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Parent-Child Tort Immunity in Illinois

I. INTRODUCTION

In 1891, the Supreme Court of Mississippi first developed the doctrine of parent-child tort immunity. In its original form, the doctrine precluded tort actions between a parent and an unemancipated child for personal injuries. Based primarily upon a policy of preserving the family relationship, parental immunity once enjoyed almost universal acceptance in American courts. In recent

1. Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891). Although there were no English decisions concerning parental immunity, there is no reason to think that English law would not permit actions for personal torts by a child against a parent. See W. KEETON, PROSSER AND KEETON ON TORTS § 122, at 904 (5th ed. 1984). There are decisions in Canada, see, e.g., Deziel v. Deziel, 1 D.L.R. 651 (1953), and Scotland, see, e.g., Young v. Rankin, 1934 Sess. Cass. 499, holding that such an action will lie. See also Comment, Tort Actions Between Members of the Family—Husband & Wife—Parent & Child, 26 Mo. L. REV. 152, 182 (1961).

“Parent-child immunity” in its overall application applies to both child defendants and parent defendants. The focus of this comment, however, is on civil suits in which an injured child sues a parent for personal injuries and the parent is, arguably, protected from suit by the doctrine. Accordingly, the terms “parent-child immunity” and “parental immunity” will be used interchangeably herein.

2. Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905).

3. See infra note 19 and accompanying text.

years, however, the doctrine has undergone a gradual process of interpretation, exception, and eventual elimination.5

Today, the majority of jurisdictions have discarded the doctrine of parent-child tort immunity or substantially restricted its application.6 However, these jurisdictions have failed to agree upon a standard of liability to govern parent-child tort litigation.7 As a result, there is no comprehensive framework by which the rights and liabilities of parent and child can be developed. Furthermore, it is unclear under what circumstances an injured child may maintain an action against his tortfeasor parent.

After reviewing the development and eventual decline of the parent-child tort immunity doctrine, this comment will focus on the development and current status of parental immunity in Illinois.

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For an excellent summary of the current status of parent-child tort immunity, see Barranco v. Jackson, 690 S.W.2d 221, 222 (Tenn. 1985) (Drowata, J., dissenting).

7. See infra notes 112-55 and accompanying text.
Next, various alternatives to parental immunity will be discussed. In particular, the reasonable parent standard will be analyzed to determine whether such a standard effectively balances both a child's right to be compensated for personal injuries and a parent's discretion in choosing how to raise his children. Finally, the author will conclude that Illinois should adopt a modified form of the reasonable parent standard in place of the now outmoded doctrine of parent-child tort immunity.

II. THE DEVELOPMENT OF PARENT-CHILD TORT IMMUNITY

Unlike many rules of law applied by American courts, the parental immunity doctrine did not originate in the English common law. Instead, its origin lies in three American judicial opinions sometimes referred to as the “great trilogy.” The first decision to recognize the doctrine was *Hwellette v. George*.

In *Hwellette*, a minor child brought an action against her mother for false imprisonment. The mother had maliciously committed her daughter to an insane asylum. Citing no authority, the court reversed a lower court ruling in favor of the child and held that the child could not maintain an action against her mother in tort.

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8. See supra note 1; see also McCurdy, *Torts Between Persons in Domestic Relation*, 43 Harv. L. Rev. 1030, 1054-63 (1930).
9. See Comment, supra note 1, at 182.
10. 68 Miss. 703, 9 So. 885 (1891). The remainder of the great trilogy are *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S.W. 664 (1903), and *Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905). In *McKelvey*, a minor child brought suit to recover damages for mistreatment by her father and stepmother. Recognizing a parent's right to control and chastise a child, 111 Tenn. at 388, 77 S.W. at 664, the court held that the child's sole remedy was resort to the criminal laws for punishment of the parents' gross misconduct. Id. at 393, 77 S.W. at 665. Additionally, the court analogized parental immunity to spousal immunity. Id. at 389, 77 S.W. at 665; see infra notes 36-39 and accompanying text.
11. In *Roller*, a minor daughter sought damages against her father for rape. The daughter argued that since the family had already dissolved, parental immunity would not further family harmony. 37 Wash. at 242-43, 79 P. at 788-9. The court held that a minor child cannot recover from its parents in tort. Id. Additionally, the court stated that recovery should be denied because: (i) the tortfeasor parent could reacquire the child's damage recovery if the child predeceased the parent, in violation of the prohibition against a tortfeasor profiting from his wrong, 37 Wash. at 243, 79 P. at 789; see infra notes 59-61 and accompanying text; and (ii) payment to the injured child would deplete the parent's assets to the detriment of the plaintiff child's siblings. 37 Wash. at 245, 79 P. at 789.
12. Prior to *Hwellette*, there were a few decisions addressing the issue of one standing in loco parentis to a child, but these decisions were ignored by *Hwellette* and subsequent decisions. See Comment, *Child v. Parent: Erosion of the Immunity Rule*, 19 Hastings L.J. 201, 202 (1967).
13. 68 Miss. at 711, 9 So. at 887.
policy designed to maintain the family relationship preclude an injured minor from bringing a tort action against a parent for personal injuries.\textsuperscript{14}

After Hewellette, the majority of American jurisdictions recognized the doctrine of parent-child tort immunity.\textsuperscript{15} In upholding parental immunity, courts advanced a variety of justifications for the doctrine.\textsuperscript{16} The majority of these justifications have been soundly criticized.\textsuperscript{17} However, in order to evaluate properly the continued viability of parental immunity and the alternatives to the doctrine,\textsuperscript{18} it is necessary to review these justifications.

The most commonly advanced justification for parental immunity is the theory that the doctrine promotes the peace and tranquility of the family and encourages the smooth functioning and integrity of the family unit.\textsuperscript{19} This justification, first advanced by the court in Hewellette,\textsuperscript{20} is based upon the belief that despite the harm inflicted or the injury suffered, it is more disruptive to domestic tranquility and family harmony to allow a child to sue his par-

\textsuperscript{14} The court stated:

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

\textit{Id.} at 711, 9 So. at 887.

\textsuperscript{15} \textit{See supra} note 4. In 1895, parental immunity became the law in Illinois. Foley v. Foley, 61 Ill. App. 577 (1895). \textit{See infra} note 66 and accompanying text.


\textsuperscript{18} \textit{See infra} notes 112-54 and accompanying text.


\textsuperscript{20} 68 Miss. at 705, 9 So. at 887.
While the preservation of family harmony and cooperation is a social concern worthy of protection, the parental immunity doctrine is not the best way to promote it. The theory that an uncompensated tort preserves family tranquility and respect for the parent, even in a family in which rape, brutal beatings or other inhumane treatment have already occurred, is wholly untenable.\(^2\)

Additionally, where liability insurance exists, as is the case in most intrafamily litigation,\(^2\) allowing a recovery in tort eliminates the family's financial burden of caring for an injured child, and thus promotes rather than disrupts family harmony.\(^2\)

Another justification for parental immunity, similar to the family harmony justification, is the argument that the doctrine preserves parental authority and discipline.\(^2\) Parents have the right and obligation to control, support, protect, guide and educate their child.\(^2\) The child has a reciprocal obligation to obey his parents.\(^2\)

Proponents of this theory argue that if a parent is to have the authority needed to discipline his child, acts committed by the parent

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However, as the Supreme Court of Oregon has noted, "[a] person's liability in our law still remains the same whether or not he has liability insurance; properly, the provision and cost of such insurance varies with potential liability under the law, not the law with the cost of insurance." Winn v. Gilroy, 296 Or. 718, 681 P.2d 776, 784 n.9 (1984); accord Barranco v. Jackson, 690 S.W.2d 221, 227 (Tenn. 1985) (Drawota, J., dissenting).


27. Matarese v. Matarese, 47 R.I. 131, 131 A. 198 (1925); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); see also Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923).
that would be tortious if directed toward someone else cannot be considered tortious when directed toward his child.\textsuperscript{28}

However, courts have recognized exceptions to the parental immunity doctrine\textsuperscript{29} and have not, therefore, allowed parental authority and discipline to remain unchecked. For example, courts which approve the doctrine have nonetheless refused to apply it where a child is injured by a parent's willful and wanton misconduct.\textsuperscript{30} Thus, even in jurisdictions which have approved the doctrine, parental authority is not unlimited.\textsuperscript{31} Moreover, parental authority and discipline are routinely controlled through state criminal laws,\textsuperscript{32} which provide for remedies including removal of a child from the home or termination of parental rights altogether.\textsuperscript{33}

It is apparent, therefore, that regardless of a state's position regarding parent-child tort actions, there exist significant restraints on the exercise of parental authority.

Because of these limitations, parental authority and discipline would not be substantially impaired by abrogation of parent-child tort immunity. However, the elimination of parental immunity would impair a parent's discretion in deciding how to raise a child.

\textsuperscript{28} Gibson v. Gibson, 3 Cal. 3d 914, 921, 479 P.2d 648, 652, 92 Cal. Rptr. 288, 292 (1971). For example, a parent may spank a child who has misbehaved without being liable for battery, or he may order the child to stay in his room as punishment, yet not be held responsible for false imprisonment. \textit{Id.}

\textsuperscript{29} The development of parental immunity illustrates the "orthodox process of judicial legislation by exception, elaboration and interpretation." Comment, \textit{supra} note 1, at 217; Beal, \textit{supra} note 5, at 334. Some of the most common exceptions allow recovery when: (1) the child or parent dies before the commencement of the action; (2) the parent was engaged in vocational or business activity at the time of the injury; (3) the parent intentionally injured the child; or (4) a third party files suit against a parent for contribution. \textit{See Annot.}, 6 A.L.R. 4th 1066 (1981) (reviewing the development and decline of parental immunity). For a discussion of the exceptions to parental immunity which have developed in Illinois, see \textit{infra} notes 70-109 and accompanying text.


\textsuperscript{31} \textit{See}, e.g., Nudd v. Matsoukas, 7 Ill. 2d 608, 131 N.E.2d 525 (1956).


\textsuperscript{33} "Courts routinely intervene when the parent's conduct is criminal or when the child's physical or mental health is endangered." Hollister, \textit{supra} note 16, at 506. Courts remove approximately 75,000 children per year from their parents' homes. Wald, \textit{State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights}, 28 STAN. L. REV. 625, 625-26 (1976).
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Given the nation's ethnic, religious and cultural diversity, it becomes difficult if not impossible to develop a standard which protects a parent's child-raising choices. Moreover, an adversarial proceeding may not be the appropriate vehicle for resolution of these concerns.

Another frequently cited justification for parental immunity relates to the doctrine of spousal immunity. At common law, spouses were considered a single entity, under the management and control of the husband. Since the wife's legal entity merged with the husband's, she retained no right to contract for herself, convey real property, or sue or be sued without joinder of the husband. Consequently, because spouses were not independent legal entities, they were immune from suit against one another.

Some courts, analogizing parental immunity to spousal immunity, prohibited all intrafamily litigation. However, these doctrines are similar only to the extent that they serve as bars to

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First, the objective standard encourages parents to disparage the favored American principle of freedom of choice in family matters by holding out the possibility of an insurance recovery if a parent is willing to expose his conduct and judgment to public scrutiny. Second, jury verdicts based on a reasonable parent standard in this value-laden area do not inspire public confidence, since they would necessarily substitute parental judgments based upon the individual juror's views of proper or ideal child-rearing practices. The tendency toward arbitrary and intrusive standards of good parenting . . . cannot be alleviated by precise instructions . . . Moreover, since the jury must consider the family context and the parent is the best, and perhaps only, witness capable of expressing the personal, cultural and socio-economic principles by which he raises his children, the danger of collusion is significant. These are not the type of claims our adversary system of factfinding is equipped to impartially resolve, and the parent's incentive for an opportunity to influence the result is so great as to further undermine the process.

Id. at 602 (Rogosheske, J., dissenting). However, on balance, protecting a parent's discretion does not justify the retention of an absolute prohibition against parent-child civil litigation. See infra notes 162-65 and accompanying text.

37. See generally Kahn-Freund, supra note 36; McCurdy, supra note 36. See also Note, Intrafamilial Tort Immunity in New Jersey: Dismantling the Barrier to Personal Injury Litigation, 10 RUT.-CAM. 661 (1979).
39. W. PROSSER, supra note 17, § 122, at 860.
40. See, e.g., Downs v. Poulin, 216 A.2d 29 (Me. 1966); Luster v. Luster, 299 Mass.
litigation between members of the same family. Unlike spousal immunity, parental immunity is not founded upon the single identity of the parties.\textsuperscript{41} At common law, children were considered independent legal entities.\textsuperscript{42} Moreover, children were permitted to maintain contract and property actions against their parents.\textsuperscript{43} The two doctrines are, therefore, fundamentally different. Additionally, the doctrine of spousal immunity has been abolished in a majority of jurisdictions.\textsuperscript{44}

Parental immunity has also been justified as preserving the family exchequer.\textsuperscript{45} Some courts have stated that if an injured child is allowed to recover from the parent and the child has siblings, the resources available to the entire family will be reduced to compensate the injured child. As a result, the injured child’s recovery will be at the siblings’ expense.\textsuperscript{46}

Those who argue that compensating an injured child depletes the family treasury to the detriment of other family members have not considered two points. First, whenever a defendant parent is held liable for damages, his family treasury will be depleted at the expense of the dependent children.\textsuperscript{47} This is the inevitable result of permitting recovery when the defendant is uninsured or insured in an amount less than the damage award. Moreover, the transfer of funds outside of the family unit to compensate an injured non-family plaintiff is a greater depletion of the family exchequer than a transfer within the family. Second, where a negligent parent has sufficient insurance to compensate the injured child, family funds will not be depleted. Instead, recovery of damages will serve to maintain the family’s original standard of living.\textsuperscript{48}

Another justification for the retention of parent-child tort immu-

\textsuperscript{41} W. PROSSER, supra note 17, § 122, at 864.

\textsuperscript{42} See Preston v. Preston, 102 Conn. 96, 128 A. 292 (1925); Crowley v. Crowley, 72 N.H. 241, 56 A. 190 (1903); Lamb v. Lamb, 146 N.Y. 317, 41 N.E. 26 (1895).


\textsuperscript{44} See W. KEETON, supra note 1, § 122, at 903.

\textsuperscript{45} See Orefice v. Albert, 237 So. 2d 142, 145 (Fla. 1970).


\textsuperscript{47} Hollister, supra note 16, at 499.

nity is the theory that allowing a child to maintain a tort action against his parents promotes fraud and collusion. The danger that family members will conspire to defraud a liability insurance carrier has often been cited as a reason for disallowance of parent-child tort litigation.

While the danger of fraud and collusion exists in any intrafamily lawsuit, courts have not found this reason sufficient to bar tort claims between husband and wife, brother and sister, grandchild and grandparent, or other family members. Additionally, the danger of fraud and collusion has not prevented courts from allowing a child to maintain property and contract actions against a parent. Moreover, courts have, despite this danger, permitted much parent-child tort litigation under the numerous exceptions to parental immunity. In any event, the threat of collusion does not justify denying an entire class of litigants a civil remedy for personal injuries.


50. The danger has been expressed by the New Jersey Supreme Court as follows: Practically speaking, an action is not going to be commenced unless the family member to be sued is in effect prepared to say that he was negligent. The decision for the child to sue will be determined within the family circle and obviously the proposed defendant is going to participate in making it, quite an unorthodox situation under our basic concept of adversary litigation, to say the least. The risk of collusion is indeed a very great and human one, when the insured's own flesh and blood and the family pocketbook are concerned.

51. See supra note 44 and accompanying text.


57. As one commentator has noted, "[a]ny rule that seeks to incidentally avoid fraud by withholding legal protection from all claimants, regardless of the justice of their
A final justification for parental immunity is the argument that an injured child should be denied recovery against a tortfeasor parent because the parent may reacquire the damage award. This possibility will occur only if the child both dies intestate and predeceases the parent. Some courts have stated that if the parent were to inherit the child’s damage award, this would violate the rule that a tortfeasor may not profit from his wrong.

Like the danger of fraud and collusion, the remote possibility that the parent may reacquire the award cannot justify denying an injured child compensation against his tortfeasor parent. After closer examination, this argument can be considered no more than an “after-the-fact” or “makeweight” justification for parental immunity. Even where this possibility occurs, the tortfeasor parent will not profit from the wrong but, instead, will have returned to him only that part of the damage award which is no longer necessary to compensate the child. On balance, it is unjust to deny an

claims, employs a medieval technique which, however satisfying it may be to defendants ... is scarcely in keeping with the acknowledged function of a modern legal system.” Hollister, supra note 16, at 501; see also Leflar & Sanders, Mental Suffering and Its Consequence—Arkansas Law, 7 U. ARK. L. SCH. BULL. 43, 60 (1939).

58. Another rationale in support of parental immunity has been advanced. It may be argued that parental immunity acknowledges the physical, mental or financial weakness of parents. For example, a parent may be financially unable to provide a reasonably safe home. See Hollister, supra note 16, at 507 (criticizing this rationale); see also W. Prosser, supra note 17, § 32, at 151-54. This rationale does not appear to have received any judicial support.


60. See ILL. REV. STAT. ch. 110 1/2, ¶ 2-1(d) (1983).


62. Such a sequence of events is highly unlikely. Even if an intestate child predeceased the parent, all of the compensatory funds might have been spent prior to the child’s death. See Reasonable Parent, supra note 17, at 802 n.34; Hollister, supra note 16, at 497.

63. A number of courts and commentators have noted that the possibility of inheritance by a tortfeasor has never limited recovery for improper conduct with respect to intrafamilial property actions. See, e.g., Preston v. Preston, 102 Conn. 96, 128 A. 292 (1925); McKlain v. McKlain, 80 Okla. 113, 194 P. 894 (1921); Comment, Parental Immunity: California’s Answer, 8 IDAHO L. REV. 179, 186; Comment, supra note 12, at 205.

64. The chance of inheritance by the parents would be less remote where the child dies as a result of the parent’s negligence. In such a case, the child’s estate would sue the negligent parent for wrongful death. The parent, as next of kin, could be a beneficiary of the child’s estate and could thus profit from his wrong if insurance proceeds were involved. See Reasonable Parent, supra note 17, at 802 n.34. Courts have dealt with this problem in the context of wrongful death actions. In a wrongful death action against a
injured minor child compensation because the child may eventually have to give part of the recovery back.

The arguments advanced in support of parental immunity no longer justify retention of the doctrine. As a result, the majority of courts have either totally abolished the doctrine or have significantly limited its application. In Illinois the doctrine has undergone substantial alteration which renders uncertain its continued viability.

III. THE CURRENT STATUS OF PARENT-CHILD TORT IMMUNITY IN ILLINOIS

Illinois was among the first states to recognize the doctrine that an unemancipated minor child cannot maintain an action against a parent for damages resulting from maltreatment. This absolute prohibition against parent-child tort litigation remained the law in Illinois until 1956 when the gradual erosion of parental immunity began. The continued development of the doctrine in Illinois has been marked by the creation of piecemeal exceptions to the absolute prohibition against parent-child tort actions. This process has created a body of case law characterized by uneven and irreconcilable precedents.

A. Willful and Wanton Misconduct

In 1956, the Illinois Supreme Court recognized the first of five exceptions to the parental immunity doctrine. In Nudd v. Mat-
soukas,\(^{71}\) the defendant was sued by his minor son for injuries allegedly occurring as a result of the defendant's willful and wanton conduct\(^{72}\) in driving his automobile at an excessive speed on a wet, foggy night.\(^{73}\) The complaint alleged that the defendant maintained liability insurance and had relinquished all rights and interest in any benefit deriving from his child's claim.\(^{74}\) The court held that parental immunity does not bar a minor child from maintaining an action against his parents for injuries caused by the parent's willful and wanton misconduct.\(^{75}\) The court reasoned that parental immunity was adopted to promote family unity and that preventing a child from obtaining redress for willful and wanton misconduct does not further such a policy.\(^{76}\) The court also stated that tolerance of such misconduct would not foster family unity but, instead, would deprive a child of redress without offering any corresponding social benefit.\(^{77}\)

B. Activity Beyond the Family Purpose

In *Schenck v. Schenck*,\(^{78}\) the court developed the "beyond the family purpose" exception to parental immunity. In *Schenck*, a father sued his unemancipated seventeen-year-old daughter after the daughter negligently ran her automobile into him as he crossed a public street.\(^{79}\) The court held that a parent or child may maintain an intrafamily suit for injuries sustained during an activity arising outside of the family relationship.\(^{80}\) The court stated that the parent-child immunity doctrine applies only to conduct which arises from the family relationship and is directly related to family purposes and objectives.\(^{81}\) Therefore, because the father's injuries through death, see *infra* notes 97-100 and accompanying text; and (5) contribution claims between a third party and a negligent parent, see *infra* notes 101-09 and accompanying text.

71. 7 Ill. 2d 608, 131 N.E.2d 525 (1956).
72. *Illinois Pattern Jury Instructions*, § 14.01 (2d ed. 1971), define willful and wanton misconduct as "a course of action which [shows actual or deliberate intention to harm or which, if not intentional,] shows an utter indifference to or conscious disregard for a person's own safety [and] the safety of others."
73. 7 Ill. 2d at 610, 131 N.E.2d at 526.
74. *Id.*, 131 N.E.2d at 526-27.
75. *Id.* at 619, 131 N.E.2d at 531.
76. *Id.*
79. *Id.* at 200, 241 N.E.2d at 12.
80. *Id.* at 206, 241 N.E.2d at 15.
81. The court stated:

[T]here are no impelling reasons for eroding or emasculating the family immu-
occurred during the exercise of his individual rights on the public street, the immunity rule did not bar an action for those injuries.\textsuperscript{82}

Since \textit{Schenck}, Illinois courts have struggled with application of this exception.\textsuperscript{83} Recently, the exception was tested in \textit{Stallman v. Youngquist},\textsuperscript{84} a case in which the plaintiff sustained prenatal injuries as a result of an automobile collision between her mother and another motorist.\textsuperscript{85} The collision occurred while the mother was driving to a restaurant.\textsuperscript{86} The plaintiff brought a negligence action against her mother and the other motorist.\textsuperscript{87} The lower court dismissed the plaintiff's action against her mother because the activity—driving to a restaurant—arose from the family relationship and was related to a family purpose.\textsuperscript{88} A divided appellate court reversed the trial court and held that the plaintiff should be given an opportunity to prove that the mother's act of driving to a restaurant was \textit{not} an act arising from the family relationship and that it was \textit{not} directly connected with family purposes and objectives.\textsuperscript{89} The dissent argued that a family excursion in the family car had long been considered a family purpose or objective and that parental immunity should therefore bar the child's action.\textsuperscript{90} The dissent

\begin{thebibliography}{99}
\bibitem{84} \textit{Id.} at 859, 473 N.E.2d 400.
\bibitem{85} \textit{Id.} at 861, 473 N.E.2d 401.
\bibitem{86} \textit{Id.} at 859, 473 N.E.2d 400.
\bibitem{87} \textit{Id.} at 860, 473 N.E.2d 401.
\bibitem{88} \textit{Id.} at 864, 473 N.E.2d 403.
\bibitem{89} \textit{Id.} at 866, 473 N.E.2d 404-05 (Romiti, J., dissenting). The validity of this conclusion is also illustrated by the recent case \textit{Marsh v. McNeil}, 136 Ill. App. 3d 616, 483 N.E.2d 595 (1985). In \textit{Marsh}, the Illinois Appellate Court applied the parent-child tort immunity doctrine to bar a negligence action against a minor child by the estate of her deceased parents. \textit{Id.} at 621-23, 483 N.E.2d 599-600. The court, in dismissing the claim, held (i) that parent-child immunity bars claims by parents against their minor children, \textit{Id.} at 621, 483 N.E.2d at 598; (ii) that the "beyond the family purpose" exception to parental immunity was inapplicable where the auto accident occurred while the parent was driving to a grocery store to purchase meat, \textit{Id.} at 621, 483 N.E.2d at 599; (iii)
concluded, however, that courts, instead of continually “chipping away” at the parental immunity doctrine, should discard it outright so that the responsibilities of parents to their children could be developed according to a comprehensive framework.91

C. Duty Owed to the General Public

In Cummings v. Jackson,92 the court recognized the public duty exception to parent-child tort immunity. In Cummings, a minor was struck by an automobile in front of her mother’s property. The minor filed suit against her mother alleging that the mother negligently and in violation of a city ordinance failed to trim the trees along her property line, thus obstructing the view of the driver who struck the minor plaintiff.93 The court held that the parent-child tort immunity doctrine did not bar plaintiff’s action against her mother94 because the mother’s duty was owed to the general public and was only incidentally related to the family members living in the house.95 Thus, under Cummings, the parent-child tort immunity doctrine does not apply when a parent fails to fulfill a duty owed to the general public.96

D. Dissolution of the Family Relationship Through Death

A fourth exception to parent-child tort immunity is recognized at the death of either the parent or the child.97 Parental immunity was originally developed to preserve family harmony and parental control and discretion.98 However, when the family relationship has been dissolved by death, immunity no longer serves the stated

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91. Stallman, 129 Ill. App. 3d at 867, 373 N.E.2d at 405.
93. Id. at 69, 372 N.E.2d at 1128.
94. Id.
95. Id.
96. Id.
98. See Johnson v. Meyers, 2 Ill. App. 3d 844, 846, 277 N.E.2d 778, 779 (1972); see also supra notes 19-21 and accompanying text.
policy. A suit brought by or against the estate of a deceased family member does not affect the family relationship or parental control and discretion. Consequently, the immunity doctrine does not preclude a cause of action where a minor child sues the estate of a deceased parent or the estate of a deceased child sues a living parent.

E. Contribution Claims Between a Third Party and the Parent

A final exception to the parent-child tort immunity doctrine has been recognized where a third party seeks contribution from an allegedly negligent parent. In Larson v. Buschkamp, the plaintiffs were passengers in an automobile driven by their father, Robert Larson. The plaintiffs sustained injuries in a collision with a car driven by the defendant, Helen Buschkamp. The plaintiffs’ mother filed suit against both Larson and Buschkamp alleging that each driver negligently operated a motor vehicle. Buschkamp subsequently brought a counterclaim against Larson seeking contribution. Larson moved to dismiss the original claim and the counterclaim on the ground that parental immunity barred such actions. The trial court dismissed both claims against Larson. The appellate court, however, reversed the trial court as to the counterclaim and held that the parent-child tort immunity doctrine did not bar a contribution claim against the father. The court reasoned that since the parental immunity doctrine bars direct tort suits between parent and child if the cause of action arises during pursuit of a family purpose, the doctrine, and the policies which support it, need not be applied against a third party so as to

100. Id. However, this conclusion may be uncertain after the recent decision of Marsh v. McNeil, 136 Ill. App. 3d 616, 483 N.E.2d 595 (1985), where the court distinguished the Johnson opinion and held that parent-child immunity applied to a suit brought against a child by her deceased parents’ estates. Id. at 622, 483 N.E.2d at 599. Marsh appears to be inconsistent with the general trend restricting the application of parent-child tort immunity. This opinion further illustrates the need to develop a more consistent approach to intrafamilial tort litigation.
103. Id. at 966, 435 N.E.2d at 222.
104. Id.; see ILL. REV. STAT. ch. 70, ¶ 302 (1981).
105. 105 Ill. App. 3d at 966, 435 N.E.2d at 223.
106. Id.
107. Id. at 970-71, 435 N.E.2d at 225-26.
defeat an action for contribution. Therefore, parent-child tort immunity does not impair a third party's right to seek contribution from a negligent parent.

The above discussion of Illinois law illustrates that the development of parental immunity has been characterized by a gradual erosion of the absolute prohibition. The numerous exceptions to parent-child tort immunity render its continued viability questionable. Although Illinois continues to profess adherence to the doctrine of immunity, the trend has been to continually restrict rather than expand application of the doctrine. Illinois courts need to reexamine the doctrine and its justifications. Such a reevaluation will illustrate the need for an alternative to parental immunity as a standard governing parents' responsibilities to their children. To date, jurisdictions which have limited the doctrine of parental immunity have disagreed as to which alternative effectively governs parental conduct. Following is a review of various alternatives and an analysis of which approach most effectively balances both a child's right to be compensated for personal injuries and a parent's right to exercise discretion in child-raising.

IV. ALTERNATIVES TO THE PARENT-CHILD TORT IMMUNITY DOCTRINE

A. The Case-By-Case Approach

One alternative to blanket parental immunity involves the individual evaluation of cases to determine whether immunity is appropriate. Generally, jurisdictions that utilize this alternative


111. As one court has noted, the existence of exceptions to parental immunity moderates its harsh effect. However, this results in paradoxical and irreconcilable judicial decisions. Falco v. Pados, 444 Pa. 372, 377, 282 A.2d 351, 354 (1971).

hold that the proper approach to parent-child tort litigation is a relaxation of the parental immunity doctrine. Under this approach, immunity is not imposed unless a parent’s conduct can be characterized as the exercise of parental authority, discipline, supervision or discretion.

This approach abolishes absolute parental immunity, yet it recognizes the importance of protecting a parent’s exercise of authority and discretion. In jurisdictions which have adopted this approach, parental immunity has become the exception to a general rule of liability. Consequently, the case-by-case approach suffers from the same shortcoming as the traditional approach which imposes liability as the exception to immunity: it fails to provide a comprehensive framework for determining the rights and liabilities of parent and child. Instead the court, in each case, must determine whether the parent’s conduct can be characterized as an exercise of parental authority or discretion. This approach creates uncertainty as to the circumstances in which parental immunity will be invoked.

B. The Absence of Duty Approach

Another approach to determining parental liability was developed by the New York Court of Appeals in Holodock v. Spencer. After New York eliminated parental immunity in 1969, the court retreated from the impact of that position by holding that parents have no legal duty to their children to supervise them properly. The court in Holodock concluded, however, that if there is a breach of a recognized duty ordinarily owed apart from


115. Illinois follows the traditional approach. See supra notes 70-110 and accompanying text.


118. Holodock, 36 N.Y.2d at 51, 324 N.E.2d at 346, 364 N.Y.S.2d at 872.
the family relationship, the law will not withhold its sanctions merely because the parties are parent and child.\textsuperscript{119}

The failure to recognize a parental duty to supervise children is unjustifiable. It is paradoxical to hold that other relationships involve a duty properly to supervise a child,\textsuperscript{120} but that a parent does not owe such a duty to his own child.\textsuperscript{121} Additionally, while parental immunity only prohibits direct tort actions between parent and child, a holding that a parent has no legal duty means that the conduct is no longer tortious.\textsuperscript{122} Even states which recognize parental immunity allow a third party, sued by a child, to seek contribution from a negligent parent.\textsuperscript{123} Yet, under Holodock, a contributorily negligent third party will have to compensate fully the injured child because the contributorily negligent parent is absolved from liability.\textsuperscript{124} This inequitable result renders the New York approach an unacceptable alternative to parental immunity.

\textbf{C. The Limited Application Approach}

The limited application alternative was first developed by the

\begin{itemize}
\item \textsuperscript{119} Id. at 50-51, 324 N.E.2d at 346, 364 N.Y.S.2d at 871-72.
\item Illinois courts have not specifically addressed the question of whether a parent may be liable to his child or a third party for negligent supervision. However, in Duensing v. Tripp, 596 F. Supp. 389 (S.D. Ill. 1984), a federal district court held that Illinois, if faced with this issue, would not recognize such an action against a parent.
\item \textsuperscript{122} An immunity does not establish that a defendant's conduct is not tortious; it simply absolves him from liability. \textit{See} Small v. Rockfeld, 66 N.J. 231, 239, 330 A.2d 335, 341 (1974); W. Prosser, supra note 17, § 134, at 970. However, failing to recognize a duty does more than absolve the parent from liability; it establishes that the conduct is not tortious. Hollister, \textit{supra} note 16, at 517.
\item \textsuperscript{123} Larson v. Buschkamp, 105 Ill. App. 3d 965, 435 N.E.2d 221 (1982).
\item \textsuperscript{124} Justice Jason noted this point in a dissent to Holodock: "[T]hat the non-parent defendant should bear the full loss to which the parent has contributed runs counter to the evolution in our law which is toward a system of comparative fault." 36 N.Y.2d at 53, 324 N.E.2d at 348, 364 N.Y.S.2d at 873 (Jason, J., dissenting).
\end{itemize}
Supreme Court of Wisconsin in *Goller v. White*. According to this approach, parental immunity is retained where the allegedly negligent act involved either the exercise of parental authority or the exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, or other care. The limited application approach of *Goller* has been adopted by three other jurisdictions.

As with the case-by-case and absence of duty alternatives, the difficulty inherent in the *Goller* approach is the maintenance of artificial distinctions under the guise of parental authority or ordinary discretion. Again, as with the other alternatives, these classifications only promote uncertain and inequitable results. For example, both Wisconsin and Michigan have adopted the *Goller* approach, yet an action against a parent for negligent supervision may be maintained in the former state, but not in the latter. Furthermore, the same artificial justifications which were advanced in support of parental immunity over ninety years ago are used to support retention of the exceptions to liability under the *Goller* approach. Since these justifications have largely been rejected, there is no viable rationale for allowing a parent to act with impunity toward his child merely because the parent's conduct may be described as the exercise of "parental authority" or "ordinary discretion."

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125. 20 Wis. 2d 402, 122 N.W.2d 193 (1963). *Goller* was the first case to abrogate the parental immunity doctrine. W. Keeton, *supra* note 1, § 122, at 904.

126. *Goller*, 20 Wis. 2d at 413, 122 N.W.2d at 198.


128. *See supra* notes 112-23 and accompanying text.

129. *See* Beal, *supra* note 5, at 347.


132. *See supra* notes 19-64 and accompanying text.

133. *See* Gibson v. Gibson, 3 Cal. 3d 914, 922, 479 P.2d 648, 653, 92 Cal. Rptr. 288, 293 (1971). As one court recently noted, "[r]esort to the temptation of carving out an exception to the immunity doctrine will only serve to perpetuate the fallacious arguments which have supposedly supported the doctrine."

134. *See supra* note 6 and accompanying text.
D. Elimination of Immunity in Automobile Accident Cases

A fourth alternative to parental immunity partially abrogates the doctrine by allowing a child to recover damages from his parent for injuries sustained in an automobile accident. The majority of cases abolishing parental immunity for automobile accident injuries have relied upon the prevalence of insurance coverage. Some states, recognizing the effect of insurance on the validity of parental immunity, have allowed a child to recover damages from his parent for injuries sustained in an automobile accident only to the extent of the parent’s automobile liability insurance coverage.

This approach fails to consider the legal foundation on which parental immunity was based. The existence of insurance, without more, has never before been the basis for recognizing a cause of action. The rationale which supports this approach is that when insurance exists, the suit by the child for injuries will be beneficial to the family relationship rather than detrimental. This rationale does not, however, justify a distinction between automobile accident injuries and other injuries. If the suit is beneficial to the family relationship when insurance exists, it should not matter how the child was injured as long as insurance coverage is available to compensate the child.

Even without considering the effect of insurance, it is unreasonable to allow a cause of action which is dependent upon how a child is injured. For example, there is no reasonable basis for distinguishing between a child injured in an automobile accident and one

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136. Beal, supra note 5, at 340; see Hollister, supra note 16, at 511.


138. See supra notes 19-64 and accompanying text.


injured by a metal tipped hunting arrow. In either case, the injured child should be allowed to maintain an action against the tortfeasor parent. Because of the arbitrariness of abrogating parental immunity only in automobile accident cases, this approach does not provide a viable alternative to the immunity doctrine.

E. The Reasonable Parent Standard

The final alternative to parental immunity was announced by the California Supreme Court in Gibson v. Gibson. The court in Gibson abolished parent-child tort immunity in its entirety. The court held that the proper test of a parent's conduct asks what a reasonable and prudent parent would have done in similar circumstances. The court refused to accept the rationale, expressed in Goller v. White, that a parent should be completely immune from liability in certain areas of child rearing. However, the court did recognize that the parent-child relationship is unique and that the traditional concepts of negligence cannot be blindly applied.

The advantages of the reasonable parent standard cannot be denied. This standard recognizes that parents should have more discretion than third parties regarding their conduct toward their children, yet it permits recovery when parental conduct falls below the standard of care required for the children's protection. The reasonable parent standard does not prevent a parent from exercising ordinary discretion in choosing the appropriate manner in which to raise his children, yet it provides an injured child with a cause of action against a parent who fails to provide the care and guidance which a "reasonable parent" would provide under like circumstances. As a result, the artificial classifications which grant a negligent parent total immunity from suit are eliminated. Instead, there develops a comprehensive framework which considers the rights, liabilities, and duties of parents with respect to their children.

142. 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971).
143. Id. at 921, 479 P.2d at 653, 92 Cal. Rptr. at 293.
144. Id.
145. See supra notes 125-34 and accompanying text for a discussion of the Goller rationale.
146. Gibson, 3 Cal. 3d at 922, 479 P.2d at 653, 92 Cal. Rptr. at 293.
147. Id. at 921, 479 P.2d at 653, 92 Cal. Rptr. at 293.
Furthermore a jury, representing a cross-section of the community, can distinguish between appropriate parental discretion and an unreasonable disregard of parental duty.\textsuperscript{150} For example, a reasonable parent does not leave a small child alone where he may play with a dangerous instrumentality.\textsuperscript{151} Such conduct can be readily distinguished from a parent's choices regarding child-raising. For example, a parent must determine the amount of supervision which will best develop a child's individuality and self-reliance. In such a situation, the reasonable parent standard does not impair the exercise of ordinary parental discretion.

Despite these advantages, however, the reasonable parent standard has been criticized as failing to protect ordinary parental discretion because of the jury's inability to establish a standard of ordinary parental care given the nation's religious, ethnic, and cultural diversity.\textsuperscript{152} This criticism questions whether the jury system is an effective or appropriate forum for resolution of disputes between an injured child and an alleged tortfeasor parent.\textsuperscript{153} Critics of the reasonable parent standard argue that such disputes should not be resolved in a judicial forum because the adversarial process is unable to distinguish between a disregard of parental duty and the appropriate exercise of parental judgment.\textsuperscript{154}

V. CHOOSING THE APPROPRIATE STANDARD FOR EVALUATION OF PARENTAL CONDUCT

Because of the special nature of the parent-child relationship,
state courts have been unable to agree upon the proper standard for evaluation of parental conduct. This uncertainty has led to uneven results and conflicting precedents.\textsuperscript{155} With the exception of the reasonable parent standard, each alternative to parental immunity retains a class of cases in which the immunity doctrine will be invoked.\textsuperscript{156} Each of these classifications is based upon criteria which either have no reasonable basis or cannot be applied in any meaningful way. Consider, for example, labels such as "family purposes and objectives,"\textsuperscript{157} "parental control and discipline,"\textsuperscript{158} or "parental supervision."\textsuperscript{159} These classifications create uncertainty and promote litigation. Thus, alternatives which retain such distinctions do not promote the interests of both parent and child.

However, difficulty in application does not totally negate the interests which these classifications were intended to protect. The courts which have adopted the case-by-case approach\textsuperscript{160} illustrate the concern that without some restraint, a complete elimination of parental immunity will interfere with the exercise of parental discretion.\textsuperscript{161} While this is a legitimate concern, it is not necessary to retain a limited immunity in order to attain this goal.

A standard which evaluates parental conduct as "prudent" or "reasonable" necessarily includes parental choice and discretion. Where that discretion is reasonably exercised, recovery will be denied. Conversely, where the exercise is unreasonable, it is appropriate to hold the parent accountable for resulting injuries. This accountability should not inhibit parental discretion, but, rather, should encourage sound parental judgment. Consequently, without specifically excluding parental choice and discretion from consideration, the reasonable parent standard protects the parent in his exercise of reasonable parental discretion while also protecting the child from unreasonable parental conduct.

It has been argued that it is difficult to distinguish between a

\textsuperscript{155} For example, regarding the issue of whether a child may maintain an action against his parent for negligent supervision, the courts have reached conflicting results. Some courts permit such claims to be maintained, see, e.g., Aimone v. Walgreen's Co., 601 F. Supp. 507 (N.D. Ill. 1985); Zarrella v. Miller, 100 R.I. 545, 217 A.2d 673 (1966), while others refuse to permit such an action. See, e.g., Foldi v. Jefferies, 93 N.J. 533, 461 A.2d 1145 (1983); Middleton v. Nichols, 114 Misc. 2d 596, 452 N.Y.S.2d 157 (N.Y. Sup. Ct. 1982).

\textsuperscript{156} See supra notes 112-41 and accompanying text.

\textsuperscript{157} See supra note 81 and accompanying text.

\textsuperscript{158} See Fugate v. Fugate, 582 S.W.2d 663, 669 (Mo. 1979).


\textsuperscript{160} See supra note 112.

disregard of parental duty and the appropriate exercise of parental discretion, and that such determinations should not be made in a judicial forum.\footnote{See supra notes 152-54 and accompanying text.} It cannot be denied that certain cases present courts with difficult questions. Other cases are more clear-cut. For example, leaving a child alone where he may play with a dangerous instrumentality is clearly a breach of parental duty.\footnote{See Sixkiller v. Summers, 680 P.2d 360 (Okla. 1984); Goedkoop v. Ward Pavement Corp., 51 A.D.2d 542, 378 N.Y.S.2d 417 (1976); Howes v. Hansen, 56 Wis. 2d 247, 201 N.W.2d 825 (1972); Cole v. Sears, Roebuck & Co., 47 Wis. 2d 629, 177 N.W.2d 866 (1970); supra note 151.} In such a situation, the injured child should not be denied a cause of action so that courts can avoid more difficult questions of parental discretion.

Even in difficult situations, the judicial forum is capable of distinguishing between the reasonable exercise of parental discretion and a neglect of parental duty.\footnote{As one commentator has noted, questions of appropriate parental discretion are currently resolved by determining whether parental immunity should apply to protect such discretion. Thus, the parent is currently subjected to "second-guessing" when the court determines whether the immunity doctrine should absolve the parent from liability. Note, Parental Immunity — Merrick v. Sutterlin, 56 WASH. L. REV. 319, 334, 338 (1981). As a result, distinctions between reasonable and unreasonable parental conduct are currently made when a court determines the applicability of parental immunity. Abolition of parental immunity would shift this decision to a cross-section of the community especially qualified to make such determinations, namely, the jury. See generally C. Joiner, CIVIL JUSTICE AND THE JURY 35-38, 64-68 (1962); Clark, The American Jury: A Justification, in SELECTED READINGS, THE JURY 1 (G. Winters ed. 1962).} Retention of parental immunity, even in some modified form, is not necessary for court resolution of this issue. Instead, courts can achieve the proper balance under the reasonable parent standard by imposing appropriate burdens of proof.

For example, it is entirely proper for a court, under the reasonable parent standard, to place the burden of persuasion on the child in cases involving the exercise of parental discretion. Where the parental conduct is only "arguably unreasonable," or where there is a "substantial question" of whether the parent acted unreasonably, the jury should find in favor of the parent. Furthermore, courts should require that the child prove unreasonable parental discretion by clear and convincing evidence.\footnote{The traditional measure of persuasion in civil cases is by a preponderance of the evidence. E. Cleary, McCORMICK ON EVIDENCE § 340, at 959 (3d ed. 1984). There is a range of claims, however, for which a party must establish his right to recover by clear and convincing evidence. See, e.g., Buzard v. Griffin, 89 Ariz. 42, 358 P.2d 155 (1961) (election fraud); Gillock v. Holdaway, 379 Ill. 467, 41 N.E.2d 504 (1942) (establishment of oral trust on land taken by absolute deed); Steketee v. Steketee, 317 Mich. 100, 26 N.W.2d 724 (1947) (specific performance of oral contract); In re Mazanec's Estate, 204}
The reasonable parent standard, when coupled with these burdens of proof, safeguards parental discretion while allowing recovery for clearly unreasonable parental conduct. By doing so, it effectively balances the parent's right to decide how to raise his child and the child's right to be free from unreasonable risks. Additionally, this standard avoids the artificial classifications present in other alternatives to parental immunity. By using the modified reasonable parent standard, courts can develop a comprehensive framework for analysis of the rights, duties and liabilities of parents and their children.

VI. CONCLUSION

The public policy arguments which have been advanced in support of parental immunity no longer justify retention of the doctrine. Consequently, Illinois and the majority of other jurisdictions, recognizing the fact that parental immunity is not a viable solution to parent-child civil litigation, have significantly limited application of the doctrine. In order to promote a comprehensive framework by which the rights and liabilities of parents and their children can be developed, Illinois should adopt the reasonable parent standard. Furthermore, in applying the standard to questions of parental discretion, courts should require the plaintiff child to meet his burden of persuasion by clear and convincing evidence. This standard safeguards both a parent's discretion in deciding how to raise a child and a child's right to maintain an action for unreasonable parental conduct.

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