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INTRODUCTION

The parent-child tort immunity doctrine prevents an unemancipated minor from maintaining an action against his parent for injuries resulting from the parent’s negligence. Initially recognized in 1891, the tort immunity doctrine was perceived as a means of avoiding the family disharmony which stems from intrafamily litigation. Various exceptions to the application of the doctrine began to emerge, however, and several jurisdictions eventually abolished the immunity. Similarly, the advent

2. The parent-child tort immunity doctrine first appeared in the United States in Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891). Hewellette held that a minor wrongfully committed to an insane asylum could not sue his mother for fraudulent imprisonment.
of contribution,\(^6\) comparative negligence,\(^7\) and the pervasive role of liability insurance\(^8\) gradually diminished the viability of this tort immunity doctrine.\(^9\)

Since its adoption in Illinois,\(^10\) the immunity doctrine has withstood the challenges directed against it, although numerous exceptions have been made.\(^11\) The recent judicial adoption of contribution\(^12\) and comparative negligence,\(^13\) however, has established the policy in Illinois that liability should be distributed in proportion to relative degrees of fault.\(^14\) In Larson v. Buschkamp,\(^15\) an Illinois appellate court confronted a case of first

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7. For a list of jurisdictions which recognize some form of comparative negligence, see Alvis v. Ribar, 85 Ill. 2d 1, 12-14, 421 N.E.2d 886, 891-92 (1981).


9. The purpose of contribution is to make parties share the economic loss caused by their wrongdoing. Consequently, focus should be centered upon the tortious conduct of the parties, and any personal defense available to a tortfeasor is irrelevant. 1 Harper & James, The Law of Torts § 10.2, at 718 (1956). See also Note, Immunity to a Direct Action: Is It a Defense to a Contribution Claim? 52 U. Colo. L. Rev. 151 (1980) [hereinafter cited as Note, Immunity to a Direct Action]; Note, Contribution Among Joint Tortfeasors When One Tortfeasor Enjoys a Special Defense Against Action by the Injured Party, 52 Cornell L. Rev. 407 (1966) [hereinafter cited as Note, Contribution Among Joint Tortfeasors].


impression regarding the intrinsic conflict between equitable distribution of loss and the parent-child tort immunity doctrine. The court held that the immunity doctrine would not bar a contribution action between a defendant and the plaintiffs’ father.

This comment will examine the adoption of the parent-child tort immunity doctrine in Illinois, the development of its underlying policies, and the exceptions carved from the doctrine. The discussion will then shift to the recognition of contribution and comparative negligence in Illinois, focusing upon these doctrines as a means of equitably distributing loss. Notably, the conflicting natures of the immunity doctrine and equitable loss distribution will be analyzed in the recent decision of Larson v. Buschkamp. Finally, the ramifications of Larson upon immunity and contribution in a strict liability setting will be explored.

**THE PARENT-CHILD TORT IMMUNITY DOCTRINE**

*Original Purposes*

Illinois first recognized the parent-child tort immunity doctrine with the decision of Foley v. Foley, 16 where the minor plaintiff sued his uncle for allegedly inflicting injuries and depriving him of adequate medical treatment. Without providing support for its conclusions, the appellate court ruled that “[i]t is doubtless the law, that a child cannot maintain an action for damages on account of maltreatment against a parent . . . .” 17 Subsequent decisions18 expounded on this initial pronouncement, and the policies underlying the parent-child tort immunity doctrine began to emerge. The prohibition against a tort action between parent and child was justified under five general theories: (1) preservation of family harmony; 19 (2) prevention of collusive claims among family members; 20 (3) avoidance of intrafamily strife; 21

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16. 61 Ill. App. 577 (1895).
17. Id. at 580.
18. See infra notes 19-23.
20. Commentators have suggested that the existence of liability insurance might be an impetus for family members to engage in collusive and fraudulent suits. See, e.g., Ingram & Barder, supra note 8, at 596.
(4) promotion of a cooperative family atmosphere;\(^{22}\) and (5) preservation of family funds.\(^{23}\)

These individual goals were eventually subsumed under the concept of "family purpose," a talismanic description first used in *Schenk v. Schenk*\(^{24}\) and illustrated in *Eisele v. Tenuta*.\(^{25}\) In the latter decision, the plaintiff, a passenger in an automobile driven by her son, sustained injuries when the car collided with another. The plaintiff attempted to sue her son for negligent operation of a motor vehicle, but was barred pursuant to the parent-child tort immunity doctrine. Noting that the accident occurred while the family members were driving to Wisconsin to determine whether the son would attend a university there, the appellate court held that the family trip arose naturally from the family relationship and was directly related to the family purpose.\(^{26}\) Consequently, the tort immunity doctrine prevented the plaintiff from suing her son for negligence.

The contours of the parent-child tort immunity doctrine in Illinois, therefore, encompass negligent conduct by a parent or child during an activity arising pursuant to the family relationship or furthering the family purpose.\(^{27}\) Because the threat of family disharmony and depletion of family funds is more acute in such a situation, Illinois courts have prohibited direct suits in negligence between parent and child.\(^{28}\) Where, however, application of the rule results in inequities or fails to further the purpose of the rule, the doctrine is not applied.

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\(^{24}\) 100 Ill. App. 2d 199, 241 N.E.2d 12 (1968). For a more detailed examination of *Schenk*, see infra text accompanying notes 33-36. Briefly, *Schenk* involved a negligence suit by a father against his daughter after she struck him with an automobile on a public street. The appellate court rejected the argument that the cause of action arose pursuant to the family relationship.


\(^{26}\) Id. at 802, 404 N.E.2d at 351.

\(^{27}\) The appellate court in *Eisele* was not persuaded by the plaintiff's argument that the decision to attend the university was to be made solely by the son. Noting that the defendant lived with the plaintiff and was unemancipated, the court found that the trip arose in furtherance of the family relationship. *Id.* at 801-02, 404 N.E.2d at 351-52.

Exceptions to the Parent-Child Tort Immunity Doctrine

Recognizing the inequities which sometimes arose through imposition of the parent-child tort immunity doctrine, Illinois courts created various exceptions to the rule. The first exception arose in *Nudd v. Matsoukas*, in which the minor plaintiff alleged willful and wanton misconduct against her father. Although the Illinois Supreme Court acknowledged the public policies underlying the prohibition against negligence actions between parent and child, it recognized that family harmony would be neither preserved nor enhanced if a child were left without redress for the more serious cause of action of willful and wanton misconduct. In holding that the child’s complaint stated a cognizable cause of action, the supreme court noted that the parent-child tort immunity doctrine had been judicially created and could therefore be judicially modified.

The second exception to the doctrine arose in *Schenk v. Schnek*, in which the appellate court held that a child or parent who is injured during an activity arising outside the family relationship may maintain an intrafamily suit. In *Schenk*, a father sued his daughter for negligence after she struck him with an automobile on a public street. The appellate court found that the duty owed the plaintiff by his daughter was the same duty owed to all similarly situated pedestrians, and, therefore, the cause of action did not arise pursuant to a family purpose. The court determined that the parent-child tort immunity doctrine was subject to modification where “impelling changes in conditions exist,” particularly since *Nudd v. Matsoukas* indicated that

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29. The American rule of parent-child tort immunity is based upon the so-called “great trilogy” of cases. France v. A.P.A. Transp. Corp., 56 N.J. 500, 267 A.2d 490 (1970). The earliest of these decisions was Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891), discussed *supra* note 2. The second decision, McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903), held that a child could not bring suit against her father despite alleged inflictions of “cruel and inhuman treatment.” *Id.* at 389, 77 S.W. at 664. Finally, in Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905), the parent-child tort immunity doctrine served as an effective bar to an action for rape brought by a daughter against her father.

30. 7 Ill. 2d 608, 131 N.E.2d 525 (1956).

31. *Id.* at 619, 131 N.E.2d at 531.

32. The supreme court in *Nudd* noted the pliability of a judicially created doctrine, particularly where “prevailing considerations of public policy and social needs” mandate a change of judicial position. *Id.*


34. *Id.* at 203, 241 N.E.2d at 14.
certain public policies could prevail over the doctrine. In addition, the court in Schenk rejected the argument that liability insurance provided a basis for abrogating the parent-child tort immunity doctrine. The court depicted such reasoning as an "illogical expression of disenchantment with the immunity rule and a baseless escape valve for a refusal to impose that rule."

A third exception to the parent-child tort immunity doctrine was set forth in Johnson v. Myers in which the minor plaintiff initiated a negligence action against her mother for injuries sustained in an automobile accident. When the mother died subsequent to the filing of the complaint, the plaintiff asserted that the purposes of the immunity doctrine were inapplicable because the parent-child relationship was dissolved through the death of a parent. The appellate court agreed, permitting the plaintiff to maintain her cause of action. The court justified its decision by explaining that the immunity rule was predicated upon an immunity to suit, not upon an absence of duty.

The decisions applying the parent-child tort immunity doctrine have thus carved out major exceptions to the rule, particularly where the injury occurs outside the family relationship or where the policies inherent in the immunity doctrine are outweighed by

35. Id.
36. Id. at 205, 241 N.E.2d at 15. A case reaching a similar result to that in Schenk and often described as carving an additional exception to the parent-child tort immunity doctrine is Cummings v. Jackson, 57 Ill. App. 3d 68, 372 N.E.2d 1127 (1978). In Cummings a minor plaintiff was struck by a motorist outside her house. The child brought suit against the city and her mother, alleging that the latter had violated a city ordinance by failing to adequately trim the shrubs located between the house and the street, thereby blocking the motorist's view. The appellate court reversed the dismissal of the plaintiff's complaint, finding that the duty owed the plaintiff was a general duty owed to the public, and that the parent-child tort immunity doctrine would not preclude the suit. In a partial dissent, Justice Weber called upon the judiciary to recognize the prevalent existence of insurance as a basis for permitting intrafamily suits. He criticized the majority for "defend[ing] to the death the collateral source rule on the one hand, and on the other, carv[ing] out exceptions sub silentio by permitting some intrafamily litigation under the guise of a general duty." Id. at 72, 372 N.E.2d at 1130.
37. 2 Ill. App. 3d 844, 277 N.E.2d 778 (1972).
38. Id. at 846, 277 N.E.2d at 779.
39. Id. at 845, 277 N.E.2d at 778-79. The court in Brennecke v. Kilpatrick, 336 S.W.2d 68 (Mo. 1968), reached a similar conclusion in permitting the child to sue the representative of her deceased parent after the child was involved in an auto accident allegedly caused by the parent's negligence.
more compelling circumstances.\textsuperscript{41} It is this latter judicial concession which has prompted litigants to assert that the doctrine no longer retains a purposeful role in modern litigation.\textsuperscript{42}

The original policies behind the doctrine, particularly the preservation of family harmony and family funds, have been significantly overshadowed by the ubiquitous presence of liability insurance.\textsuperscript{43} Interestingly, the insurance policy maintained by a child's parents actually fosters family tranquility by providing proceeds which may be tapped by the injured child.\textsuperscript{44} While the existence of insurance has been deemed a compelling factor in abolishing the immunity doctrine in other jurisdictions,\textsuperscript{45} Illinois courts generally have declined to recognize the widespread existence of insurance when deciding an action between parent and child.\textsuperscript{46} With the adoption of contribution and comparative negligence, however, a new equitable theory of liability distribution emerged, and the survival of the parent-child tort immunity doctrine was again challenged.

**DISTRIBUTION OF LOSS RELATIVE TO FAULT**

**Judicial Recognition of Contribution**

The abrogation of the common law rule prohibiting contribu-
tion among joint tortfeasors\textsuperscript{47} was judicially promulgated in Illinois with the decision of \textit{Skinner v. Reed-Prentice Division Package Machinery Co.},\textsuperscript{48} and its two companion cases.\textsuperscript{49} The plaintiff in \textit{Skinner} filed a strict liability action against the manufacturer of an injection molding machine after the plaintiff was allegedly injured by design defects in the machine. The manufacturer subsequently filed a third-party complaint against the plaintiff’s employer,\textsuperscript{50} seeking by way of contribution an amount commensurate with the degree of misconduct attributable to the employer. The circuit court dismissed the third-party complaint pursuant to the employer’s motion, and the appellate court affirmed.

In reversing the rulings of the lower courts, the Illinois Supreme Court held that the prohibition against contribution among joint tortfeasors was abolished.\textsuperscript{51} The supreme court acknowledged the inequities which stemmed from the right of indemnification,\textsuperscript{52}

gence action between parent and child on grounds that such evidence would be inadmissible at trial.

47. Merryweather v. Nixan, 8 Term Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799), is often cited as the first decision denying contribution among joint tortfeasors. It has been noted, however, that at the time of the decision, the concept of “tort” included intentional as well as negligent acts, and the application of the no-contribution rule to negligent tortfeasors may have been inappropriate. See Note, \textit{A Judicial Rule of Contribution Among Joint Tortfeasors in Illinois}, 1978 U. ILL L.F. 633.


50. \textit{Skinner}, 70 Ill. 2d at 5, 374 N.E.2d at 438. Specifically, the third-party complaint requested that

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if judgment be entered in favor of the plaintiff and against it [the defendant] that judgment be entered against the third party defendant and in favor of the third party plaintiff in such amount, by way of contribution, as would be commensurate with the degree of misconduct attributable to the third party defendant in causing the plaintiff's injuries.
\end{quote}

\textit{Id.}


52. 70 Ill. 2d at 6-7, 374 N.E.2d at 439. Indemnity shifts the entire loss from one tortfeasor who has been compelled to pay the loss to the plaintiff to the shoulders of another who should bear the loss instead. W. PROSSER, supra note 6, § 50, at 306. See also Bua, \textit{Third Party Practice In Illinois: Express And Implied Indemnity}, 25 De PAUL L. REV. 287 (1976); Michael & Appel, \textit{Contribution and Indemnity Among Joint Tortfeasors in Illi-
compelling one tortfeasor to shoulder the entire loss.\textsuperscript{53} Citing Dean Prosser,\textsuperscript{54} the Supreme Court stated that a flagrant lack of justice and common sense characterized a legal theory which required one party to bear the financial obligations of two or more equally responsible tortfeasors, thereby relieving a wrongdoer of any liability.\textsuperscript{55}

In addition to establishing the right of contribution, the supreme court permitted the strictly liable defendant manufacturer to implead an employer for acts of misconduct.\textsuperscript{56} Construing the third-party complaint as alleging misuse of the product and assumption of the risk by the employer, the court determined that such conduct by the third-party defendant may have contributed to the plaintiff's injuries.\textsuperscript{57} Finally, the majority allowed the manufacturer to seek contribution from the plaintiff's employer despite the fact that the employer was not amenable to direct suit by the plaintiff pursuant to the Workers' Compensation Act.\textsuperscript{58}

Three vigorous dissents\textsuperscript{59} filed in \textit{Skinner} questioned three
significant aspects of the majority opinion. First, the dissenters argued that misuse and assumption of the risk had previously been recognized as defenses to a strict liability suit and had never provided the basis for an original or third-party action. Second, Justice Dooley criticized the majority for permitting a comparison between the condition of the manufacturer’s product and the conduct of the employer, asserting that an examination of fault or conduct was inappropriate in a strict liability action. Moreover, Justice Dooley argued that the policies underlying strict liability warranted the imposition of liability upon one who created the risk of a defective product, not upon one who used the product. Finally, the majority’s opinion was attacked for allowing an employer, legislatively immunized against direct suits by an employee, to be subjected to “limitless tort liability” through a third-party action.

An admitted digression from established Illinois law the Skinner decision prompted a series of questions, including the viability of a contribution claim where the third-party defendant

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60. 70 Ill. 2d at 31-32, 374 N.E.2d at 450-51 (1977) (Dooley, J., dissenting). Justice Dooley stated that since 1837, assumption of risk had been utilized as a defense to an original action and had never provided the basis for an original or third-party action. Id.

61. Id. at 24, 374 N.E.2d at 447. Justice Dooley stated:

How can there be a comparison between the manufacturer’s fault and the employer’s fault, when fault is not the question? If the unreasonably dangerous product is put in commerce and is a proximate cause of injury, how can contribution and indemnification on the basis of the employer’s negligence be in proportion to the wrong of a manufacturer?

Id.

62. For an analysis of strict liability policies, see Suvada v. White, 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

63. 70 Ill. 2d at 25, 374 N.E.2d at 448. Justice Dooley deemed it “well recognized” that strict liability is not premised upon the concept of fault. He viewed as the motivating factors behind the doctrine the public interest in life and health, the invitations by the manufacturer to purchase products, and the inherent fairness in imposing liability upon the party who reaps a profit from the sale of a defective product. Id.

64. Id. at 34-39, 374 N.E.2d at 452-55.

65. In response to the employer’s argument that abolition of the no-contribution rule posed such a substantial change in existing law that the legislature rather than the judiciary was better equipped to implement such a change, the majority stated that it had created the no-contribution rule and was therefore empowered and obligated to modify or abolish it. Id. at 13-14, 374 N.E.2d at 442.

enjoys an immunity to a direct suit by the plaintiff. Although the *Skinner* decision specifically permitted contribution despite an employer-employee immunity, additional statutory and common law immunities had yet to be addressed within the framework of contribution. In an attempt to confront and resolve such issues, the Illinois General Assembly responded with legislation.

Enactment of the Contribution Statute

The Illinois legislature enacted an Act in Relation to Contribution Among Joint Tortfeasors, applicable to causes of action arising on or after March 1, 1978. In its legislative history, the Civil Practice Committee articulated the inherent inequities resulting from the law of indemnification and expressed a desire to compel joint tortfeasors to share equally in the financial loss stemming from a plaintiff’s injury. In an apparent response

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69. See, e.g., the parent-child tort immunity doctrine, *supra* notes 1-5, 8-11 and accompanying text.


73. CHICAGO BAR ASSOC. CIVIL PRACTICE COMM., LEGISLATIVE HISTORY BEHIND SENATE BILL 308 1 [hereinafter cited as LEGISLATIVE HISTORY]

74. The general objectives of the Contribution Act provide:

It is the view of the Civil Practice Committee that the prohibition against contribution cannot be justified upon either a social or theoretical basis. As noted by the Illinois Supreme Court in *Skinner v. Reed-Prentice* . . . there is an obvious lack of common sense and justice in a ruling which permits the entire burden of loss, for which two or more tortfeasors were responsible, to be cast upon one entirely because of the accident of the successful levy of execution, the existence of liability insurance, the plaintiff’s whim or spite, or his collusion with one of the wrongdoers. Likewise, the assertion that the Court should not be used for the aid of tortfeasors is particularly empty under circumstances where the Courts have long been used to permit tortfeasors to obtain indemnity. Indemnity permits the shifting of the entire loss upon the theory that the party seeking contribution was simply less culpable than the party from whom contribution is sought.

*Id.*
to the dissents raised in *Skinner*, the committee applied the Contribution Act to actions encompassing different liability theories, thereby allowing a defendant sued in strict liability to implead a third party for negligence. Finally, the committee justified the concept of contribution as a means of preventing the unjust enrichment of one tortfeasor over another; it described contribution as a "derivative right . . . not barred by any common law or statutory immunity which would preclude the prime claimant from pursuing an action directly against the party from whom contribution is sought." The intention of the Civil Practice Committee appears clear, therefore, that no immunity may effectively bar the right of one joint tortfeasor to seek contribution from another equally responsible wrongdoer.

Adoption of Comparative Negligence

On April 17, 1981, the Illinois Supreme Court decided *Alvis v. Ribar*, abolishing the doctrine of contributory negligence and adopting the standard of pure comparative negligence in Illinois. The Supreme Court depicted comparative negligence as a means by which parties could "recover the proportion of damages not attributable to their own fault," finding the intrinsic

75. Id. at 1-2. The committee expressly provided for the application of contribution to those sued in strict liability as a joint tortfeasor. Id.
76. Id. at 2.
77. Id.
78. Not all legislators, however, perceived the prophylactic purpose of the Contribution Act:

Well, I told you the lawyers would get it back, you see, and whenever you say that a bill here had been endorsed by the Bar Association and whether it's . . . the Illinois Bar Association and then when you say it's also endorsed by the Chicago Bar Association, boys, be careful, but what will happen here, is you see, some guy pays the penalty. We have the right for . . . so tortfeasor [sic] to pay the whole thing and now there's two or three other [sic] involved after he pays it he can turn around and sue each one of those so it's going to increase litigation. We were just talking about decreasing it a minute or two ago with Senator Rock's bill and you know, the lawyers will get one-third of it all the way around. No wonder it's endorsed.

79. 85 Ill. 2d 1, 421 N.E.2d 886 (1981).
81. Pure comparative negligence compares the negligent conduct of both the plaintiff and the defendant, and allows the plaintiff to recover to the extent that the plaintiff was
not negligent. See, e.g., Li v. Yellow Cab. Co., 13 Cal. 3d 804, 532 P.2d 1226 (1975). Under the modified form of comparative negligence, the plaintiff cannot recover if he is more than 50 percent negligent. See, e.g., Vincent v. Pabst Brewing Co., 47 Wis. 2d 120, 177 N.W.2d 513 (1970); See also Kionka, Comparative Negligence Comes to Illinois, 70 Ill. B.J. 16 (1981).
82. 85 Ill. 2d at 27, 421 N.E.2d at 898.
83. See supra note 7.
84. 85 Ill. 2d at 16, 421 N.E.2d at 893.
85. See generally Halligan, Another Look At Consecutive Tortfeasors: Responsibility, Indemnity, Contribution and Settlement, 70 Ill. B.J. 236 (1981); Zaremski & Berns, supra note 55.
86. 85 Ill. 2d at 29, 421 N.E.2d at 898 (1981) (Underwood, J., dissenting). Justices Underwood and Ryan dissented to the majority’s opinion. Justice Underwood stated that although the decision was not unforeseen, it nonetheless constituted a radical change in the law and should have been implemented by the legislature. Id.
88. See supra note 67.
LARSON V. BUSCHKAMP

Facts

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 Helen Buschkamp, an employee of Keystone Printing Services, Inc. The children's mother filed suit on their behalf, naming Buschkamp, Keystone and Robert Larson as defendants, and alleging that each driver negligently operated a motor vehicle.90

Buschkamp and Keystone subsequently brought a counterclaim against Robert Larson, seeking contribution pursuant to the Contribution Act.91 Larson moved to dismiss both the original complaint and the counterclaim on the ground that the parent-child tort immunity doctrine barred such actions.92 The trial court sustained the father's motion to dismiss, reasoning that Larson was not amenable to a direct suit by his children and consequently could not be subjected to liability under a contribution theory.93 The Illinois Appellate Court for the Second District reversed and held that the parent-child tort immunity doctrine did not pose a substantive bar to a contribution claim against the father of minor plaintiffs.94

Case Analysis of the Parent-Child Tort Immunity Doctrine

The appellate court's analysis in determining whether contribution could be sought from the parent of an injured child commenced with an examination of the parent-child tort immunity doctrine.95 Tracing the doctrine to its origins, the court recognized that preservation of family harmony was deemed a sufficiently compelling reason to warrant the prohibition of tort actions between parent and child.96 The court enumerated three

90. Id. at 966-67, 435 N.E.2d at 223.
91. Id. See ILL REV. STAT. ch. 70, ¶ 302 (1981).
92. 105 Ill. App. 3d at 967, 435 N.E.2d at 223.
93. Id.
94. Id. at 970-71, 435 N.E.2d at 225-26.
95. Id. at 967, 435 N.E.2d at 223.
96. Id. at 968-69, 435 N.E.2d at 224. See also Perchel v. District of Columbia, 444 F.2d 997 (D.C. Cir. 1971); Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966); Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891); Brennecke v. Kilpatrick, 336 S.W.2d 68 (Mo. 1968).
goals underlying the adoption of the immunity doctrine in Illinois: (1) preservation of parental authority and family tranquility; (2) prevention of the depletion of family funds; and (3) prevention of fraudulent claims.\(^9\) The Larson court concluded its initial analysis of the parent-child tort immunity doctrine with the generalization that the doctrine bars direct tort suits between parent and child if the cause of action arises during pursuit of a family purpose or in furtherance of the family relationship.\(^9\)

Acknowledging the series of exceptions which emerged from the parent-child tort immunity doctrine, the appellate court categorized the general situations within which the immunity doctrine would not prevail: (1) allegations of willful and wanton misconduct by one family member against another;\(^9\) (2) dissolution of the family relationship through death;\(^10\) (3) breach of a duty owed the general public;\(^10\) and (4) infliction of an injury during an activity outside the family relationship.\(^10\) The court concluded that although the parent-child tort immunity doctrine retains some degree of vitality, the doctrine will not apply where the policies and purposes underlying the rule are not served.\(^10\)

Reliance upon Wirth v. City of Highland Park

The discussion in Larson then shifted to the applicability of contribution where an immunity defense exists between the plaintiff and the third party. The court placed considerable emphasis upon the decision of Wirth v. City of Highland Park,\(^10\) in which a third-party plaintiff was permitted to seek contribution from a third-party defendant despite the presence of an intraspousal immunity between the plaintiff and third-party defendant. The plaintiff in Wirth allegedly sustained injuries when she fell down a stairway in a building owned by the defendant. The plaintiff initiated a negligence action against the

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97. 105 Ill. App. 3d at 968, 435 N.E.2d at 223.
98. Id. at 969, 435 N.E.2d at 223.
99. Id. at 968, 435 N.E.2d at 223 (citing Nudd v. Matsoukas, 7 Ill. 2d 608, 619, 131 N.E.2d 525, 531 (1956)).
100. Id. (citing Johnson v. Myers, 2 Ill. App. 3d 844, 846, 277 N.E.2d 778, 779 (1972)).
101. Id. at 969, 435 N.E.2d at 223; see also Cummings v. Jackson, 57 Ill. App. 3d 68, 372 N.E.2d 1127 (1978).
102. 105 Ill. App. 3d at 968, 435 N.E.2d at 223; see also Schenk v. Schenk, 100 Ill. App. 2d 199, 206, 241 N.E. 2d 12, 15 (1968).
103. 105 Ill. App. 3d at 969, 435 N.E.2d at 223.
defendant, who in turn sought contribution from the plaintiff's husband, alleging that he negligently maintained the stairway.\textsuperscript{105} The husband moved to dismiss the third-party complaint pursuant to the intraspousal immunity doctrine,\textsuperscript{106} but the trial court denied the motion. The husband appealed.

In affirming denial of the motion, the appellate court in \textit{Wirth} weighed the policies underlying the intraspousal immunity doctrine against the purposes behind contribution.\textsuperscript{107} The court viewed the adoption of contribution as a reaction to the "harsh results" associated with a no-contribution rule and perceived any compromise of the Contribution Act or comparative negligence as an impediment to the development of such legal doctrines.\textsuperscript{108} Drawing upon the equitable considerations articulated in \textit{Skinner} and \textit{Alvis}, the \textit{Wirth} court concluded that the trend in Illinois is to distribute loss in relation to fault, regardless of whether an immunity defense exists between the plaintiff and third-party defendant.\textsuperscript{109}

In addition, the court in \textit{Wirth} described the intraspousal immunity doctrine as a procedural rather than as a substantive bar to tort actions between spouses.\textsuperscript{110} Pursuant to this charac-

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\textsuperscript{105} \textit{Id.} at 1075, 430 N.E.2d at 238.
\textsuperscript{106} \textit{Id.} See ILL. REV. STAT. ch. 40, \textsection 1001 (1981).
\textsuperscript{107} The appellate court traced the origins of the intraspousal immunity doctrine to the common law that provided that upon marriage, the wife's legal existence merged into and was converged with that of her husband's. With the enactment of ILL. REV. STAT. ch. 40, \textsection 1001-1002 (1981), the Married Woman's Act, a married woman became free to own and convey property, contract, and incur liabilities. This statute was subsequently construed as permitting one spouse to maintain a tort action against another spouse. Brandt v. Keller, 413 Ill. 503, 109 N.E.2d 729 (1952). The legislature responded by amending the Act and establishing an intraspousal tort immunity defense. ILL. REV. STAT. ch. 40, \textsection 1001 (1981). See generally Tonner, \textit{The Decline of Intraspousal Immunity in Illinois}, 47 INS. COUNS. J. 573 (1980).
\textsuperscript{108} 102 Ill. App. 3d at 1080, 430 N.E.2d at 241.
\textsuperscript{109} Specifically, the court stated that "[t]he recent trend in Illinois has been to curtail common law tort doctrines to allow contribution among joint tortfeasors." \textit{Id.}
\textsuperscript{110} \textit{Id.} The appellate court relied upon the decision of Allstate Ins. Co. v. Elkins, 77 Ill. 2d 384, 396 N.E.2d 528 (1979), wherein the wife and daughter of the plaintiff's policy holder were injured in an automobile accident. Because the injured parties were denied insurance coverage pursuant to an exclusionary clause, they sought compensation under the uninsured motorist clause. The plaintiff contended that the intraspousal immunity doctrine precluded such recovery, but the Illinois Supreme Court rejected this argument. The supreme court held that the statutory immunity doctrine did not "destroy the cause of action of the injured spouse, but [conferred] immunity upon the tortfeasor spouse, which like a defense based upon the statute of limitations can be waived by the defendant spouse." \textit{Id.} at 390, 396 N.E.2d at 531.
\end{flushleft}
terization of the immunity doctrine, the court found that a cause of action between spouses may exist but be unenforceable.111 Consequently, when the procedural bar is removed, as in a third-party action, the cause of action becomes enforceable and the right to seek contribution permissible.112 The court concluded by holding that the intraspousal immunity defense to a direct suit by a spouse does not impair the right of a defendant to seek contribution from a negligent spouse.113

Conclusion of Larson

Drawing extensively from the Wirth analysis, the court in Larson reasoned that a claim for contribution poses no greater threat to the stability of the parent-child relationship than that feared in the husband-wife situation.114 The court acquiesced in the view that the child’s injury rather than the intrafamily litigation constitutes the greater source of family disruption115 and that the widespread existence of liability insurance diminishes the possibility that family funds may be exhausted.116 Invoking the reasoning of Wirth and recognizing the growing trend in Illinois towards equitable loss distribution, the Larson court concluded that no overriding policy considerations compel the application of the parent-child tort immunity doctrine in a contribution claim.117

In dicta, the appellate court recognized the potential conflict between the parent-child tort immunity doctrine and contribution where the third-party plaintiff alleges negligent supervision of a child by the parent.118 Although acknowledging that some

111. 102 Ill. App. 3d at 1081, 430 N.E.2d at 242.
112. Id.
113. Id. The appellate court noted that the Contribution Act did not contain any specific language that exempted parties with an immunity defense from the right of contribution. Id.
114. 105 Ill. App. 3d at 967, 969-70, 435 N.E.2d at 223-25.
115. Id. at 970, 435 N.E.2d at 225. See generally Polelle, supra note 44, at 220.
116. 105 Ill. App. 3d at 970, 435 N.E.2d at 225. The court in Larson stated that “[t]he widespread use of liability insurance mitigates against the possibility that such suits disrupt the domestic peace or deplete the family’s financial resources. (Williams v. Williams (Del. 1976), 369 A.2d 669; France v. A.P.A. Transport Corp. (1970), 56 N.J. 500, 267 A.2d 490.)” Id. at 971, 435 N.E.2d at 226.
117. Id. at 971, 435 N.E.2d at 225.
118. Id.
jurisdictions uphold the immunity doctrine in such situations, the court declined to address the issue, noting that the pleadings therein only alleged negligent operation of a motor vehicle and not negligent supervision of a child.\textsuperscript{119}

\textbf{POTENTIAL RAMIFICATIONS OF LARSON \textit{v. BUSCHKAMP} IN A STRICT LIABILITY ACTION}

The application of \textit{Larson v. Buschkamp} in a strict liability action presents the possibility of a significant conflict between the parent-child tort immunity doctrine and contribution. The \textit{Skinner} decision\textsuperscript{120} allowed a manufacturer, sued under a strict liability theory, to seek contribution from the user of an allegedly defective product, thereby creating the concept of “downstream contribution.”\textsuperscript{121} \textit{Larson} permitted an allegedly negligent defendant to seek contribution from the plaintiffs’ father, rejecting the argument that the parent-child tort immunity doctrine bars such a claim. Thus, the convergence of these two decisions would allow a manufacturer, sued in strict liability by an injured child, to seek contribution from the plaintiff’s parent.

To illustrate, assume hypothetically that six-year-old Jane Doe is injured when she picks up a power saw while left unattended in her back yard. Jane files a strict liability action against the

\textsuperscript{119} Id. The appellate court cited Schneider v. Coe, 405 A.2d 682 (Del. 1979), and France v. A.P.A. Transp. Corp., 56 N.J. 500, 267 A.2d 490 (1970) in support of its position. These decisions are discussed in greater detail \textit{infra} note 125.


\textsuperscript{121} “Downstream” liability refers to that imposed upon subsequent users or consumers of an allegedly defective product. “Upstream” liability is that imposed upon those who are responsible for placing the product into the stream of commerce. Stevens v. Silver Mfg. Co., 70 Ill. 2d 41, 374 N.E.2d 455 (1977), \textit{modified}, 70 Ill. 2d 41 (1978). Prior to the decision in \textit{Skinner}, manufacturers suing in strict liability were precluded from seeking downstream indemnification from users or consumers. Stanfield v. Medalist Indus., Inc., 17 Ill. App. 3d 996, 309 N.E.2d 104 (1974). In \textit{Stanfield}, the Illinois Appellate Court stated:

It appears that the liability in these cases is qualitatively active so far as the seller or manufacturer is concerned and because of his unique relationship to the product as its creator, his negligence cannot be offset against that of a mere subsequent user. We conclude, therefore, that actions founded on strict liability for defective and unreasonably dangerous products are outside the active-passive theory of indemnity. Hence, third-party actions for indemnity against subsequent users are not maintainable by the manufacturer or seller of the defective product.

\textit{Id.} at 1000, 309 N.E.2d at 108.
power saw manufacturer, alleging that her injuries were proximately caused by a defectively designed safety switch. The manufacturer then files a third-party contribution action against Jane's father, John Doe, alleging that his failure to supervise Jane constituted negligence and contributed to her injuries.

Within such a hypothetical framework, the policies underlying contribution and the parent-child tort immunity doctrine are polarized, presenting two significant problems. First, if the manufacturer prevails in his contribution claim, an individual consumer is compelled to share the financial obligations which result when a plaintiff is injured by a defective product. Moreover, this economic loss is imposed upon the parent of an injured child, thereby threatening the depletion of family funds and causing family disharmony. Second, the basis for the contribution claim against John Doe is negligent supervision of his child, a challenge directed at the essence of parental authority and the core of the family relationship. Each of these considerations will now be analyzed.

The Problems of Requiring the User of a Defective Product to Share Economic Loss

In Skinner, the third-party defendant (plaintiff's employer) argued that the policies underlying strict liability warrant the imposition of liability solely upon the party who creates the risk of a defective product and who reaps a profit through the manufacture and sale of such a product. The Illinois Supreme Court

122. In Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965), the Illinois Supreme Court recognized the doctrine of strict liability and stated that liability for a consumer's injuries should be placed on the party who creates the risk of a defective product and reaps pecuniary gains through its sale. Id. at 617, 210 N.E.2d at 186.


124. In Larson, the Illinois Appellate Court specifically noted that the counterclaimant's allegations against Robert Larson did not allege negligent supervision, but rather, negligent operation of a motor vehicle. See supra note 30 and accompanying text.

125. In Schneider v. Coe, 405 A.2d 682 (Del. 1979), a father brought suit on behalf of his child when the child was kicked by a horse owned by the defendant. The defendant sought contribution against the father on the ground of negligent parental supervision, but the Delaware Supreme Court affirmed the dismissal of the third-party complaint. Noting that parental supervision consists of authority and a personal exercise of judgment, the court feared the disruption of family harmony if negligent parental supervision constituted the basis of a third-party action. Id. at 685.

126. 70 Ill. 2d at 14, 374 N.E.2d at 443. See Burke v. Sky Climber, Inc., 57 Ill. 2d 542,
recognized this argument as reflective of the fundamental policy behind strict liability\textsuperscript{127} but found the goal satisfied once the manufacturer of an allegedly defective product was named a defendant in the original action.\textsuperscript{128} Consequently, the court foresaw no serious infringement upon the strict liability doctrine by allowing the user of a defective product to share the financial liability with the manufacturer.\textsuperscript{129}

It is significant, however, that the third-party defendant in \textit{Skinner} was a major employer and products manufacturer.\textsuperscript{130} Although admittedly a downstream user of an allegedly defective product, the employer was nonetheless in a position to justify imposition of contribution in a strict liability action. First, the employer in \textit{Skinner} arguably possessed a degree of expertise and experience in anticipating and guarding against the hazards of the product. The same degree of sophistication cannot be attributed to an individual consumer such as John Doe, who purchases a power saw with a defective safety switch. Notably, the disparity of knowledge between a consumer and manufacturer regarding such defects represents a primary motivation behind the adoption of strict liability.\textsuperscript{131} To compel John Doe to contribute to the manufacturer's financial burden would emasculate the policies underlying strict liability.

Second, the employer in \textit{Skinner} was in a stronger position than an individual consumer to absorb and distribute any economic loss. John Doe cannot, absent sufficient liability insurance, withstand the financial obligations attendant to contribution. To permit contribution in such an action allows the manufacturer to share its loss with a consumer, shifting a portion of the responsibility from one who creates the risk of a defective

\textsuperscript{127} 70 Ill. 2d at 14, 374 N.E.2d at 443. In \textit{Skinner}, the Illinois Supreme Court recognized that the policies underlying strict liability were motivated by the desire to impose the economic loss upon "the one who created the risk and reaped the profit, including everyone from the manufacturer on through to the seller or any one of them." \textit{Id.}

\textsuperscript{128} \textit{Id.} Specifically, the court stated that "[w]hen the economic loss of the user has been imposed upon a defendant in a strict liability action the policy considerations of \textit{Suvada} are satisfied and the ordinary equitable principles governing the concepts of indemnity or contribution are to be applied." \textit{Id.}

\textsuperscript{129} \textit{Id.}

\textsuperscript{130} \textit{Id.} at 4, 374 N.E.2d at 438.

product to one who is unable to anticipate it, prevent it, or absorb the loss. Moreover, in the absence of adequate insurance, John Doe is compelled to exhaust family funds to contribute to the liability resulting from his child’s injury. The ensuing family discord represents the precise danger that the parent-child tort immunity doctrine was designed to prevent, warranting continued application of the doctrine in such a situation. Despite the trend in Illinois to equitably distribute loss among responsible tortfeasors, the inequities resulting from contribution by the parent of an injured child mandate an exception to the trend.

The Dangers of Seeking Contribution for Negligent Supervision

In the hypothetical situation, the manufacturer’s contribution claim against John Doe alleges negligent supervision of the minor plaintiff. Unlike the allegations of negligent driving presented in Larson, where negligent driving by a parent threatens the public’s safety, allegations of negligent supervision challenge the essence of parental authority. Supervision of a child encompasses discretion, judgment and discernment on behalf of a parent, a domain not willingly invaded by the judiciary. To allow a manufacturer contribution on the basis of negligent supervision by a parent would undermine the flexibility and individuality intrinsic to parental authority.

Moreover, the strength of the family relationship is premised upon the ability of family members to co-exist without excessive interference from external sources. The need for enforcement of regulations and standards regarding automobile driving are not as compelling in a situation encompassing parental supervision. The manufacturer’s contribution claim against John Doe constitutes a significant intrusion into the realm of the family relationship, and threatens the domestic tranquility which the parent-child tort immunity doctrine seeks to preserve. The

132. See supra notes 8, 42.
133. See, e.g., Schneider v. Coe, 405 A.2d 682 (Del. 1979).
134. Id. at 684.
135. The familial domain has been given constitutional dimensions in some situations. See, e.g., Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); Pierce v. Society of Sisters, 268 U.S. 510 (1925).
137. Id. at 684.
potential disruption of family harmony and invasion of parental discretion mandates a limited application of *Larson v. Buschkamp*.

**CONCLUSION**

The parent-child tort immunity doctrine retains a meaningful role in modern litigation. Imbued with the purpose of preventing intrafamily disharmony, the doctrine is nonetheless threatened with abrogation by the development of equitable loss distribution and contribution. The equities, however, do not materialize when contribution results in a significant encroachment upon parental supervision and disruption of domestic tranquility. A continued judicial awareness of the policies underlying the tort immunity doctrine must be maintained if the salutary purposes of the doctrine are to prevail.

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