobile accidents.[83] This route appears to dispose of the largest quantity of litigations involving the parent-child immunity rule and affords more time for investigating the feasibility of theories presented by other courts.

Thus, it is apparent that there is little uniformity even among those states which have abolished the parent-child immunity rule. This lack of uniformity leaves several choices for other jurisdictions to analyze before arriving at a decision when confronted with this problem.[84]

TEXAS

ORIGIN AND DEVELOPMENT OF THE RULE

In *Garza v. Garza*,[85] Texas was first confronted with a situation where

to others as she does to her children who are passengers. Johnson v. Myers, 277 N.E.2d 778, 779 (Ill. App. 1972).

78 Johnson v. Myers, 277 N.E.2d 778, 779 (Ill. App. 1972). The court merely discussed this issue; they did not decide it.

79 Hebel v. Hebel, 435 P.2d 8 (Alas. 1967).

80 Streenz v. Streenz, 471 P.2d 282 (Ariz. 1970).

81 France v. A.P.A. Transport Co., 267 A.2d 490 (N.J. 1970).

82 Smith v. Kauffman, 183 S.E.2d 190 (Va. 1971). The Virginia court also considered the application of that state's guest statute to such an action by a minor. The Virginia guest statute states that a person transported in a motor vehicle ". . . as a guest without payment for such transportation . . ." cannot recover for death or injuries resulting from the operation of the motor vehicle except upon proof of the owner's or operator's gross negligence or willful and wanton conduct. VA. CODE ANN. § 8-646.1 (1957). The court ruled that a child can become a guest in a motor vehicle and subject himself to the gross negligence rule only if he can knowingly and voluntarily accept an invitation to become a guest. Smith v. Kauffman, 183 S.E.2d 190, 195 (Va. 1971). The court then set a dividing line between those children who cannot knowingly and voluntarily accept an invitation to become a guest. They held that a child under the age of fourteen years is incapable of knowingly and voluntarily accepting an invitation to become a guest in an automobile so as to subject himself to the gross negligence rule. *Id.* at 195.

83 Hebel v. Hebel, 435 P.2d 8, 15 (Alas. 1967); Streenz v. Streenz, 471 P.2d 282, 285 (Ariz. 1970); France v. A.P.A. Transport Co., 267 A.2d 490, 495 (N.J. 1970); Smith v. Kauffman, 183 S.E.2d 190, 194 (Va. 1971).

84 Not all states recently confronted with litigation in this area have elected to abolish or modify the parent-child immunity rule. *See* Latz v. Latz, 272 A.2d 434 (Md. 1971); Oldman v. Bartshe, 480 P.2d 99 (Wyo. 1971). The court in the latter case was of the opinion that the judiciary should be reluctant to encourage actions by children against their parents. *Id.* at 101.

85 209 S.W.2d 1012 (Tex. Civ. App.—Eastland 1948, no writ).

the parent-child immunity doctrine could be applied. The question was whether or not a child had a cause of action against a father who had deserted him, for loss of his society, love, companionship, and guidance. In holding that the child did not have a cause of action, the court quoted the following excerpt from *Ruling Case Law* as authority:

> It is well established that a minor child cannot sue his parent for a tort. The peace of society . . . and a sound public policy, designed to subserve the repose of families and the best interest of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent.[86]

The court concluded that while the plaintiffs were not suing for personal injuries, the parent-child immunity rule would certainly apply to a suit to recover for the loss of society.[87]

The Forth Worth Court of Civil Appeals in *Aboussie v. Aboussie*[88] was called upon to apply the parent-child immunity doctrine in a suit by a minor child against his parent for personal injuries. After pointing out that there was no evidence of willful, malicious, wanton, or intentional wrong-doing on the part of the parent, the court denied recovery and said:

> We believe that the peace and tranquility of the home and the best interest of minor children will be subserved by following the general rule that an unemancipated minor child cannot sue its parent for damages based on acts of ordinary negligence.[89]

The court further stated that the suit was against a parent, regardless of the fact that the unemancipated child was suing her father as a member of a partnership along with his brother and sister.[90]

Though the application of the parent-child immunity rule was not widely litigated in Texas, its development was typical of that in other jurisdictions.

FELDERHOFF V. FELDERHOFF

The first blow to the foundation of the parent immunity doctrine in Texas is the late 1971 supreme court decision of *Felderhoff v. Felder-*

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86 *Id.* at 1015.
87 *Id.* at 1015.
88 270 S.W.2d 636 (Tex. Civ. App.—Fort Worth 1954, writ ref'd).
89 *Id.* at 639.
90 Aboussie v. Aboussie, 270 S.W.2d 636, 640 (Tex. Civ. App.—Fort Worth 1954, writ ref'd).

hoff.[91] The plaintiff, a fourteen-year-old unemancipated minor, received injuries when his arm became caught in an auger of a large combine owned and operated by a partnership of which his father was a member. It was alleged that the plaintiff's father was negligent in letting his foot slip and strike a lever which put the auger in motion, while the plaintiff was scraping out excess grain and chaff within the grain auger. The trial court granted the defendant partnership summary judgment on the basis that a parent is immune from a suit involving ordinary negligence when brought by his unemancipated child. The court extended the immunity doctrine to include the partnership of which the father was a member. The court of civil appeals, believing itself to be bound by precedent, affirmed with some reluctance.[92] The Texas Supreme Court reversed, abolishing the parent-child immunity rule insofar as it involves an employer-employee relationship. The court was apparently urged to consider the presence of insurance as had other jurisdictions, but clearly declined to do so.[93] In refuting the argument that to allow such an action would open the door to fraud and collusion, the court said:

> We believe that our laws and judicial system are adequate to ferret out and prevent collusion if and when proper allegations and proof are presented in a particular case without the necessity of adopting an absolute immunity rule which would apply to this and all other cases in which no collusion is alleged.[94]

The court then distinguished between acts of parents in the course of business activities and acts arising from the discharge of normal parental duties and responsibilities. The reason for making this distinction was given as follows:

> The legal relationship of employer and employee was created between the defendant partnership and plaintiff under which the same legal duties were owed to plaintiff as to any other employee. These duties and their concomitant liabilities are not nullified by reason of the fact that the father was a member of the partnership and that he is alleged to have committed the negligent acts which resulted in the injuries complained of.[95]

The court could have ended its opinion at this point and merely

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91 473 S.W.2d 928 (Tex. Sup. 1971).
92 Felderhoff v. Felderhoff, 470 S.W.2d 301, 303 (Tex. Civ. App.—Fort Worth 1971, writ granted).
93 Felderhoff v. Felderhoff, 473 S.W.2d 928, 932 (Tex. Sup. 1971).
94 *Id.* at 932.
95 *Id.* at 933.

joined those jurisdictions which have allowed actions between parent and child when the negligence occurred in an employer-employee relationship.[96] The court directly stated that its holding was to be limited to employer-employee relationships.[97] Nevertheless, insight as to the future of the parent-child immunity doctrine as applied to other parent-child relationships may be gained in analyzing the remainder of the opinion dealing with the possibility of total abrogation responding to plaintiff's argument of that point. While the court responded that this was neither "required nor appropriate in the present case," it did proceed to give its opinion of decisions in other jurisdictions. The court stated:

> We trust that it is not out of date for the state and its courts to be concerned with the welfare of the family as the most vital unit in our society. We recognize that peace, tranquility and discipline in the home are endowed and inspired by higher authority than statutory enactments and court decisions. Harmonious family relationships depend on filial and parental love and respect which can neither be created nor preserved by legislatures or courts. The most we can do is to prevent the judicial system from being used to disrupt the wide sphere of reasonable discretion which is necessary in order for parents to properly nurture, care, and discipline for their children. These parental duties, which usually include the provision of a home, food, schooling, family chores, medical care and recreation, could be seriously impaired and retarded if parents were to be held liable to lawsuits by their unemancipated minor children for unintentional errors or ordinary negligence occurring while in the discharge of such parental duties and responsibilities. It is in this sphere of family relations between parent and child that the rule of immunity from litigation continues to find justification and validity.[98]

While it must be understood that the above well-presented views are not now Texas law, they do indicate the underlying principles which will be foremost in the court's thinking when it is presented with the problem of retaining or abolishing the parent-child immunity rule.

The court faced this problem in the application for writ of *Wallace v. Wallace*.[99] The court granted writ and would have faced this issue squarely but for the fact that it was settled before a decision could be

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[96] *E.g.*, Trevarton v. Trevarton, 378 P.2d 640 (Colo. 1963); Dunlap v. Dunlap, 150 A. 905 (N.H. 1930); Signs v. Signs, 103 N.E.2d 743 (Ohio 1952).

[97] Felderhoff v. Felderhoff, 473 S.W.2d 928, 933 (Tex. Sup. 1971).

[98] *Id.*

[99] 466 S.W.2d 416 (Tex. Civ. App.—Eastland 1971, writ dism'd) (writ was granted but later dismissed at request of the parties).

rendered. The fact that writ was applied for and granted indicates that the court may be willing and ready to consider a change.[100]

CONCLUSION

Does a child's right of redress for a tort occasioned by the negligence of a parent actually impair family harmony or parental authority? If so, in the balance of justice, which is to prevail? The fact that different jurisdictions have taken varying positions in regard to the answers to these questions indicates that there is no set solution. Total immunity or complete abolishment ignores either the right of a child to redress for a tort committed by a parent without regard to the circumstances or the duty of the court to prevent actions that would actually interfere with family relationships.

In looking favorably upon the Wisconsin approach, the Texas court has indicated preference of a rule which will abolish immunity when no reason for it exists, yet retain it where disruption of family life appears imminent.

Should Texas follow this approach, it appears that suits arising from the negligent use of an automobile would be allowed on the theory that negligence of that type does not involve parental authority or parental discretion. In such a case, the court would probably be urged to take recognition of the prevalence of automobile liability insurance. To base a decision on the presence of insurance could lead to unacceptable results, i.e., carried to its extreme, vicarious liability for all injuries caused, regardless of negligence, if insurance is present.

The willingness of courts to re-evaluate laws in light of changing conditions reveals the continuing development of justice.

> The law is not fossilized. It is a growth. It grows more just with the growing humanity of the age and broadens "with the process of the suns.[101]

100 Calvert, *Application for Writ of Error*, in APPELLATE PROCEDURE IN TEXAS § 22.14 (O. Walker and J. Hebdon eds. 1964) (a State Bar publication).

101 Pressley v. Yarn Mills, 51 S.E. 69, 74 (N.C. 1905) (Clark, C.J., concurring opinion).