Notes

Parental Tort Immunity Doctrine in Indiana

> *It is well established that a minor child cannot sue his parent for a tort. The peace of society . . . and a sound public policy, designed to subserve the repose of families . . . forbid to the minor child a right to appear in court in the assertion of a claim of civil redress for personal injuries suffered at the hands of the parent.*[1]

Thus, the doctrine of parental immunity was adopted in *Smith v. Smith*,[2] a 1924 Indiana decision. Prior to that case, the doctrine had been construed only once in Indiana to the extent necessary to hold it inapplicable to the facts at hand.[3] Since the *Smith* decision, the immunity doctrine has not arisen in any reported Indiana case. Despite the dearth of cases on point, the doctrine is by no means unassailable in this state. In view of the public policy statements in *Brooks v. Robinson*[4] and *Campbell v. State*[5] as well as numerous cases in other jurisdictions, the

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[1]Smith v. Smith, 81 Ind. App. 566, 568, 142 N.E. 128, 129 (1924), *quoting from* 20 R.C.L. 631 (1918), *quoting from* Hewlett v. Ragsdale, 68 Miss. 703, 711, *reported sub nom.* Hewelette v. George, 9 So. 885, 887 (1891).

[2]81 Ind. App. 566, 142 N.E. 128 (1924). This was an action by an adult son against his father for damages sustained during minority, arising out of acts alleged to be cruel and malicious. The court held that the son could not sue the father for personal torts committed during minority. *See also* 4 B.U.L. Rev. 217 (1924); 8 Minn. L. Rev. 451 (1924).

[3]Treschman v. Treschman, 28 Ind. App. 206, 61 N.E. 961 (1901). This was an action by a minor child against her stepmother, who allegedly stood in loco parentis, for injuries sustained during minority as a result of acts of personal violence. The court held that the stepmother was not relieved of liability for a malicious assault on the child because she stood in loco parentis.

[4]284 N.E.2d 794 (Ind. 1972). Appellant was injured while a guest in a car being driven by appellee. While the action was pending, the parties were married. The trial court dismissed the complaint, citing the interspousal immunity doctrine as a bar to the action. The Indiana Supreme Court, per Justice Hunter, reversed the trial court, reinstated the complaint, and abrogated the doctrine. *See also* 6 Ind. L. Rev. 558 (1973).

[5]284 N.E.2d 733 (Ind. 1972). Appellants sustained personal injuries as a result of a head-on collision with a car traveling in appellants' lane on a state-maintained highway. Appellants alleged negligence by the state in failing to mark the road with a yellow line signifying that it was not safe

doctrine is ripe for abrogation. The two fundamental bases for the doctrine were severely criticized in these cases, although with regard to other tort immunity doctrines. The preservation of domestic peace and harmony was held in *Brooks* to be an insufficient reason on which to base an interspousal tort immunity.[6] The desire to minimize fraudulent claims was held in *Campbell* to be outweighed by the fundamental injustice of a tort immunity policy.[7] Consequently, it is necessary to re-examine the origins of the parental immunity doctrine and the reasons both for its support and for its abrogation to determine if such an immunity retains any continued vitality.

I. Development of the Doctrine

A. Common Law

The earliest American decisions recognizing the parental immunity doctrine state that its existence is to be traced to the common law and is so basic to our legal structure that it scarcely requires support.[8] However, many courts[9] and noted writers[10] have examined this assertion and found it to be clearly erroneous.

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to pass and failing to install no-passing signs. The Indiana Supreme Court held that the sovereign immunity doctrine could not be used to protect the state when justified by a governmental-proprietary characterization of the negligence. *See also* Lockyear, *Torts, 1973 Survey of Indiana Law*, 7 Ind. L. Rev. 262 (1973).

[6]284 N.E.2d at 796. Justice Hunter stated:

> In regard to the [domestic tranquility argument], this Court is unpersuaded that tort actions will tend to disrupt the peace and harmony of the marriage . . . to any greater degree than would actions in ejectment, partition, or contract [all permitted under Indiana law].

Id.

[7]Chief Justice Arterburn, writing for the majority, stated:

> There has been a general apprehension that fraud and excessive litigation would result in unbearable cost to the public in the event municipal corporations were treated as ordinary persons for purposes of tort liability. On the other hand the unfairness to the innocent victim of a principle of complete tort immunity and the social desirability of spreading the loss—a trend now evident in many fields—have been often advanced as arguments in favor of extending the scope of liability. It is doubtful whether the purposes of tort law are well served by either the immunity rule or its exceptions.

Id. at 735-36, *quoting from* Brinkman v. City of Indianapolis, 141 Ind. App. 662, 666, 231 N.E.2d 169, 172 (1967).

[8]Roller v. Roller, 37 Wash. 242, 246, 79 P. 788, 789 (1905).

[9]Villaret v. Villaret, 169 F.2d 677 (D.C. Cir. 1948), *reviewed in* 26 Ind. L.J. 465 (1951); Gibson v. Gibson, 3 Cal. 3d 914, 916, 479 P.2d 648, 649, 92 Cal. Rptr. 288, 289 (1971); Dunlap v. Dunlap, 84 N.H. 352, 354, 150 A. 905, 906 (1930); Badigan v. Badigan, 9 N.Y.2d 472, 474, 174 N.E.2d 718, 720, 215 N.Y.S.2d 35, 36 (1961) (Fuld, J., dissenting), *cited with approval in*

They have noted the absence of any English case law on point and conclude that the doctrine is simply a product of ipse dixit in *Hewlett v. Ragsdale*,[11] the first American decision. To base a doctrine on nonexistent common law is hardly to be tolerated in our legal system, and cases based on such claims are justly criticized.[12] Yet, bald assertions that there was no such common law rule are equally unavailing, since the weight accorded such statements derives more from the reputation of the writers than from the scholarship on which they rest.

Not only was there no common law doctrine of parental immunity, but there is authority for the proposition that the common law recognized the capacity of minor children to sue their parents in tort. There is no doubt the common law permitted suits arising out of property[13] and contract[14] rights by minor chil-

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Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969). *But cf.* Mroczynski v. McGrath, 34 Ill. 2d 451, 216 N.E.2d 137 (1966).

[10]H. CLARK, LAW OF DOMESTIC RELATIONS § 9.2, at 256-60 (1968); W. PROSSER, THE LAW OF TORTS § 122, at 864-68 (4th ed. 1971); McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1072 (1930); McCurdy, *Torts Between Parent and Child*, 5 VILL. L. REV. 521 (1960).

[11]68 Miss. 703, *reported sub nom.* Hewelette v. George, 9 So. 885 (1891).

[12]Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930); Hastings v. Hastings, 33 N.J. 247, 163 A.2d 147 (1960); Small v. Morrison, 185 N.C. 577, 581, 118 S.E. 12, 17 (1923) (Clark, C.J., dissenting); W. PROSSER, THE LAW OF TORTS § 122, at 864-68 (4th ed. 1971); McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1072 (1930). Student writers have overwhelmingly condemned the doctrine. *See, e.g.*, Note, Streenz v. Streenz: *The End of an Era of Parental Tort Immunity*, 13 ARIZ. L. REV. 720 (1971); Note, Gibson v. Gibson: *California Abrogates Parental Tort Immunity*, 7 CALIF. WESTERN L. REV. 466 (1971); Note, *Parental Immunity: The Case for Abrogation of Parental Immunity in Florida*, 25 U. FLA. L. REV. 794 (1973); Comment, *A Child's Rights Against His Parent: Evolution of the Parental Immunity Doctrine*, U. ILL. L. REV. 805 (1967); 25 ARK. L. REV. 368 (1971); 58 COLUM. L. REV. 576 (1958); 38 CORNELL L.Q. 462 (1953); 7 FORDHAM L. REV. 459 (1938); 64 HARV. L. REV. 1208 (1951); 26 TENN. L. REV. 561 (1959); 79 U. PA. L. REV. 80 (1930); 10 WASH. & LEE L. REV. 121 (1953). *Cf.* Cooperrider, *Child v. Parent in Tort: A Case for the Jury?*, 43 MINN. L. REV. 73 (1958).

[13]Roberts v. Roberts, Hardr. 96, 145 Eng. Rep. 399 (1657); Anon., Y.B. 2 Edw. 2 (1308), *reprinted in* 19 SELDEN SOC. 35 (1904). *See also* Duke of Beaufort v. Berty, 1 P. Wms. 703, 24 Eng. Rep. 579 (1721); Thomas v. Thomas, 2 Kay & J. 79, 69 Eng. Rep. 701 (1855). Indiana has consistently upheld this rule. *See, e.g.*, Young v. Wiley, 183 Ind. 449, 107 N.E. 278 (1914); Cotterell v. Koon, 151 Ind. 182, 51 N.E. 235 (1898); McKern v. Beck, 73 Ind. App. 92, 126 N.E. 641 (1920).

[14]Morgan v. Morgan, 1 Atk. 489, 26 Eng. Rep. 310 (1737). Indiana has allowed an emancipated child to recover wages due from minority from his father on the theory of implied contract. *See* Hilbish v. Hilbish, 71 Ind. 27 (1880). Recovery has also been permitted a child, minor or adult, for

dren against their parents. An English case decided over seven hundred years ago permitted a property suit by a child against his mother.[15] There was no hint that the suit was barred for any reason. An infant's capacity to sue and be sued was covered by early statutes. The earliest, dated 1275, states:

> [T]hat if any from henceforth purchase a Writ of Novel Disseisin, and he against whom the Writ was brought as principal disseisor, [dies] before the [assize] be passed, then the plaintiff shall have his Writ of [Entry] upon Disseisin against the heirs . . . of the disseisor . . . of what age so ever they be; (2) In the same wise the heirs . . . of the disseisee shall have their Writs of [Entry] against the disseisor . . . of what age soever they be . . . ; (3) so that for the nonage of the heirs of one party, nor the other, the Writ shall not be abated, nor the Plea delayed . . . .[16]

In 1285 a statute allowed infants to appear by next friend in all suits,[17] which commentators have noted was merely a confirmation of existing common law practices.[18] *Bassett's Case*[19] enunciated the developing policy of the common law by stating that "the common law rule is, that an infant in all things which [are] found to his benefit shall have favor and preferment in law . . . but shall not be prejudiced by anything to his disadvantage."[20] Modern legal writers confirm the preference shown infants in the common law,[21] though the general principle on which

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services rendered to the parent. *See* Miller v. Miller, 47 Ind. App. 239, 94 N.E. 243 (1911); Collins v. Williams, 21 Ind. App. 227, 52 N.E. 92 (1898); Story v. Story, 1 Ind. App. 284, 27 N.E. 573 (1891).

[15]Anon., Lib. Ass. 732, 3d (No. 763) and 5th (No. 838) (1203), *reprinted in* 3 SELDEN SOC. 83 (1966).

[16]3 Edw. 1, c. 47, 11 COKE'S INST. 265-68 (1275).

[17]13 Edw. 1, c. 15, 11 COKE'S INST. 390 (1285). The statute provides: "In every case whereas such as may be within age may sue, it is ordained; that if such within age be essoined, so that they cannot sue personally, their next friends shall be admitted to sue for them." Statutory law has always been construed as giving permission in all cases for infants to appear by next friend, the practice of the common law. *See* 2 J. REEVES, ENGLISH LAW § 180 (1880). This procedure is incorporated into Indiana law by IND. CODE § 34-2-3-1 (IND. ANN. STAT. § 2-209a, Burns Supp. 1974).

[18]2 J. REEVES, ENGLISH LAW § 180 (1880).

[19]2 Dyer 136a, 73 Eng. Rep. 297 (Ex. 1557). *See also* Beecher's Case, 8 Co. Rep. 58a, 77 Eng. Rep. 559 (Ex. 1608).

[20]2 Dyer 136a, 73 Eng. Rep. 297 (Ex. 1557).

[21]R. GRAVESON, STATUS IN THE COMMON LAW 20 (1953). He concludes that minor children "are the special favorites both of law and equity, and in any matter in which they are concerned their interests and welfare are predominent." *Id.*

the preference stands was best described by William Blackstone.[22] The preference continued in later English cases[23] and continues to this day.[24]

Ash v. Ash[25] appears to be the only case at common law wherein a child was permitted to sue a parent for a personal tort. In an action for assault, battery and false imprisonment, the daughter recovered 2000 pounds in damages from her mother who persuaded an apothecary to administer unneeded medicine and to confine the daughter for two or three hours, tied and bound. The attorney for Lady Ash, the mother, moved for and was granted a new trial based *only* on the excessiveness of the damages. There was no reference to any reason why suit was barred because of the parent-child relation. Surely if an immunity were known at common law it would have been raised on

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[22]3 W. BLACKSTONE, COMMENTARIES *2-3. He stated:

> The more effectively to accomplish the redress of private injuries, courts of justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws, by which rights are defined, and wrongs prohibited. This remedy is therefore principally to be sought by application to these courts of justice.

Id.

[23]Whitfield v. Hales, 12 Ves., Jr. 492, 33 Eng. Rep. 186 (1806); Stevens v. Stevens, 6 Madd. 97, 56 Eng. Rep. 1028 (1821); Hall v. Hollander, 4 B. & C. 660, 107 Eng. Rep. 1206 (1825). It is stated in *Stevens* that it is "essential for the protection of infants that suits on their behalf should not be discouraged; and . . . an inquiry [into whether the suit is brought for the infant's benefit] ought never to be directed unless there be a strong case of no benefit or improper motive." 6 Madd. at 97, 56 Eng. Rep. at 1028. The *Thomas* case goes farther, albeit in dicta, by suggesting that the statute of limitations would not run against minor children until they reach majority as to property claims against their father, whereas it might run as to property claims against strangers. Thomas v. Thomas, 2 Kay & J. 79, 69 Eng. Rep. 701 (1855).

[24]*See, e.g.*, McKee v. McKee, [1951] A.C. 352 (P.C.). Cases from other Commonwealth countries not only recognize the preference to be accorded children but specifically allow children to sue their parents for personal torts. Dolbel v. Dolbel, [1963] N.S. Wales 758 (1962) (Australia); Deziel v. Deziel, [1953] 1 D.L.R. 651 (Ont. H. Ct. 1952) (Canada); Fidelity & Cas. Co. v. Marchand, [1923] 4 D.L.R. 913 (1923), *rev'd on other grounds*, 4 D.L.R. 157 (1924) (Canada); Young v. Rankin, [1934] Sess. Cas. 499 (Scot. 1st Div.). Their approach is illustrated by *Fidelity:*

> It seems therefore sufficient to say [the law does not distinguish between minor children and others who sue the parent], however repugnant it may seem that a minor child should sue his own father, although it would probably be equally repugnant that a child injured by his father's negligent act, perhaps maimed for life, should have no redress for the damages he has suffered.

4 D.L.R. at 166 (Mignault, J., concurring).

[25]Comb. 357, 90 Eng. Rep. 526 (1696).

this appeal, given the huge sum the recovery represented in 1696. Considering the policy iterated in *Bassett's Case*,[26] the court may very well have thought the age and status of the plaintiff-daughter of so little consequence as not to be worthy of mention.

Modern Commonwealth cases are uniform in their opinion that no immunity rule existed at common law.[27] Some have intimated that even if such a doctrine did exist at common law it could not be rationally sustained today.[28]

B. Early American Decisions

Prior to *Hewlett v. Ragsdale*[29] in 1891, three cases suggested that those standing in loco parentis were not thereby immune from suits arising out of torts committed against minors. *Gould v. Christianson*[30] held a minor child entitled to recover damages from a shipmaster, into whose care the youth had been placed by his father, for assault and battery. The standard of conduct applied to the shipmaster required that he exercise the restraint of a parent in chastising minors committed to his care and that such conduct must clearly be in furtherance of constructive discipline, not wanton personal violence. *Lander v. Seaver*[31] involved a suit for trespass by a minor child against his schoolmaster. The court held that the teacher was not liable for corporeal punishment unless it was clearly excessive. *Nelson v. Johansen*[32] allowed a minor to sue her guardian for negligently failing to properly clothe her, resulting in a severe illness to the child. These cases are illustrative of basic common law policy. The interests of

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[26] 2 Dyer 136, 73 Eng. Rep. 297 (1557).

[27] *See, e.g.*, Fitzgerald v. Northcote, 4 F. & F. 656, 176 Eng. Rep. 734 (1865) (schoolmaster in loco parentis held liable); Young v. Rankin, [1934] Sess. Cas. 499 (Scot. 1st Div.) (natural parents held liable). It is stated in *Young:*

> Is there any clearly settled rule or principle of the common law or the public policy to prevent a son in minority, who has been injured through the fault of his father, from maintaining an action to be compensated for his injuries? I can find no such rule or principle, and we were referred to no judicial formulation of it, if such a rule exists.

Id. at 508. *See also* Dolbel v. Dolbel, [1963] N.S. Wales 758 (1962) (Australia); Fidelity & Cas. Co. v. Marchand, [1923] 4 D.L.R. 913 (1923), *rev'd on other grounds*, 4 D.L.R. 157 (1924) (Canada).

[28] Young v. Rankin, [1934] Sess. Cas. 499, 520 (Scot. 1st Div.).

[29] 68 Miss. 703, *reported sub nom.* Hewelette v. George, 9 So. 885 (1891).

[30] 10 F. Cas. 857 (No. 5,636) (D.C.S.D. N.Y. 1836).

[31] 32 Vt. 114 (1859).

[32] 18 Neb. 180, 24 N.W. 730 (1885). Later cases upheld the liability of those in loco parentis. Dix v. Martin, 171 Mo. App. 266, 157 S.W. 133 (1913); Clasen v. Pruhs, 69 Neb. 278, 95 N.W. 640 (1903); Steber v. Norris, 188 Wis. 366, 206 N.W. 173 (1925).

minors are to be protected by courts as against those into whose care they have been entrusted by their parents, without regard to the nature or degree of control exercised.

C. *Rise of the Doctrine*

Hewlett v. Ragsdale[33] was the first case to squarely recognize the parental immunity doctrine. A mother maliciously committed her daughter to an insane asylum. The Mississippi Supreme Court refused to allow the daughter to recover in damages, citing the desire to preserve domestic harmony.[34] In 1903, *McKelvey v. McKelvey*[35] held that a minor child could not sue her stepmother or father for damages resulting from brutal punishment inflicted by the stepmother with the father's consent. In 1905, the doctrine was carried to an absurd extreme in *Roller v. Roller*,[36] a suit by a daughter against her father for damages arising out of a rape. He had already been convicted and sent to prison. The Washington Supreme Court held that the raped daughter could not sue, for to allow suit would fly against the interest that society has in preserving harmony in domestic relations, an interest "inspired by the universally recognized fact that the maintenance of . . . proper family relations is conducive to good citizenship, and therefore works to the welfare of the state."[37] The court relied on three additional public policy arguments: (1) the possibility that, were the prevailing minor to die before majority, the wrongdoing parent would succeed to the sum recovered, (2) the depletion of family financial resources, and (3) an analogy between parent-child suits and the interspousal immunity doctrine.[38] For thirty years after *Hewlett, McKelvey* and *Roller,* courts recognizing the doctrine outnumbered those disapproving it[39] despite

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[33]68 Miss. 703, *reported sub nom.* Hewelette v. George, 9 So. 885 (1891).

[34]*Id.* at 711, 9 So. at 887.

[35]111 Tenn. 388, 77 S.W. 664 (1903).

[36]37 Wash. 242, 79 P. 788 (1905).

[37]*Id.* at 244, 79 P. at 788.

[38]*Id.* at 245, 79 P. at 789.

[39]Only one case held that an unemancipated child could sue his parent for a personal tort. Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930). The remainder denied the child's right to sue. *See, e.g.*, Owens v. Automobile Mut. Indem. Co., 235 Ala. 9, 177 So. 133 (1937); Rambo v. Rambo, 195 Ark. 832, 114 S.W.2d 468 (1938); Trudell v. Leatherby, 212 Cal. 678, 300 P. 7 (1931); Mesite v. Kirchstein, 109 Conn. 77, 145 A. 753 (1929); Chastain v. Chastain, 50 Ga. App. 241, 177 S.E. 828 (1934); Meece v. Holland Furnace Co., 269 Ill. App. 164 (1933); Lund v. Olson, 183 Minn. 515, 237 N.W. 188 (1931); Cook v. Cook, 232 Mo. App. 994, 124 S.W.2d 675 (1939); Stacey v. Fidelity & Cas. Co., 114 Ohio St. 633, 151 N.E. 718 (1926); Krohngold v. Krohngold, 181 N.E. 910 (Ohio Ct. App. 1932); Canen v.

the persistent efforts of dissenting judges[40] and legal scholars.[41] Today, more courts retain the doctrine than reject it.[42]

Additional reasons have been developed in the approving cases in a seemingly vainglorious attempt to shore up the defective origins of the rule while avoiding results similar to the incredible *Roller* case.[43] These reasons have been (1) the position of the family as a quasi-governing unit and the analogy of parental discipline to judicial powers, (2) the danger of fraudulent, collusive or trivial claims, (3) the interference with parental discretion and control, and (4) the prevention of stale claims by adult children alleging torts committed during their minority.

II. Public Policies Supporting Immunity

Possibly the oldest of reasons advancing the parental immunity doctrine is the notion that a family is a quasi-governmental unit. At Roman law, a father had absolute power over the very lives of his children, though such power was tempered by the maxim, "[p]atria potestas in pietate debet, non in atrocitate, consistere."[44] The common law moved away from the Roman concept towards the concept that children are too protected by the law, even from their parents. In the spirit of the common law movement from status to contract, *Lander v. Seaver*[45] noted

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Kraft, 41 Ohio App. 120, 180 N.E. 277 (1931); York Trust Co. v. Blum, 22 Pa. D. & C. 313 (1935); Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927).

[40]Small v. Morrison, 185 N.C. 577, 582, 118 S.E. 12, 17 (1923) (Clark, C.J., dissenting).

[41]McCurdy, *Torts Between Persons in Domestic Relations*, 43 Harv. L. Rev. 1030, 1056 (1930).

[42]Since 1963, fifteen states have rejected the immunity doctrine using various formulations. Xaphes v. Mossey, 224 F. Supp. 578 (D. Vt. 1963); Hebel v. Hebel, 435 P.2d 8 (Alas. 1967); Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970); Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); Petersen v. Honolulu, 51 Hawaii 484, 462 P.2d 1007 (1969); Rigdon v. Rigdon, 465 S.W.2d 921 (Ky. Ct. App. 1971); Plumley v. Klein, 388 Mich. 1, 199 N.W.2d 169 (1972) (dicta—abrogation not necessary to result); Silesky v. Kelman, 281 Minn. 431, 161 N.W.2d 631 (1968); Nuelle v. Wells, 154 N.W.2d 364 (N.D. 1967); Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966); France v. A.P.A. Transport Corp., 56 N.J. 500, 267 A.2d 490 (1970); Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969); Falco v. Pados, 444 Pa. 372, 282 A.2d 351 (1971); Smith v. Kauffman, 212 Va. 181, 183 S.E.2d 190 (1971) (limited to automobile accidents); Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963). The doctrine is either recognized in all other states, or it has never arisen in a reported case.

[43]37 Wash. 242, 79 P. 788 (1905).

[44]Paternal power should consist [or be exercised] in affection, not in atrocity. Black's Law Dictionary 1283 (4th rev. ed. 1968).

[45]32 Vt. 114 (1859).

the difference between the ancient and modern views in a discussion of a schoolmaster in loco parentis.

> We think the schoolmaster does not belong to the class of public officers vested with . . . judicial . . . powers. He is included rather in the domestic relation of master and servant . . . . In some sense he may be said to act by public authority, but we do not find him spoken of anywhere as acting in a judicial capacity . . . .[46]

If those standing in loco parentis are not clothed with judicial powers in matters of discipline, then natural parents can hardly be said to have such power, especially in view of the close parallels between those in loco parentis and parents. Absent some method whereby parents are granted judicial powers, the family cannot be considered a quasi-governing unit. It is significant to note that this argument has been advanced only once, in *Matarese v. Matarese*,[47] and has not been heard from again.

The second reason advanced in support of the doctrine draws an analogy between interspousal immunity and parental immunity. *McKelvey v. McKelvey*[48] first sought out the analogy by comparing a husband's duty to protect and maintain his wife[49] with a father's duty to protect and maintain his children.[50] The interspousal immunity doctrine was founded, however, upon the common law identity of husband and wife as a single legal entity. No such merger has ever been the basis of parent-child relations. Moreover, most states have enacted married women's statutes which militate against an absolute merger of identity and the concomitant incapacity to act independently of the husband.[51] Finally, the interspousal immunity doctrine is under attack and has been abrogated in many states, including Indiana.[52] The analogy is, therefore, based upon the slimmest of superficialities and is fundamentally unsound.

The danger of fraudulent, collusive or trivial claims is the third reason put forth in defense of the doctrine. The rationale is best stated in *Hastings v. Hastings*,[53] which reasoned that the

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[46]*Id.* at 121.

[47]47 R.I. 131, 131 A. 198 (1925). Another case mentioned the family *qua* government argument but professed no faith in it. Cannon v. Cannon, 287 N.Y. 425, 40 N.E.2d 236 (1942).

[48]111 Tenn. 388, 77 S.W. 664 (1903).

[49]*Id.* at 391, 77 S.W. at 665.

[50]*Id.* This duty has been long recognized in the law, violation of which can give rise to criminal prosecution. *See* Eaglen v. State, 249 Ind. 144, 231 N.E.2d 147 (1967).

[51]H. CLARK, LAW OF DOMESTIC RELATIONS § 7.2, at 222 & n.4 (1968).

[52]Brooks v. Robinson, 284 N.E.2d 794 (Ind. 1972).

[53]33 N.J. 247, 163 A.2d 147 (1960).

decision for the child to sue will be determined within the family circle, with the defendant-parent's participation, thus making the risk of collusion very great indeed. There are at least six reasons, however, why this rationale is unsound. Trial courts have at their command effective means to detect and expose fraud and collusion. Cross-examination, pretrial discovery and arguments before the jury are available to any party of interest who feels fraud exists.[54] Insurance carriers are likewise protected by the typical condition in a policy requiring cooperation between the insurer and the insured parent.[55] Lawyers are not apt "to encourage litigation which has no merit, particularly where the customary fee arrangement is a contingent one."[56] The relation of parent and child goes only to the credibility of the parties, not to the nature of the action itself. To bar suits on the basis of prospective fraud and collusion is tantamount to a presumption of fraud which cuts across an entire class of cases,[57] despite the absence of such a presumption in parent-child suits involving property or contracts. Finally, the existence of fraud or collusion is predicated upon an assumed cooperation between parent and child. Aside from the fact that there may be precious little cooperation, this rationale contradicts another reason for the immunity doctrine—the disruption of family unity. Despite the incompatibility of these separate rationales, they continue to be used together.[58]

A fourth basis which has been recognized for the doctrine is that successful suits of this kind will deplete the family finances; one child's recovery is another child's loss. It is contended that the public policy should encourage the equal application of family resources for the benefit of all.[59] Critics have focused upon the fact that no child has a "legally recognized claim to . . . the parent's property or even to equality of treatment."[60] There is no assurance that granting or denying the right of recovery will

[54]*See generally* 32 ATL. L.J. 277, 281 (1968).

[55]*Id.*

[56]Balts v. Balts, 273 Minn. 419, 430, 142 N.W.2d 66, 73 (1966).

[57]*Cf.* Midkiff v. Midkiff, 201 Va. 829, 833, 113 S.E.2d 875, 878 (1960).

[58]*See* Barlow v. Iblings, 261 Iowa 713, 156 N.W.2d 105 (1968).

[59]Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905). *See also* Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923).

[60]McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1073 (1930), *citing* Rice v. Andrews, 127 Misc. 826, 217 N.Y.S. 528 (Sup. Ct. 1926). *See also* Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952). Chief Judge Peaslee, in Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930), rejected the "family exchequer" argument by reasoning that this argument "ignores the parent's power to distribute his favors as he will, and leaves out of the picture the depletion of the child's assets of health and strength through the injury." *Id.* at 361, 150 A. at 909.

in any way affect the manner in which family resources are allocated for the benefit of other children. At most this desire to protect the family exchequer is relevant to the potential of even-handed allocation of resources, a potential whose realization is entirely speculative.

Four other criticisms of the family finances rationale are noted here. When the recovering child is the only family member other than the paying parent, or when the child recovers jointly with all family members from the parent responsible for the tort, the application of the doctrine is specious. When the parent's liability will be covered by an insurance policy, there is no change in total family resources save the premiums, an obligation not affected by the suit. The protection of family resources has little to do with a parent's liability toward third persons for torts. Courts have never recognized this rationale in cases involving children recovering from parents in matters not sounding in tort.

The fifth reason for the doctrine is the possibility that the parent will succeed to the child's estate, if the child dies during minority, including the judgment the child received from the parent by reason of the tort. The underlying principle is that no one should be allowed to profit from his own wrongs.[61] If inheritance by the parents is to be discouraged, there is no reason why such a policy should not be evenly applied. Husbands should not be allowed to recover from their wives if, upon the husband's death, the wife can collect at least her forced heir share. Parents should not be allowed to sue adult children who have no prospective heirs save the parents. Obviously this rationale is not so applied. This raises the question of whether courts are actually committed to this reason or whether the reason is merely used as fatuous bolstering of an otherwise shaky doctrine.

Other criticisms can be based upon circumstances where the child's recovery does not, at death during minority, pass to the defendant-parent. The common themes of these criticisms would be that there are many situations in which a parent could not inherit sums recovered by the child as a matter of law, and the possibility of succession can be circumvented in many ways, and is in any case so remote, that the reasons for abrogating the doctrine outweigh this rationale as a matter of public policy.

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[61] *See* Hartfield v. Roper & Newell, 21 Wend. 615, 620, 13 N.Y. Com. L. Rep. 1209, 1211 (Sup. Ct. 1839). It is interesting to note that this precept can be used on both sides of the immunity issue. The sums for which the parent might otherwise be liable, but for the immunity, could be considered his profit for the wrong. Denying the child's right to bring suit amounts to a judicial sanction of that profit.

Still another reason given for the doctrine is the prevention of stale claims by minors upon reaching majority.[62] Courts would have difficulty separating fanciful from real claims. To the extent that stale claims are disapproved due to the possibility of fraud, the criticisms are the same as those for the fraud rationale. To the extent they are disapproved because of difficulty or failure of proof, owing to the passage of time, there are several criticisms. First, problems of proof in tort actions should at least be ascertained on a case-by-case basis, not presumed for the entire class. Secondly, courts are quite capable of rendering judgments based on acts occurring many years prior to trial, as in suits based on adverse possession or multi-year contracts. Thirdly, suits by adult children against their parents based on acts committed during minority are permitted when concerned with property or contracts. Most states recognize this by enacting statutes which toll the statute of limitations for minors until they reach majority. If the legislatures could not face delayed suits, they would not have passed such laws.[63]

By far the most frequently cited rationale for the doctrine is that to allow children to sue their parents would disturb domestic tranquility.[64] Courts have not confined themselves to a single expression of this rationale. Some have emphasized the effect adversary proceedings have on family unity[65] while others note the disruption wrought by the mechanics of suit.[66] Commentators and judges have criticized this rationale on many levels. One noted scholar points out the absence of such a rationale in suits involving property or contracts.[67] Others have mentioned the inconsistency of this argument with the fraud rationale. When parents are indemnified against loss by an insurance policy, whatever disruption may occur would be minimal and wholly tolerable under public policy. The facts of the case may indicate that no family unity ever existed, or that it has been destroyed by the tort, as in *Roller v. Roller*.[68] Perhaps the most irrefutable attack on this argument would be that the redress of a child's just claim should contribute far more to immediate and continued family peace than would a doctrine which summarily deprives the child of a remedy for what is admittedly a wrong.

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[62]Small v. Morrison, 185 N.C. 577, 580, 118 S.E. 12, 14 (1923), *citing* J. SCHOULER, DOMESTIC RELATIONS § 691 (6th ed. 1921).

[63]*See, e.g.*, IND. CODE § 34-1-2-5 (Burns 1973).

[64]*See, e.g.*, cases cited note 39 *supra.*

[65]Mesite v. Kirchstein, 109 Conn. 77, 84, 145 A. 753, 755 (1929).

[66]Luster v. Luster, 299 Mass. 480, 482, 13 N.E.2d 438, 439 (1938).

[67]McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1075 (1930).

[68]37 Wash. 242, 79 P. 788 (1905).

Whatever force the family unity argument has is left at the doorstep of particular circumstances and common sense. It is absurd to suppose that in all cases family unity will be lost. Recovery under wrongful death statutes, conviction of the parent for a crime against the minor child, and indemnification by insurance unassailably militate against the blanket application of the domestic harmony rationale. Even limiting its use to individual cases, however, does not go far enough. It is common knowledge that "some of the most acrimonious family disputes have arisen in respect to property."[69] To allow the greater disruption of some actions while denying tort suits, arguably resulting in less disruption, cannot be tolerated by the judicial conscience. One writer has gone so far as to say that "[t]his paradox of permitting suits affecting property and contracts, but denying actions for personal torts must be acceptable only to those with a large tolerance for whimsy and a spacious indifference to justice."[70]

The final reason advanced in support of the doctrine is that to permit suit will interfere with parental discipline, authority and control. In *Small v. Morrison*,[71] it is stated that "[n]o greater disservice could be rendered to any child than to teach its feet to stray from the path of rectitude, or to suffer its mind to be poisoned by ideas of disloyalty and dishonor."[72] The law has always recognized that not all parental conduct is subject to judicial review.[73] The parent's right to administer reasonable chastisement has been consistently protected even though such conduct might otherwise have constituted a technical assault.[74] As noted in *Cowgill v. Boock*,[75] "parental non-liability is not granted as a reward, but as a means of enabling the parents to discharge the duties which society exacts."[76]

The court in *Borst v. Borst*[77] noted the limits of this argument by recognizing that when the tort has nothing to do with

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[69]McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1075 (1930).

[70]30 NACCA L.J. 133, 137-38 (1964).

[71]185 N.C. 577, 118 S.E. 12 (1923).

[72]*Id.* at 581, 118 S.E. at 15.

[73]*See, e.g.*, Manners v. State, 210 Ind. 648, 5 N.E.2d 300 (1936). *See generally* W. PROSSER, THE LAW OF TORTS § 27, at 136 (4th ed. 1971).

[74]*Cf.* Hornbeck v. State, 16 Ind. App. 484, 45 N.E. 620 (1896).

[75]189 Ore. 282, 218 P.2d 445 (1950) (Rossman, J., specially concurring).

[76]*Id.* at 307, 218 P.2d at 455.

[77]41 Wash. 2d 642, 251 P.2d 149 (1952). Chief Judge Peaslee, in Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930), would have gone further. He stated, with perhaps more emotion than logic, "[i]t smacks of the abandoned notion that ignorance and blind obedience of the servient class is necessary to their proper control." *Id.* at 361, 150 A. at 910.

an exercise of parental authority the rationale is meaningless. When the tort is related to parental authority, it should not be protected if it involves excesses of parental discipline ranging from the merely unreasonable to the cruel and inhuman. Some courts have interpreted this criticism as tacit support for a "parental authority" exception to the immunity doctrine.[78] This is the essence of *Goller v. White*[79] which held that the immunity should be preserved in two areas: when the negligent act involves an exercise of parental authority, and when the negligent act involves an exercise of parental discretion with regard to providing food, clothing, or other essentials for the child. Justice Sullivan, in *Gibson v. Gibson*,[80] rejected the *Goller* approach as simply replacing a broad immunity with a narrow one still subject to basic infirmities. He noted:

> [A]lthough a parent has the prerogative and the duty to exercise authority over his minor child, this prerogative must be exercised within reasonable limits . . . . [W]e think the proper test of a parent's conduct is this: what would an ordinarily reasonable and prudent *parent* have done in similar circumstances?[81]

Courts have not been insensitive to the criticisms leveled at the doctrine. Numerous exceptions have sprung up—so many that some writers feel the rule has been judicially gutted.[82] There are at least seven major exceptions to an absolute immunity rule: (1) when the personal injuries are intentionally, wilfully or wantonly inflicted on the child,[83] (2) when the conduct consists of

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[78]Rigdon v. Rigdon, 465 S.W.2d 921 (Ky. Ct. App. 1971); Plumley v. Klein, 388 Mich. 1, 199 N.W.2d 169 (1972); Silesky v. Kelman, 281 Minn. 431, 161 N.W.2d 631 (1968); Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963). Many recent cases have impliedly rejected the interpretation of these cases by holding that a minor child cannot sue his parents for negligence. Denault v. Denault, 220 So. 2d 27 (Fla. Ct. App. 1969); Rickard v. Rickard, 203 So. 2d 7 (Fla. Ct. App. 1967); Sanford v. Sanford, 15 Md. App. 390, 290 A.2d 812 (1972); Downs v. Poulin, 216 A.2d 29 (Me. 1966); Hale v. Hale, 426 P.2d 681 (Okla. 1967); Castellucci v. Castellucci, 96 R.I. 34, 188 A.2d 467 (1967); Littleton v. Jordan, 428 S.W.2d 472 (Tex. Ct. App. 1968).

[79]20 Wis. 2d 402, 122 N.W.2d 193 (1963).

[80]3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971).

[81]*Id.* at 922, 479 P.2d at 653, 92 Cal. Rptr. at 293.

[82]*See* 32 ATL. L.J. 277, 278-82 (1968).

[83]Dennis v. Walker, 284 F. Supp. 413 (D.D.C. 1968); Brown v. Cole, 198 Ark. 417, 129 S.W.2d 245 (1939); Begley v. Kohl & Madden Printing Ink Co., 157 Conn. 445, 254 A.2d 907 (1969) (dicta); Buttrum v. Buttrum, 98 Ga. App. 226, 105 S.E.2d 510 (1958); Aurora Nat'l Bank v. Anderson, 132 Ill. App. 2d 217, 268 N.E.2d 552 (1971); Treschman v. Treschman, 28 Ind. App. 206, 61 N.E. 961 (1901); Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951); Pullen v. Novak, 169 Neb. 211, 99 N.W.2d 16 (1959); Chaffin v. Chaffin, 239 Ore. 374, 397 P.2d 771 (1964); Felderhoff v. Felderhoff, 473

varying degrees of negligence,[84] (3) when either the parent or child dies and suit is brought under various representation statutes,[85] (4) when the child is injured as a result of a business, rather than a personal, activity of the parent,[86] (5) when the parent's tortious acts are imputed to his employer who is sued by the child,[87] (6) when there is a de facto or de jure emancipation of the child,[88] and (7) when the child brings suit as the representative of a deceased parent against another parent or his estate.[89]

A sizable number of courts have declined to follow the lead of states carving out exceptions to the doctrine; they have explicitly abrogated the doctrine in whole or in part. Since 1963, fifteen states have chosen this path.[90] Yet, even those states which have abrogated the doctrine have done so only because they could not rationally support any of the eight reasons for the doctrine discussed above. Little attention has been paid to the development of reasons that the abrogation of the doctrine is per se desirable.

S.W.2d 928 (Tex. 1971) (dicta); DeLay v. DeLay, 54 Wash. 2d 63, 337 P.2d 1057 (1959) (dicta). *But see* Owens v. Automobile Mut. Indem. Co., 235 Ala. 9, 177 So. 133 (1937); Chastain v. Chastain, 50 Ga. App. 241, 177 S.E. 828 (1934); Smith v. Smith, 81 Ind. App. 566, 142 N.E. 128 (1924); Rowe v. Rugg, 117 Iowa 606, 91 N.W. 903 (1902); Cook v. Cook, 232 Mo. App. 994, 124 S.W.2d 675 (1939); Teramano v. Teramano, 6 Ohio St. 2d 117, 216 N.E.2d 375 (1966); Maxey v. Sauls, 242 S.C. 247, 130 S.E.2d 570 (1963).

[84]Buttrum v. Buttrum, 98 Ga. App. 226, 105 S.E.2d 510 (1958) (dicta); Nudd v. Matsoukas, 7 Ill. 2d 608, 131 N.E.2d 525 (1956); Cowgill v. Boock, 189 Ore. 282, 218 P.2d 445 (1950); Hoffman v. Tracy, 67 Wash. 2d 31, 406 P.2d 323 (1965). *But cf.* Stevens v. Murphy, 69 Wash. 2d 939, 421 P.2d 668 (1966).

[85]*Compare* Harlan Nat'l Bank v. Gross, 346 S.W.2d 482 (Ky. Ct. App. 1961), *with* Fowler v. Fowler, 242 S.C. 252, 130 S.E.2d 568 (1963), *and* Hale v. Hale, 312 Ky. 867, 230 S.W.2d 610 (1950).

[86]Trevarton v. Trevarton, 151 Colo. 418, 378 P.2d 640 (1963); Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930); Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952); Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952); Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932).

[87]Mi-Lady Cleaners v. McDaniel, 235 Ala. 469, 179 So. 908 (1938); Chase v. New Haven Waste Material Corp., 111 Conn. 377, 150 A. 107 (1930). *But cf.* Foy v. Foy Elec. Co., 231 N.C. 161, 56 S.E.2d 418 (1949); Sherby v. Weather Bros. Transfer Co., 421 F.2d 1243 (4th Cir. 1970) (applying Maryland law); Meece v. Holland Furnace Co., 269 Ill. App. 164 (1933); Smith v. Henson, 214 Tenn. 541, 381 S.W.2d 892 (1964).

[88]Shea v. Pettee, 19 Conn. Supp. 125, 110 A.2d 492 (1954); Skillin v. Skillin, 130 Me. 223, 154 A. 570 (1931).

[89]Johnson v. Ottomeier, 45 Wash. 2d 419, 275 P.2d 723 (1954). *Cf.* Union Bank & Trust Co. v. First Nat'l Bank, 362 F.2d 311 (5th Cir. 1966) (applying Georgia law). *See also* Brennecke v. Kilpatrick, 336 S.W.2d 68 (Mo. 1960).

[90]*See* cases cited note 42 *supra.*

There are numerous expressions of affirmative public policy which can be utilized by counsel and courts in examining the doctrine.

III. Public Policies Supporting Abrogation

It is not enough for courts to take note of the familiar maxim that when the reasons for the rule cease, so should the rule. There should be a parallel maxim that when the reasons against the rule are paramount, the rule should cease. There are nine reasons which oppose the effect of the parental immunity doctrine and, taken together, are indeed paramount. They are (1) the policy of the common law, (2) the absence of legislative barriers to abrogation, (3) the idea that no one should be allowed to benefit from his own wrong, (4) the spirit of our legal system, (5) the letter and spirit of the Indiana Constitution, (6) the inadequacy of other remedies, (7) the effect of liability insurance on the doctrine, (8) the prevalence of child abuse and society's interest in its elimination, and (9) the public policy favoring children.

As noted above, the conclusions of early American courts, that the doctrine was the product of the common law, were in error. Writers have generally conceded that there was no common law rule one way or the other. In view of some early cases and statutes which reveal an intent to protect minors, however, it does no violence to common law to conclude that, if any rule existed, its policy was to permit children to sue their parents and to remove obstacles to such suits. Since Indiana has adopted the common law and the legislature has not spoken to the doctrine, the conclusion is possible that *Smith v. Smith*[91] was in error and contrary to common law.[92]

Assuming that there was no time-honored rule, the doctrine is traceable to *Hewlett v. Ragsdale*[93] and is common law of recent vintage. The notion that a judicially created rule of common law can be judicially destroyed was most recently reiterated in *Brooks v. Robinson.*[94] Justice Hunter spoke to this concept by saying that "this Court should not hesitate to alter, amend, or abrogate the common law when society's needs so dictate."[95]

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[91]81 Ind. App. 566, 142 N.E. 128 (1924).

[92]The effect of concluding that if such a common law rule existed it permitted suit by minors is important to future Indiana decisions. The common law is in effect in this state except where modified or abrogated by statute, Phillips v. Tribbey, 82 Ind. App. 68, 141 N.E. 262 (1923), or by judicial decree, as in Brooks v. Robinson, 284 N.E.2d 794 (Ind. 1972) and Campbell v. State, 284 N.E.2d 733 (Ind. 1972).

[93]68 Miss. 703, *reported sub nom.* Hewelette v. George, 9 So. 885 (1891).

[94]284 N.E.2d 794 (Ind. 1972).

[95]*Id.* at 797.

Abrogation of the doctrine is consistent with the letter and spirit of the Indiana Constitution, which states: "All courts shall be open; and every man, for injury done to him . . . shall have remedy by due course of law."[96] This spirit has pervaded our legal system from the earliest times. Magna Carta contains similar language: "To no one will we sell, to no one will we refuse or delay, right or justice."[97] Since denying a minor child the right of recovery against his parents for torts which would be actionable, were they strangers, amounts to a denial of substantive justice to the child and permits the parent to benefit from his own wrong, courts upholding the doctrine are impliedly ignoring a precept of our law which has been constantly reaffirmed over the last seven hundred years.

Consistent with this spirit is the idea that one should not only have a remedy for a wrong done to him, but also that the remedy should be adequate. Some courts have brazenly intimated that criminal processes against the parent are sufficient remedy for the child.[98] *Treschman v. Treschman*[99] rightly challenged this supposition by stating that it is manifestly unfair to say that criminal prosecution is sufficient to correct parental abuses. Although such protection is prospective, "the criminal sanctions which the State has imposed leaves [*sic*] the clear and palpable injustice to the individual child still unredressed."[100] The only remedy for the child which would resolve this "palpable injustice" is the right to maintain the tort action against the parent. It is therefore a matter of affirmative public policy that minor children be allowed to recover when the merits so warrant.

It cannot be disputed that the essence of law is reality. When law and fact collide, the law should give way. The prevalence of liability insurance is just such a reality. Its existence undercuts the vitality of the doctrine by removing its prime justifications. There would be no disruption of domestic harmony, no diminution of family finances, less chance that fraud or collusion will go undetected, and less likelihood that parental authority will be undermined. There are, moreover, affirmative features to insurance. Its aim is the transference of a risk from specified types of losses.[101] When loss is not covered by insurance, both the in-

[96]IND. CONST. art. 1, § 12.

[97]MAGNA CARTA § 40 (1215).

[98]*See, e.g.*, Smith v. Smith, 81 Ind. App. 566, 572, 142 N.E. 128, 132 (1924). Another court suggested that the natural affections of the family are a sufficient remedy for the injured child. Brown v. Cole, 198 Ark. 417, 129 S.W.2d 245 (1939).

[99]28 Ind. App. 206, 61 N.E. 961 (1901).

[100]*Id.* at 208, 61 N.E. at 962.

[101]G. COUCH, COUCH ON INSURANCE § 2, at 3 (1929).

jured and the liable parties may become so destitute as to become burdens on the public charge. Avoiding the extreme effects of uninsured loss is a major goal of state promotion of insurance by its laws.

Recognizing the beneficial effect liability insurance has on the public welfare, courts have no reason to cast a jaundiced eye on the child. They should rather continue the policy of promoting insurance by allowing minor children to sue their parents for personal torts. Parents would be encouraged to purchase liability insurance to cover their children and insurance companies would be prompted to provide the coverage. Courts would be advancing the public policy of protecting children from personal loss.

Another reality the law cannot ignore is the increase of child abuse in our society.[102] It is surely a matter of public policy to reduce the incidence of child abuse, to protect the helpless child, and to castigate erring parents. But the public policy goes further. Generally speaking, people who engage in violence tend to have been the victims of violence when they were children.[103] If a person who has been abused in childhood becomes a parent, the likelihood of a repetition of abusive practices is great.[104] Thus, the rewards of a public policy which unmistakably discourages child abuse are to be found not only in the health and well-being of today's children, but also in the welfare of future generations. If approval of the immunity doctrine can logically be used to protect parents who abuse their children, as was demonstrated in *McKelvey v. McKelvey*[105] and *Roller v. Roller*,[106] then the abrogation of the doctrine must be considered another tool in furtherance of an affirmative public policy of eliminating child abuse altogether.

The most potent public policy affirmatively supporting abrogation is the interest society has in keeping a child's physical and mental well-being, and consequent earning power, unimpaired throughout life.[107] When the child is injured by the parent, how

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[102]D. BAKEN, SLAUGHTER OF THE INNOCENTS 4-5 (1971).

[103]Duncan, Frazier, Litin, Johnson & Barron, *Etiological Factors in First-Degree Murder*, 168 J.A.M.A. 1755, 1755-58 (1958).

[104]D. BAKEN, SLAUGHTER OF THE INNOCENTS 114 (1971). *See also* Nurse, *Familial Patterns of Parents Who Abuse Their Children*, 35 SMITH COLLEGE STUDIES IN SOCIAL WORK 11-25 (1964); Thomas, *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C.L. REV. 293 (1972).

[105]111 Tenn. 388, 77 S.W. 664 (1903).

[106]37 Wash. 242, 79 P. 788 (1905).

[107]McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1073 (1930); McCurdy, *Torts Between Parent and Child*, 5 VILL. L. REV. 521 (1960).

else can society guarantee recompense to the child save by permitting suit on the tort? Our commitment to children would be meager indeed if we rely exclusively on the largesse of the negligent or violent parent to provide for the child, a matter almost wholly within parental discretion. The judicial system provides the most efficient structure whereby society's interests in the future of children can be given the full expression it deserves. And, the judicial system can be used only if the doctrine is abrogated.

IV. Conclusions

When Indiana courts are again faced with the parental immunity doctrine, as they will be,[108] given the encouragement of *Brooks v. Robinson*[109] and *Campbell v. State*[110] and the results of cases like *Hollowell v. Greenfield*,[111] judges will find the area has changed much since they last considered the question in 1924.[112] They will find a variety of reasons upon which the doctrine has been upheld here and elsewhere, dozens of reasons used by other judges and writers to mercilessly attack those reasons, a number of exceptions to the doctrine, and numerous reasons why there should be no doctrine at all. There is little question that the immunity cannot stand—the only question remaining will be how much of the rule must fall. The options are varied: (1) courts can distinguish between negligent and intentional, wilful or wanton torts, (2) courts can partially abrogate the doctrine, (3) courts can hold the parent's conduct against a standard of reasonable-

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[108]On September 18, 1974, the Indiana Court of Appeals ruled, in Vaughan v. Vaughan, 316 N.E.2d 455 (Ind. Ct. App. 1974), that Smith v. Smith, 81 Ind. App. 566, 142 N.E. 128 (1924), retains its judicial vitality. A young boy was injured by a falling tombstone while visiting a cemetery with his parents. The child sued his parents, by his grandfather, for negligent supervision. The trial court sustained a motion to dismiss, citing the immunity doctrine. The overruled motion to correct errors, on appeal, attacked the doctrine.

While the court conceded that Brooks v. Robinson, 284 N.E.2d 794 (Ind. 1972), tends to militate against the fraud, collusion, and trivial litigation rationale of the doctrine, this and other cases cited therein were not held to be support for the proposition that the remaining rationales are defective, in the manner herein noted. On transfer, the doctrine should be placed squarely before the Indiana Supreme Court.

[109]284 N.E.2d 794 (Ind. 1972).

[110]284 N.E.2d 733 (Ind. 1972).

[111]142 Ind. App. 344, 216 N.E.2d 537 (1966). Indiana tacitly recognized one of the exceptions to the immunity doctrine by allowing a minor child to sue his father's employer for his father's negligence.

[112]Smith v. Smith, 81 Ind. App. 566, 142 N.E. 128 (1924).

ness when related to an exercise of parental authority, or (4) courts can abrogate the doctrine in its entirety.

The only logical choices are the latter two. Only these are compatible with affirmative public policy as it concerns the relations of parent and child in our society. Of the two, the former is superior—the approach taken by *Gibson v. Gibson.*[113] Total abrogation inevitably would result in treating parents and children as if they were strangers; it fails to recognize that certain rights and responsibilities accrue to the parent-child relation. The standard of reasonableness announced in *Gibson* balances the rights of a child in seeking a remedy with the rights of a parent in maintaining basic authority over the child. In this way, society's interest in maintaining the legal identity of the family unit can be preserved while still allowing minor children to sue their parents for personal torts.

BRIAN J. FAHEY

[113] 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971).