

Winter 1995

## Rock-A-Bye Lawsuit: Can a Baby Sue the Hand That Rocked the Cradle, 28 J. Marshall L. Rev. 429 (1995)

Geoffrey A. Vance

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Civil Law Commons](#), [Common Law Commons](#), [Family Law Commons](#), [Juvenile Law Commons](#), [Legal History Commons](#), [Legislation Commons](#), [Litigation Commons](#), [State and Local Government Law Commons](#), and the [Torts Commons](#)

---

### Recommended Citation

Geoffrey A. Vance, Rock-A-Bye Lawsuit: Can a Baby Sue the Hand That Rocked the Cradle, 28 J. Marshall L. Rev. 429 (1995)

<https://repository.law.uic.edu/lawreview/vol28/iss2/10>

This Comments is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact [repository@jmls.edu](mailto:repository@jmls.edu).

# ROCK-A-BYE LAWSUIT: CAN A BABY SUE THE HAND THAT ROCKED THE CRADLE?

## INTRODUCTION

In its original state, the parental tort immunity doctrine protected parents from liability for acts that resulted in injury to their child.<sup>1</sup> A child thus could not sue a parent for any tortious act, intentional or negligent.<sup>2</sup> However, since its adoption, the doctrine has undergone significant changes.<sup>3</sup>

While almost all states now allow children to sue a parent for any intentional tort,<sup>4</sup> states have greatly varied in their approach to immunity in negligence actions.<sup>5</sup> Ambiguous definitions of immune conduct have resulted in inconsistent application of the doctrine. Consequently, the doctrine has led to inequitable re-

---

1. David L. Grobart, Comment, *Parent-Child Tort Immunity in Illinois*, 17 LOY. U. CHI. L.J. 303, 320 (1986). It is important to note that the immunity doctrine is also termed the "parent-child immunity doctrine." This doctrine precludes any tort action by a child against a parent or a parent against a child. This Note concentrates on tort actions brought by a child only and does not address tort actions brought by the parent.

The word "child" in this Note refers to a person under 18 years of age who is unemancipated.

Complete emancipation . . . removes the bar to actions between parent and child for personal torts . . . Complete emancipation occurs by act of the parent when he surrenders all right to the services and earning of the child, as well as the right to the custody and control of his person . . . Complete emancipation arises by operation of law irrespective of the parent's consent when a child marries, . . . when the child becomes twenty-one years old, . . . [or] when the parent abandons or fails to support the child . . .

Gilliken v. Burbage, 139 S.E.2d 753, 757-58 (N.C. 1965).

Moreover, the term "injury" specifically refers to physical injuries, not emotional or psychological injuries.

2. See *Meece v. Holland Furnace Co.*, 269 Ill. App. 164, 169 (Ill. App. Ct. 1933) (stating "[i]t is a rule of common law that a child cannot sue his father in tort unless a right of action is authorized by statute").

3. Martin J. Rooney & Colleen M. Rooney, *Parental Tort Immunity: Spare The Liability, Spoil The Parent*, 25 NEW ENG. L. REV. 1161, 1166 (1991). "No uniform rule now exists within the United States on the issue of parental tort immunity." *Id.*

4. See, e.g., *Nudd v. Matsoukas*, 131 N.E.2d 525, 531 (Ill. 1956). "While this policy might be such justification to prevent suits for mere negligence within the scope of the parental relationship we do not conceive that public policy should prevent a minor from obtaining redress for wilful and wanton misconduct on the part of a parent." *Id.*

5. Rooney & Rooney, *supra* note 3, at 1166.

suits, often protecting undeserving parents and simultaneously leaving deserving and injured children-victims without a remedy. Moreover, these problems are adversely affecting several other types of suits. Simply put, parental tort immunity, in any form, is unjustifiable in present day American jurisprudence, due to inequitable and inconsistent results.

Accordingly, this Note critically analyzes the parental tort immunity doctrine, and specifically addresses its most recent effect in Illinois. Further, this Note concludes that states should abolish the parental tort immunity doctrine and determine liability using the modern-day "reasonableness" standard. Part I of this Note explains the introduction of the doctrine into the American courts and describes Illinois' current approach to parental immunity. Part II illustrates problems inherent to the immunity doctrine, specifically recognizing Illinois' recent decision of *Cates v. Cates*<sup>6</sup> as illustrative of these problems. Part II also analyzes current legislative and judicial substitutes employed by other states to address parental tort immunity. Finally, Part III concludes with recommendations for a model statute, as well as a proposal that states, like Illinois, adopt a pattern jury instruction invoking the standard of reasonableness as a replacement to parental immunity.

## I. PARENTAL TORT IMMUNITY IN AMERICAN JURISPRUDENCE

The idea of parental immunity dates back to the Roman empire.<sup>7</sup> However, it was not until 1891 that the American judicial system adopted the parental tort immunity doctrine.<sup>8</sup> In response to increased children's rights, American courts developed a doctrine which bars children from suing their parents.<sup>9</sup> Initially following its creation, a large majority of states instantly adopted the doctrine.<sup>10</sup> However, states have subsequently split into four groups in the application of the doctrine. Therefore, this section first explains the introduction of parental tort immunity into the American judicial system. This section then explains the four approaches taken by different states regarding negligent torts. Lastly, this section specifically addresses Illinois' approach to parental

---

6. *Cates v. Cates*, 619 N.E.2d 715 (Ill. 1993).

7. Gail D. Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, 50 *FORDHAM L. REV.* 489, 490 (1982).

8. *Hewellette v. George*, 9 So. 885, 885-86 (Miss. 1891). In *Hewellette*, a parent had her child committed to an insane asylum without just reason to do so. *Id.* The child later brought a claim against her mother for false imprisonment. *Id.* The Mississippi Supreme Court barred the claim under parental tort immunity. *Id.* at 887.

9. *Id.* at 887. (recognizing the creation of parental tort immunity doctrine).

10. Rooney & Rooney, *supra* note 3, at 1162-63. See *infra* notes 33-34 and accompanying text for a list of the states that continue to recognize the doctrine.

tort immunity in negligence actions.

A. *The Introduction Of Parental Tort Immunity Into American Courts*

Prior to 1891, the doctrine of parental tort immunity did not exist in American jurisprudence.<sup>11</sup> In early Roman law, a child was a member of a single family unit.<sup>12</sup> The head of the family unit, usually the eldest male, had the responsibility of authority and discipline over the family.<sup>13</sup> Because of the broad discretion for authority allowed to the family head, he was not liable for any injuries that resulted.<sup>14</sup> Further, since children could not legally hold title to property or money, any compensatory damages awarded to the child would necessarily revert back to that very family head, the tortfeasor.<sup>15</sup>

As English common law developed, children's rights expanded.<sup>16</sup> Children acquired the rights of owning property and maintaining causes of actions for a variety of torts.<sup>17</sup> However, there is no record of any personal tort actions between a parent and a child in early English law.<sup>18</sup> Moreover, no specific law barred children from suing their parents. Nonetheless, it was generally recognized that a parent had total discretion in how to discipline a child.<sup>19</sup> Accordingly, common law civil courts were reluctant to

---

11. *Cates v. Cates*, 619 N.E.2d 715, 718 (Ill. 1993).

12. See Hollister, *supra* note 7, at 490.

13. *Id.* In fact, early Roman society favored strict disciplinary techniques and severe punishments. *Id.* at 491 (citing Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 908-909 (1975)). Parental authority over children had no set limits. For example, state statutes in both Massachusetts and Connecticut during the 1600's sentenced a child 17 or over to death if he cursed, struck, or rebelled against a parent. *Id.* at 491.

14. *Id.* at 490. "[T]he head of the family . . . had nearly total power over the children in the family unit. He possessed not only the power to alienate the child, but also control over the child's life and death." *Id.*

15. *Id.*

16. Rooney & Rooney, *supra* note 3, at 1162. "At common law, a child was never considered a part of its parent's identity. Unlike a wife, a child did not suffer from a unity of legal identity with either parent. Thus the child was free to sue or be sued, in contract or tort, law or equity, in his or her own right, unlike his married mother." *Id.*

17. RESTATEMENT (SECOND) OF TORTS § 895G cmt. a (1979); Samuel Mark Pipino, Comment, *In Whose Best Interest? Exploring the Continuing Viability of the Parental Immunity Doctrine*, 53 OHIO ST. L.J. 1111, 1111 (1992); RESTATEMENT (SECOND) OF TORTS § 895G cmt. a (1979).

18. *Gibson v. Gibson*, 479 P.2d 648, 649 (Cal. 1971); William E. McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1059-60 (1930).

19. See Hollister, *supra* note 7, at 491-92. However, parents were subjected to criminal sanctions for excessive force and abuse. *Id.* (citing T. COOLEY, A TREATISE ON THE LAW OF TORTS § 123, at 259-60 (5th ed. 1930)).

interfere with the family relationship and question the parent's choices and methods of discipline.<sup>20</sup>

In 1891, the Mississippi Supreme Court became the first American court to create the immunity doctrine prohibiting a child from suing a parent for injuries.<sup>21</sup> Even though the Mississippi Supreme Court created the doctrine without any prior authority,<sup>22</sup> two courts quickly followed with similar holdings.<sup>23</sup> These three court decisions became known as the "Great Trilogy."<sup>24</sup> In justifying the complete bar from compensation, the "Great Trilogy" delineated six underlying rationales: (1) the maintenance of peace and harmony within the family unit;<sup>25</sup> (2) the

20. *Id.* at 490-91. Parents were presumed to have acted fairly and correctly and were only subject to criminal penalties if several criteria were met. Most notably, the parent must have "acted with malice or had inflicted permanent injury." *Id.* at 492. Moreover, the child must overcome the presumption of fair conduct on the part of the parent. *Id.* (citing W. TIFFANY, HANDBOOK ON THE LAW OF PERSONS AND DOMESTIC RELATIONS 264-65 (2d ed. 1909)).

Few criminal prosecutions were brought against parents for mistreating their children, but in those that were instituted, the court recognized wide parental discretion. For example, in 1837 in a case where parents had punched their child, pushed her head against the wall, switched her, tied her to the bed for two hours and hit her with cowhide, the court held that the reasonableness of the actions was a question for the jury. *Johnson v. State*, 21 Tenn. 282, 284 (Tenn. 1837). Some fifty years later the North Carolina Supreme Court held that a father who had hit his daughter 30 times with a "small limb," choked her until her tongue hung out of her mouth and threw her violently to the ground, thereby dislocating her thumb, could not be held criminally liable. *State v. Jones*, 95 N.C. 488, 491-92 (N.C. 1837) *Id.* at 492 n.26. To this day, some jurisdictions still believe that criminal prosecution is the only proper legal deterrent to parental misconduct. Pipino, *supra* note 17, at 1125 n.76.

21. See *Hewellette v. George*, 9 So. 885, 887 (Miss. 1891). A Michigan Appellate Court noted, "[t]he doctrine of parental immunity from tort actions by their . . . children seems to have been brought into the legal world in [Hewellette v. George]. . . . This case has been the parent of absurdity." *Rodebaugh v. Grand Trunk W.R.R.*, 145 N.W.2d 401, 403 (Mich. Ct. App. 1966).

22. Hollister, *supra* note 7, at 493-94.

23. *McKelvey v. McKelvey*, 77 S.W. 664 (Tenn. 1903). The Tennessee Supreme Court analogized parent-child immunity to husband-wife immunity; the community required and expected both the wife and the child to be obedient to the husband/father. *Id.* at 665. Any injury which resulted from punishment due to a child's lack of obedience did not constitute a cause of action. *Id.* at 664. The court held that a child may not maintain an action against a father for alleged cruel disciplinary punishment. *Id.* Furthermore, courts considered a suit by a child against a parent as a suit against the child's own family entity. See Pipino, *supra* note 17, at 1112.

Similarly, in *Roller v. Roller*, 79 P. 788 (Wash. 1905), a daughter brought a cause of action against her father for rape. The *Roller* court compared parent-child immunity with spousal immunity and determined that public policy conflicts with the possibility of a child suing a parent. *Id.* at 789. Thus, the court also adopted parental tort immunity. *Id.*

24. Hollister, *supra* note 7, at 494; Pipino, *supra* note 17, at 1112.

25. Pipino, *supra* note 17, at 1112 (citing *Hewellette*, 9 So. at 887); Rooney &

parent's need for broad discretion when disciplining and controlling the child;<sup>26</sup> (3) the similarity between parental immunity and the already-existing interspousal immunity;<sup>27</sup> (4) the need for protection against fraud or collusion between the parent and child;<sup>28</sup> (5) the fact that, through inheritance, a parent would ultimately procure the damages paid to the child after the child's death;<sup>29</sup> and (6) the fear that the child would ultimately suffer from the exhaustion of the family's financial resources because of the parent's litigation expenses.<sup>30</sup>

Subsequent to the "Great Trilogy," a majority of states adopted the parental immunity doctrine.<sup>31</sup> With respect to intentional

Rooney, *supra* note 3, at 1163.

26. *McKelvey*, 77 S.W. at 664.

27. *Hollister*, *supra* note 7, at 495.

Various reasons have been given [for why a wife cannot sue her husband], but the principal immediate reasons were the incapacity of a married woman to sue or be sued generally without joinder of her husband as party plaintiff or defendant and the further inability of spouses to sue, or even to have certain rights against, each other, consequent upon the concept of legal unity of husband and wife.

William McCurdy, *Torts Between Parent and Child*, 5 VILL. L. REV. 521, 521 (1960). However, the notion of spousal unity has since been abolished by several Married Women's Property Acts of various states. See William McCurdy, *Property Torts Between Spouses*, 2 VILL. L. REV. 447, 461 (1957). Intrasposal immunity was effectively abolished in Illinois through the passage of a statute. That current statute states in part: "A married woman may, in all cases, sue and be sued without joining her husband with her, to the same extent as if she were unmarried. A husband or wife may sue the other for a tort committed during the marriage." 750 ILCS 65/1 (1992). Prior to 1874, women in Illinois were only allowed to sue their husbands when the suit was necessary to protect their own property. *Brandt v. Keller*, 109 N.E.2d 729, 730-31 (Ill. 1953).

28. *Hastings v. Hastings*, 163 A.2d 147, 150 (N.J. 1960). The New Jersey Supreme Court acknowledged the danger in the possibility of fraud and collusion by stating:

[A]n action is not going to be commenced unless the family member to be sued is in effect prepared to say that he was negligent. The decision for the child to sue will be determined within the family circle and obviously the proposed defendant is going to participate in making it, quite an unorthodox situation under our basic concept of adversary litigation, to say the least. The risk of collusion is indeed a very great and human one, when the insured's own flesh and blood and the family pocketbook are concerned.

*Id.*

29. *Hollister*, *supra* note 7, at 496 (citing *Roller v. Roller*, 79 P. 788, 789 (Wash. 1905)). The court noted that parents could ultimately benefit from their own wrong. *Id.* If the child sued the parent and was awarded money damages, the parents would reacquire the money if the child predeceased them. *Id.* at 497; see also WILLIAM L. PROSSER, *THE LAW OF TORTS* § 127, at 904-05 (4th ed. 1971).

30. *Roller*, 79 P. at 789.

31. *Rooney & Rooney*, *supra* note 3, at 1163. *But see Dunlap v. Dunlap*, 150 A. 905, 906-908 (N.H. 1930) (resisting the adoption of parental tort immunity). The New Hampshire Supreme Court stated:

There has never been a common-law rule that a child could not sue its par-

torts, almost all the states have since allowed a child to bring suit against a parent.<sup>32</sup> However, over the years, states have greatly differed in their approach to parental immunity in cases involving negligent torts.

States have taken four approaches concerning parental immunity with regard to negligent torts. The first approach is the retention of the original doctrine, completely barring any child from maintaining negligent tort actions.<sup>33</sup> According to this view, a parent sued by a child could move the court to dismiss the entire negligent tort, claiming parental tort immunity as an affirmative defense.

The second approach is a partial abrogation of the doctrine by which courts create exceptions to the general bar of immunity.<sup>34</sup> A majority of states follow this piecemeal approach.<sup>35</sup> The

ent. It is a misapprehension of the situation to start with that idea, and treat the suits which have been allowed as exceptions to a general rule. The minor has the same right to redress for wrongs as any other individual.

*Id.* at 906.

32. See *The "Reasonable Parent" Standard: An Alternative to Parent-Child Tort Immunity*, 47 U. COLO. L. REV. 795, 804 (1976). Most states, like Illinois, consider a parent to have abandoned the family relationship when acting willfully and intentionally. Thus, the child is allowed to maintain an action in tort. See generally *Kobylanski v. Chicago Bd. of Educ.*, 317 N.E.2d 714 (Ill. App. Ct. 1974).

33. The following nine states continue to retain the doctrine of parental tort immunity: Arkansas, Georgia, Idaho, Indiana, Louisiana, Maryland, Nebraska, Tennessee, and Utah. See, e.g., *Carpenter v. Bishop*, 720 S.W.2d 299 (Ark. 1986); *Coleman v. Coleman*, 278 S.E.2d 114 (Ga. Ct. App. 1981); *Pedigo v. Rowley*, 610 P.2d 560 (Idaho 1980); *Frye v. Frye*, 505 A.2d 826 (Md. 1986); *Pullen v. Novak*, 99 N.W.2d 16 (Neb. 1959); *Barranco v. Jackson*, 690 S.W.2d 221 (Tenn. 1985).

34. The following 28 states have created exceptions to the general parental immunity rule and thus have partially abrogated it: Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Illinois, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Mississippi, Montana, New Jersey, New Mexico, North Carolina, Oklahoma, Rhode Island, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. See, e.g., CONN. GEN. STAT. ANN. § 52-572c (West Supp. 1990) (abrogating immunity in actions against a parent for the negligent operation of an automobile, aircraft, or watercraft); N.C. GEN. STAT. § 1-539.21 (Supp. 1990) (abolishing immunity in automobile cases); *Hurst v. Capitell*, 539 So. 2d 264 (Ala. 1989) (abolishing the doctrine with regards to sexual abuse cases); *Hebel v. Hebel*, 435 P.2d 8 (Alaska 1967) (allowing a child to sue a parent for injuries resulting from negligent driving); *Sandoval v. Sandoval*, 623 P.2d 800 (Ariz. 1981) (retaining the parental tort immunity doctrine for injuries resulting from parental care); *Terror Mining Co. v. Roter*, 866 P.2d 929 (Colo. 1994) (allowing a child to sue for injuries resulting from a parent's negligence while in the course of business-related activities); *Dzenutis v. Dzenutis*, 512 A.2d 130 (Conn. 1986) (allowing a child to sue a parent for injuries resulting from a parent's business activities); *Schneider v. Coe*, 405 A.2d 682 (Del. 1979) (barring an action in which parent is exercising control, authority or discretion); *Ard v. Ard*, 414 So. 2d 1066 (Fla. 1982) (allowing an unemancipated child to sue parent for negligence only to extent of parent's insurance coverage); *Cates v. Cates*, 619 N.E.2d 715 (Ill. 1993) (barring actions concerning conduct inherent to parent-child relationship);

Wisconsin Supreme Court created the most common example of such an exception, allowing all actions in which the alleged tortious act does not concern the exercise of parental authority and discretion in providing for the child.<sup>36</sup>

The third approach is the abolition of immunity. States following this approach completely refuse to adopt a parental immunity doctrine in any form and do not in any way restrict a child's ability to bring suit by any means.<sup>37</sup> Thus, this approach bars a

---

Turner v. Turner, 304 N.W.2d 786 (Iowa 1981) (allowing a cause of action if conduct does not relate to parental authority and discretion); Nocktonick v. Nocktonick, 611 P.2d 135 (Kan. 1980) (allowing a child to sue for the negligent operation of an automobile); Rigdon v. Rigdon, 465 S.W.2d 921 (Ky. 1971) (allowing a child to sue in all cases except for those involving exercise of parental authority and discretion in childcare); Black v. Solnitz, 409 A.2d 634 (Me. 1979) (reserving the consideration of parental care and discipline for the future); Sorensen v. Sorensen, 339 N.E.2d 907 (Mass. 1975) (abrogating immunity to the extent of a parent's liability insurance coverage); Haddrill v. Damon, 386 N.W.2d 643 (Mich. Ct. App. 1986) (upholding immunity for conduct which involves reasonable parental authority over child); Cherry v. Cherry, 203 N.W.2d 352 (Minn. 1972) (abrogating immunity with the exception of ordinary parental discretion cases); Glaskox v. Glaskox, 614 So. 2d 906 (Miss. 1992) (excepting automobile cases from parental immunity); Transamerica Ins. Co. v. Royle, 656 P.2d 820 (Mont. 1983) (allowing a child to sue a divorced, noncustodial parent); Foldi v. Jeffries, 461 A.2d 1145 (N.J. 1983) (creating a willful and wanton conduct exception to the rule of immunity); Guess v. Gulf Ins., 627 P.2d 869 (N.M. 1981) (allowing suit by child against deceased parent's estate); Lee v. Mowett Sales Co., 342 S.E.2d 882 (N.C. 1986) (applying immunity only in ordinary negligence cases, as opposed to malicious acts); Unah v. Martin, 676 P.2d 1366 (Okla. 1984) (allowing an unemancipated minor to sue parent for negligent operation of an automobile); Silva v. Silva, 446 A.2d 1013 (R.I. 1982) (allowing a child to sue for injuries resulting from an automobile accident caused by parent); Jilani v. Jilani, 767 S.W.2d 671 (Tex. 1988) (allowing a child to sue parent for injuries received in automobile accident); Smith v. Kaufman, 183 S.E.2d 190 (Va. 1971) (allowing suits by children who are under 14 years of age); Talarico v. Foremost Ins. Co., 712 P.2d 294 (Wash. 1986) (upholding immunity with exception of willful and wanton conduct); Lee v. Comer, 224 S.E.2d 721 (W. Va. 1976) (abrogating immunity in automobile cases involving parent and child); Goller v. White, 122 N.W.2d 193 (Wis. 1963) (abolishing the rule in personal injury actions).

35. See *supra* note 34 and accompanying text.

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

37. The following four jurisdictions have never adopted parental immunity: District of Columbia, Hawaii, Nevada, and South Dakota. See *Rousey v. Rousey*, 528 A.2d 416 (D.C. 1987); *Peterson v. City of Honolulu*, 462 P.2d 1007 (Haw. 1969); *Rupert v. Stienne*, 528 P.2d 1013 (Nev. 1974). South Dakota courts have not had the opportunity to consider parental tort immunity.

See also Hollister, *supra* note 7, at 528-32; Harlin R. Dean, Jr., *It's Time To Abolish North Carolina's Parent-Child Immunity, But Who's Going To Do It?—Coffey v. Coffey and North Carolina General Statutes Section 1-539.21*, 68 N.C. L. REV. 1317, 1328 n.123 (1990) (listing jurisdictions adopting parental tort immunity through 1990); Chansé McLeod, Note, *Jilani v. Jilani: The Erosion of the Parental Tort Immunity Doctrine in Texas*, 28 HOUS. L. REV. 717, 718-19 nn.7-9 (1991) (listing jurisdictions with some form of parental tort immunity through 1991).



parent from defending a negligence action brought by his child simply by claiming immunity.

The fourth and final approach entirely abrogates the parental immunity doctrine, but replaces it with restrictions on suits between children and their parents.<sup>38</sup> Restrictions to replace the abolished parental tort immunity doctrine are of two types.<sup>39</sup> The first restriction permits a child to sue a parent only when the parent owes a duty to the child separate from the parent-child relationship.<sup>40</sup> The second restriction in effect replaces the immunity doctrine<sup>41</sup> with a "reasonable and prudent parent" standard.<sup>42</sup> Thus, in summary, the four approaches to parental tort immunity differ greatly among the states, varying from strict adherence to the doctrine's bar from liability to complete abrogation and replacement of the doctrine.

### B. The Illinois Approach: Creating Exceptions

Illinois courts have taken the second of the above-mentioned approaches:<sup>43</sup> partial abrogation of parent-child immunity

---

38. The following 10 states have abrogated parental immunity with regard to negligent torts: California, Minnesota, Missouri, New Hampshire, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina. See, e.g., *Gibson v. Gibson*, 479 P.2d 648 (Cal. 1971); *Anderson v. Stream*, 295 N.W.2d 595 (Minn. 1980); *Hartman v. Hartman*, 821 S.W.2d 852 (Mo. 1991); *Briere v. Briere*, 224 A.2d 588 (N.H. 1966); *Holodook v. Spencer*, 324 N.E.2d 338 (N.Y. 1974); *Nuelle v. Wells*, 154 N.W.2d 364 (N.D. 1967); *Shearer v. Shearer*, 480 N.E.2d 388 (Ohio 1985); *Winn v. Gilroy*, 681 P.2d 776 (Or. 1984); *Falco v. Pados*, 282 A.2d 351 (Pa. 1971); *Elam v. Elam*, 268 S.E.2d 109 (S.C. 1980).

39. See *Gibson v. Gibson*, 479 P.2d 648 (Cal. 1971) (*en banc*); *Holodook v. Spencer*, 324 N.E.2d 338 (N.Y. 1974).

40. *Holodook*, 324 N.E.2d at 346.

41. *Gibson*, 479 P.2d at 648.

42. *Id.* at 653. "The [reasonable and prudent parent] standard is the traditional one of reasonableness, but viewed in light of the parental role." *Id.* Thus, the court held that the proper test of a parent's conduct is: "what would an ordinarily reasonable and prudent parent have done in similar circumstances?" *Id.*

43. The parental tort immunity doctrine was adopted in its entirety by an Illinois appellate court in *Foley v. Foley*, 61 Ill. App. 577 (Ill. App. Ct. 1895). "It is doubtless [in] the law, that a child can not [sic] maintain an action for damages on account of maltreatment against a parent, whether the relation is by blood or created by adoption . . . followed by all the legal consequences and incidents of the natural relation." *Id.* at 580. The court gave approval to the trial court's instruction to the jury stating:

The court instructs the jury that if a parent, or one sustaining that relation to a child, treats that child inhumanly or cruelly, so as to injure it in health or limb, the parents are subject to criminal prosecution, and conviction punished by fine or imprisonment in the penitentiary for a term not exceeding five years. But a child can not [sic] maintain a civil action for damages against its parents for such injury. This rule of law, as the court conceives, is founded upon consideration of public policy, affecting family government; that is, that the child shall not contest with the parent the parent's right to

through the creation of piecemeal exceptions.<sup>44</sup> Until recently, Illinois courts have recognized six separate exceptions to the original doctrine of parental immunity.<sup>45</sup> Then, in August 1993, the Illinois Supreme Court created yet another exception, riddling the immunity doctrine with a seventh exception to its general rule.<sup>46</sup>

### 1. *The Willful and Wanton Conduct Exception*

In 1956, the Illinois Supreme Court adopted the parental immunity doctrine at the same time it created its first exception.<sup>47</sup> In *Nudd v. Matsoukas*, a minor child alleged that his father willfully and wantonly drove a vehicle too fast for conditions and, as a result, caused severe injuries to the child.<sup>48</sup> Although the court recognized that allowing the child's action might interfere with family harmony, one of the prominent arguments in favor of immunity, the court refused to tolerate the parent's willful and wanton conduct.<sup>49</sup> Furthermore, the court declared that it was the role of the courts, not the legislature, to create the parental immunity doctrine, as well as to modify the doctrine when necessary.<sup>50</sup> Thus, although the court adopted the immunity doctrine, it simultaneously created the first Illinois exception, allowing a child to bring an action by alleging willful and wanton misconduct on the part of the parent.<sup>51</sup>

---

govern the child.

*Id.* at 579.

44. Illinois' version of parental immunity has gradually eroded by "the creation of piecemeal exceptions to the absolute prohibition against parent-child tort actions." Grobart, *supra* note 1, at 313; see also *Cummings v. Jackson*, 372 N.E.2d 1127, 1130 (Ill. App. Ct. 1978) (Webber, J., dissenting). "Either the doctrine of parental immunity should be abolished altogether or left standing intact. The piecemeal approach, taken in the case and in *Schenk*, can lead to nothing but confusion." *Id.* "[Parental tort immunity has eroded] like the all-day sucker in the hands of a small child until there isn't much left but the stick itself." *Schenk v. Schenk*, 241 N.E.2d 12, 14 (Ill. App. Ct. 1968). See generally Romualdo P. Eclavea, Annotation, *Liability of Parent For Injury to Unemancipated Child Caused by Parent's Negligence—Modern Cases*, 6 A.L.R. 4th 1066, 1093-1113 (1981).

45. Timothy I. McArdle, Stallman v. Youngquist: *Parent-Child Tort Immunity: Will Illinois Ever Give This Doctrine The Examination And Analysis It Deserves?*, 19 J. MARSHALL L. REV. 807, 808-09 n.6 (1986).

46. *Cates v. Cates*, 619 N.E.2d 715, 729 (Ill. 1993).

47. *Nudd v. Matsoukas*, 131 N.E.2d 525, 531 (Ill. 1956).

48. *Id.* at 526. Note that the Illinois Guest Statute enacted in 1985 precludes any person riding as a guest in a motor vehicle from suing the driver absent willful or wanton misconduct. 625 ILCS 5/10-201 (1992).

49. *Nudd*, 131 N.E.2d at 531.

50. *Id.*

51. *Id.*

## 2. The "Beyond the Family Purpose" Exception

The second exception to parental tort immunity exists when a parent injures a child while acting "beyond the family purpose."<sup>52</sup> In *Schenk v. Schenk*, a father filed suit alleging that his daughter negligently operated her car by hitting him as he was walking on the street.<sup>53</sup> Although this case dealt with a suit brought by a parent, the case affects all intrafamily suits because the holding focused on the scope of the family relationship.

In determining whether the father had a valid cause of action, the court noted that the parent's conduct which resulted in injury did not "arise out of the family relationship [and was not] directly connected with the family purposes and objectives."<sup>54</sup> Since the father was acting as an ordinary citizen while walking on the street, and this action was not related to any of his familial duties, the court held that he had a valid cause of action.<sup>55</sup> The court explicitly rejected the argument that the suit would destroy family harmony and refused to rely on the fact that the daughter had liability insurance to make its decision.<sup>56</sup> Therefore, Illinois created the second exception when it recognized that a parent and child could sue each other if the injury occurred beyond the family purpose.

## 3. The Dissolution of the Family Relationship Exception

Illinois courts created another exception to the parental immunity doctrine when they recognized suits brought by children against the administrator of their parent's estate.<sup>57</sup> In *Johnson v. Myers*, the court found that "when the family relationship is dissolved by death," the policy behind the rule of family immunity—maintaining family harmony—ceases to exist.<sup>58</sup> Immunity, if applied, would unjustly prevent an "otherwise valid tort action from proceeding."<sup>59</sup> Thus, the court held that the family relationship between the child and the deceased parent dissolved at the parent's death, and immunity did not apply.<sup>60</sup> Therefore, the

---

52. *Schenk v. Schenk*, 241 N.E.2d 12 (Ill. App. Ct. 1968).

53. *Id.*

54. *Id.* at 15.

55. *Id.*

56. See Ron Beal, "Can I Sue Mommy?" *An Analysis of a Woman's Tort Liability for Prenatal Injuries to her Child Born Alive*, 21 SAN DIEGO L. REV. 325, 338-40 (1984) (noting Florida and West Virginia refuse to consider the existence of liability insurance in a suit between parent and child).

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

58. *Id.* at 779.

59. *Id.*

60. *Id.* But see *Marsh v. McNeill*, 483 N.E.2d 595 (Ill. App. Ct. 1985) (contra-

court created the third exception to the general rule, the dissolution of family relationship exception.

#### 4. *The Temporary Custody or Control Exception*

Illinois' fourth exception to parental tort immunity allows a child to sue family members, such as grandparents, aunts and uncles, who have only temporary control or custody of that child.<sup>61</sup> In *Gulledge v. Gulledge*, two grandparents sued by their grandchild for negligence argued that they deserved the right to plead the same defenses that the child's parents could raise.<sup>62</sup> The court, however, refused to extend immunity to grandparents.<sup>63</sup> In justifying its holding, the court stated that, while not unsympathetic to grandparents, the persuasive force behind the immunity doctrine diminishes when considering persons other than actual parents.<sup>64</sup> Thus, the court created the fourth exception precluding family members who have temporary custody and control of a child from using the parental tort immunity defense.

#### 5. *The Breach of a Public Duty Exception*

The fifth exception applies when a parent injures a child by breaching a duty owed to the public at large.<sup>65</sup> In *Cummings v. Jackson*, a child sued her mother for injuries received while in the family's front yard.<sup>66</sup> The child alleged that the mother failed satisfactorily to trim the trees in the yard, in violation of the local ordinance. Unable to view the road adequately, the child walked in front of a moving car and received injuries.<sup>67</sup> The court held that, since the mother owed a duty to the general public to trim the trees and "only incidentally to the members of the family living in the house," the child's cause of action was valid.<sup>68</sup> Thus, the court continued to create exceptions, making the breach of a public duty exception the fifth exception to the Illinois parental tort doctrine.

---

dicting the *Johnson v. Myers* exception by barring a suit sounding in negligence commenced by two parents' estates against a child who was alive).

61. *Gulledge v. Gulledge*, 367 N.E.2d 429 (Ill. App. Ct. 1977).

62. *Id.* at 430-31.

63. *Id.* at 431.

64. *Id.*

65. *Cummings v. Jackson*, 372 N.E.2d 1127, 1128 (Ill. App. Ct. 1978).

66. *Id.* at 1127-28.

67. *Id.* at 1128.

68. *Id.* Another example of a parent's breach of a duty owed to the public is shown in *Hurst v. Titus*, 415 N.Y.S.2d 770, 770 (N.Y. Sup. Ct. 1979). In *Hurst*, a mother's negligence resulted in a fire which burned a child. *Id.* at 771. Because the mother owed the duty to prevent fires to the general public, the court found her liable. *Id.* at 774.

### 6. *The Parental Contribution Exception*

The sixth exception applies to a suit in which a child seeks contribution from a parent.<sup>69</sup> In *Larson v. Buschkamp*, a car in which two children were passengers, and which their father was driving, collided with another car. The mother of the children brought an action on behalf of her minor children against the father and against the other driver. The other driver then filed a counterclaim seeking contribution from the father. The father argued that he was immune under the parental tort immunity doctrine.<sup>70</sup> The court rejected the father's argument and analogized the facts to a previous case<sup>71</sup> in which the court allowed contribution actions between husband and wife.<sup>72</sup> Finding no logical distinction between the two cases, the court concluded that the parent-child tort immunity doctrine should not bar such a claim since it neither disrupted family harmony nor infringed on the rights of third parties.<sup>73</sup> Therefore, the court created the sixth exception, the parental contribution exception.

### 7. *The Non-Inherent Parental Conduct Exception*

Recently, the Illinois Supreme Court created the seventh exception,<sup>74</sup> allowing a child to maintain a cause of action against a parent for any conduct other than "conduct inherent to the parent-child relationship . . . such conduct constitutes an exercise of parental authority and supervision over the child or an exercise of discretion in the provision of care to the child."<sup>75</sup> In *Cates v. Cates*,<sup>76</sup> a four-year-old sued for injuries sustained in a car accident while driving home with her non-custodial father.<sup>77</sup> While on the way to his home, the father negligently collided with another automobile.<sup>78</sup> As a result, the daughter received injuries and the driver of the other car died.<sup>79</sup>

The child, by her mother,<sup>80</sup> brought a negligence action

---

69. *Larson v. Buschkamp*, 435 N.E.2d 221, 226 (Ill. App. Ct. 1982).

70. *Id.* at 225.

71. *Wirth v. City of Highland Park*, 430 N.E.2d 236, 236 (Ill. App. Ct. 1981).

72. *Buschkamp*, 435 N.E.2d at 224.

73. *Id.* at 225.

74. *Cates v. Cates*, 619 N.E.2d 714, 729 (Ill. 1993). "The standard we have created is not, however, as extreme [as fully abolishing the parental tort immunity doctrine] . . . but rel[ies] on an exception." *Id.*

75. *Cates*, 619 N.E.2d at 729.

76. *Id.* at 716.

77. *Id.*

78. *Id.*

79. *Id.*

80. Since a child has no capacity to sue an adult, the child is required to sue through his/her next friend. ROBERT M. HOROWITZ & HOWARD A. DAVIDSON, LEGAL

against her father.<sup>81</sup> The father argued that the Illinois parental tort immunity doctrine specifically disallowed his child from maintaining a negligence suit.<sup>82</sup> The trial court granted summary judgment in favor of the child since the "purpose of the parental immunity doctrine would [not be] served by applying it to the facts" in *Cates*.<sup>83</sup>

The appellate court reversed and remanded, concluding that the Illinois Supreme Court had never adopted such a doctrine and that the doctrine had only been "recognized," not adopted, by appellate courts, as in *Foley v. Foley*<sup>84</sup> in 1895. Further the appellate court advocated the abrogation of the entire doctrine but only partially abrogated the doctrine in cases regarding the negligent operation of automobiles and other motor vehicles.<sup>85</sup>

On appeal,<sup>86</sup> the Illinois Supreme Court affirmed the appellate court's judgment in part by abrogating a large portion of the parental tort immunity doctrine.<sup>87</sup> The court noted that the appellate courts failed to take into account the rationale of the *Schenk* decision<sup>88</sup> when applying the "beyond the family purpose" standard.<sup>89</sup> Instead, courts focused on the expansive language of

RIGHTS OF CHILDREN 74 (1984). Although states have created their own rules regarding the procedure for a child under the age of majority to sue, the Federal Rules of Civil Procedure state:

Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

FED. R. CIV. P. 17(c).

81. *Cates*, 619 N.E.2d at 716. In addition to suing the father, the child sued the estate of the third party driver and the construction company in charge of repairing the roadway at the site of the collision. *Id.*

82. *Id.*

83. *Id.*

84. *Foley v. Foley*, 61 Ill. App. 577 (Ill. App. Ct. 1895).

85. *Cates v. Cates*, 588 N.E.2d 330, 335 (Ill. App. Ct. 1992).

86. *Cates v. Cates*, 619 N.E.2d 715 (Ill. 1993).

87. The Illinois Supreme Court used the Wisconsin's *Goller* standard as a model. *Cates*, 619 N.E.2d at 729; see Hollister, *supra* note 7, at 512 n.151 (quoting Illinois Nat'l Bank & Trust Co. v. Turner, 403 N.E.2d 1256 (Ill. App. Ct. 1980)). The Illinois approach is similar to that of *Goller* in that it abrogates immunity except for injuries resulting from conduct outside of the parental relationship. *Pedigo v. Rowley*, 610 P.2d 560, 563 (Idaho 1980) (stating that Illinois has taken a similar yet different approach by focusing on "whether the conduct arises out of the family relationship and is directly connected with family purposes," instead of enumerating the exceptions).

88. *Cates*, 619 N.E.2d at 724.

89. *Id.* at 725.

"family purpose."<sup>90</sup> As a result, immunity applied to an extensive amount of intrafamily situations simply because they pertained to the family purpose.<sup>91</sup>

In response to the unclear definition of "family purpose" and the growing number of immunity defenses allowed by appellate courts in Illinois, the Illinois Supreme Court attempted to clarify the already-existing *Schenk* exception by modifying the definition of conduct concerning parental immunity. The adjusted standard afforded protection to "conduct inherent to the parent-child relationship; such conduct constitutes an exercise of parental authority and supervision over the child or an exercise of discretion in the provision of care to the child."<sup>92</sup> As a result of this broad new definition, many of the previous six exceptions to parental immunity overlap with the seventh exception.

After comparing the facts of the case with the newly-defined standard, the court concluded that the operation of an automobile was not conduct "inherent to the parent-child relationship."<sup>93</sup> Accordingly, the court held that immunity was inapplicable. Thus, despite the *Cates* court's attempt to redefine the parental immunity doctrine, problems still remain.

## II. PROBLEMS WITH PARENTAL TORT IMMUNITY: A CRITICAL LOOK

The parental tort immunity doctrine is replete with fundamental problems. Although states, like Illinois, have attempted to solve these problems, none of the purported solutions are completely effective. This section analyzes the efficacy of the popular approaches. First, this section examines the defects of the Illinois approach of creating exceptions to the doctrine. Next, this section analyzes two current judicial replacements employed in many other states.

### A. *Problems With The Creation Of Exceptions: A Look At Illinois' Approach*

There are four problems with the parental tort immunity

---

90. *Id.*

91. *Id.*; see also *Hogan v. Hogan*, 435 N.E.2d 770 (Ill. App. Ct. 1982) (applying immunity when children sued parents for automobile collision on the way to a piano lesson); *Eisele v. Tenuta*, 404 N.E.2d 349 (Ill. App. Ct. 1980) (applying immunity to accident occurring on visit to a college campus).

92. *Cates*, 619 N.E.2d at 729. "These limited areas of conduct require the skills, knowledge, intuition, affection, wisdom, faith, humor, perspective, background, experience, and culture which only a parent and his or her child can bring to the situation; our legal system is ill-equipped to decide the reasonableness of such matters." *Id.*

93. *Id.* "The negligent operation of a vehicle even when exercising visitation privileges does not constitute conduct inherent to the parent-child relationship." *Id.*

doctrine existing in Illinois. The first problem is that the current doctrine contains an ambiguous definition. As a result of the ambiguity problem, Illinois' doctrine has a second problem, misapplication of the doctrine by appellate and trial courts. The third problem with the doctrine is that present-day application is directly contrary to the aim of tort law. Lastly, the fourth problem with the parental tort immunity doctrine is that the ambiguity and misapplication problems already have and will continue to have a detrimental effect on other areas of law outside of intrafamily suits.

The first problem with Illinois' parental tort immunity doctrine is the ambiguous definition of immune conduct. As discussed above, Illinois' newly-created seventh exception has drastically altered the doctrine by redefining what parental conduct is immune from negligence actions by children. The new definition incidentally affects conduct previously found to be immune under earlier-created exceptions. It affords protection to parents when they exercise "parental authority and supervision over the child or an exercise of discretion in the provision of care to the child."<sup>94</sup> Due to the vague and excessively broad definition, the circumstances in which immunity is still applicable are difficult to determine. As such, the definition gives little or no direction to judges and juries. Thus, the court's effort to clarify the earlier "beyond the purpose" exception<sup>95</sup> was to no avail; the exception is still ambiguous. In fact, the ambiguous definition has led to another problem with the parental tort immunity doctrine.

A second problem is the misapplication of the doctrine as a result of the ambiguity. Since the method of creating exceptions results in varied application in a case-by-case basis, the court affords immunity to undeserving, negligent parents. Simultaneously, the court bars deserving children from seeking compensation for an injury.

Admittedly, there are certain circumstances where a child deserves a remedy as a result of a parent's negligence.<sup>96</sup> Unfortunately, the exceptions to the immunity doctrine do not always allow a child to sue in these circumstances.<sup>97</sup> Instead, the courts have allowed a child the right to sue in very specific instances, such as when an injury results from automobile accidents, since the activity is outside of the family purpose.<sup>98</sup> To demonstrate

---

94. *Id.*

95. *Id.*

96. See *infra* notes 99-105 and accompanying text for a discussion of several states' different approaches to the problem.

97. See *infra* notes 102-05 and accompanying text for a discussion of varying holdings barring children from suing parental figures.

98. *Schenk v. Schenk*, 241 N.E.2d 12, 15 (Ill. App. Ct. 1968).



how the ambiguity and consequent misapplication has lead to inequitable results, one need only look at the doctrine's effect in similar cases.

For example, there are instances in which these exceptions could conflict with other duties placed on a parent. One such instance is when a child is injured as a result of an automobile collision while on the way to a school bus stop.<sup>99</sup> Assume that the child lives far from the stop, it is torrentially raining, and the parent is left with two alternatives: drive the child to the bus stop or keep the child home from the school. Further assume that the parent is unmarried and must miss work to babysit the child if she chooses the latter alternative. The parent has an undeniable duty to ensure proper education for the child.<sup>100</sup> Further, the parent has a duty to support the child financially.<sup>101</sup> Considering these two duties, the parent decides to drive the child to the bus stop on the way to work. On the way to the bus stop, an automobile accident occurs.

In most states, as in Illinois, the parent is not immune because the negligent driving of a parent is an exception to immunity since it is outside the parent-child relationship.<sup>102</sup> Thus, a

---

99. This example is a modified version of a previously-used example. The original is found in *The "Reasonable Parent Standard": An Alternative to Parent-Child Tort Immunity*, 47 U. COLO. L. REV. 795, 804 (1976).

100. HOROWITZ & DAVIDSON, *supra* note 80, at 276.

The state's interest in assuring that its citizens are educated may lead to intervention when it is determined that parental conduct is interfering with a child's education, either directly or indirectly. State intervention due to educational problems most frequently occurs when a parent permits a child to be excessively truant from school (i.e., knows of the child's attendance problem but does little or nothing to help change the child's behavior); refuses to enroll a child of mandatory school-attendance age in a state-approved or otherwise adequate educational program; causes a child to miss numerous school days; or refuses to allow a child to receive recommended remedial services.

*Id.*

101. See 305 ILCS 5/10-2 (1992) (requiring all financially able parents to support children); see also FLA. STAT. ANN. § 61.13(1)(a) (West 1995) (acknowledging a parent's duty to support a child even after the parent loses custody of a child); MD. CODE ANN., FAM. LAW § 12-202(a)(2) (1994) (noting that a "parent owes a duty of support" towards the child); MASS. GEN. LAWS ANN. ch. 209, § 30 (West 1974); MICH. COMP. LAWS ANN. § 722 (West 1994) ("establish[ing] rights and duties to provide support for a child [even] after the child reaches the age of majority under certain circumstances"); N.J. REV. STAT. § 9:2-4 (1982); N.Y. DOM. REL. LAW § 32 (McKinney 1977); OHIO REV. CODE ANN. § 3103.03 (Anderson 1982); HOROWITZ & DAVIDSON, *supra* note 80, at 12.

In some states, the burden of financially supporting a child has also been placed on step-parents, and others standing *in loco parentis* to the child. *Id.* at 13. Every state makes criminal the willful failure to support a child. *Id.* at 22. However, courts rarely jail parents who do not comply with the specific statutes requiring them to support the child. *Id.*

102. *Schenk*, 241 N.E.2d at 15. "It seems thus clear to us that reason and justice

child has the right to sue the parent.<sup>103</sup> As a result, the parent's discretionary judgment to drive the child to the bus stop in fulfillment of the duties to support and provide education is second-guessed by the courts.<sup>104</sup> It is in these exact circumstances that immunity should, if ever, apply. Instead, the Illinois practice of creating exceptions allows a child to sue in those very same circumstances and in other instances protects parents who are undeserving of immunity.<sup>105</sup>

The third problem is that the retention of immunity is both unjustifiable and contrary to the purpose of tort law.<sup>106</sup> The Illinois Supreme Court in *Cates* correctly discounted the most common justifications for the necessity of parental tort immunity. Yet, contrary to this reasoning, as well as the very purpose of tort law, the court opted to retain immunity in particular circumstances.

The Illinois Supreme Court in *Cates* addressed two rationales frequently given in defense of parental immunity: the need to preserve family harmony and the need to dissuade fraud and collusion.<sup>107</sup> In addressing the first rationale, the court recognized that Illinois does not allow immunity when a family relationship dissolves since no family harmony can possibly be present.<sup>108</sup> Furthermore, the court noted that it was the injury for which the child sought recovery that actually caused the division of a family relationship, not the lawsuit.<sup>109</sup> In fact, the court stated that the outcome of such a lawsuit may even reconcile problems between parent and child by providing a remedy for the misconduct.<sup>110</sup> Thus, the court properly concluded that allowing

---

require that the immunity rule should not stand as an insuperable bar to redress for injuries occasioned by the exercise of those [individual] rights [of a child]." *Id.*; see *Cates v. Cates*, 619 N.E.2d 715, 725 (Ill. 1993) (noting that the *Schenk* court intended to allow automobile negligence actions between parent and child).

103. *Cates*, 619 N.E.2d at 725.

104. Since the court must determine whether or not immunity would apply, it would necessarily have to determine arbitrarily whether the conduct is an exercise of authority or ordinary parental discretion. *Gibson v. Gibson*, 479 P.2d 648, 653 (Cal. 1971). See Frederick W. Grimm, Recent Development, *Tort—Parental Immunity—Merrick v. Sutterlin*, 56 WASH. L. REV. 319, 334 (1981) (stating "[t]he only way the courts can avoid a quagmire caused by tenuous distinctions and confusing holdings is to abrogate the doctrine of parental tort immunity entirely").

105. See, e.g., *Cates*, 619 N.E.2d at 726-27.

106. See *Grobart*, *supra* note 1, at 307 (stating that "[t]he theory that an uncompensated tort preserves family tranquility and respect for the parent, even in a family in which rape, brutal beatings or other inhumane treatment have already occurred, is wholly untenable.").

107. *Id.*

108. *Id.* at 326; see also *The "Reasonable Parent Standard": An Alternative to Parent-Child Tort Immunity*, *supra* note 98, at 804.

109. *Cates*, 619 N.E.2d at 727; see also *Hollister*, *supra* note 7, at 502; *Rooney & Rooney*, *supra* note 3, at 1169.

110. *Cates*, 619 N.E.2d at 727.

a child the right to maintain an action may promote, not destroy, family harmony.<sup>111</sup>

In rejecting the argument that allowing a suit would disrupt family harmony, the court also recognized that liability insurance<sup>112</sup> exists in the majority of parent-child disputes.<sup>113</sup> Thus, the "real" defendant is the insurance company.<sup>114</sup> Accordingly, the parent and child are "only nominally adverse" in this situation.<sup>115</sup> Moreover, the court noted that liability insurance is often a prerequisite to the filing of a suit; a child will rarely sue a parent without insurance.<sup>116</sup> Therefore, *Cates* correctly recognized that the family harmony rationale was no longer justified.

Similarly, the court rejected the second rationale, the fear of collusion and fraud.<sup>117</sup> The court stated that the legal system has adequate measures to rid itself of frivolous and meritless

111. *Id.* In addressing the same "family harmony" argument with respect to intraspousal immunity, Dean William Prosser stated:

The chief reason relied upon by all these courts, however, is that personal tort actions between husband and wife would disrupt and destroy peace and harmony of the home, which is against the policy of the law. This is on the bald theory that after a husband has beaten his wife, there is a state of peace and harmony left to be disturbed; and that if she is sufficiently injured or angry to sue him for it, she will be soothed and deterred from reprisals by denying her the legal remedy—and this even though she has left him or divorced him for that very ground, and although the same courts refuse to find any disruption of domestic tranquility if she sues him for a tort to her property, or brings a criminal prosecution against him.

PROSSER, *supra* note 29, at 863.

112. The finding of liability has no relation to the existence of liability insurance. *Wilkocz v. Wilkocz*, 464 N.E.2d 1232, 1238 (Ill. App. Ct. 1984); *Hogan v. Hogan*, 435 N.E.2d 770, 772 (Ill. App. Ct. 1982); *Schenk v. Schenk*, 241 N.E.2d 12, 14 (Ill. App. Ct. 1968).

113. *Cates*, 619 N.E.2d at 727.

114. *Id.* The Illinois Appellate Court in *Stallman v. Youngquist* stated:

Where insurance exists, the domestic tranquility argument is hollow; in reality the sought after litigation is not between child and parent but between child and parent's insurance carrier. Far from being a potential source of disharmony, the action is more likely to preserve the family unit in pursuit of a common goal—the easing of family financial difficulties stemming from the child's injuries.

*Stallman v. Youngquist*, 504 N.E.2d 920, 926 (Ill. App. Ct. 1987), *rev'd*, 531 N.E.2d 355 (Ill. 1988).

115. *Cates*, 619 N.E.2d at 727. "It is now generally recognized that the existence of liability insurance eliminates the actual adversity of parent and child in negligence actions." *Id.*; see *Grobart*, *supra* note 1, at 322 (noting that the existence of immunity, although beneficial to the parent as well as the child, should not preclude the child from just compensation); see, e.g., *Nocktonick v. Nocktonick*, 611 P.2d 135, 142 (Kan. 1980); *Sorensen v. Sorensen*, 339 N.E.2d 907, 915 (Mass. 1975).

116. *Cates*, 619 N.E.2d at 727; see also *Winn v. Gilroy*, 681 P.2d 776, 784 (Or. 1984).

117. *Cates*, 619 N.E.2d at 727.

suits.<sup>118</sup> Moreover, the court recognized that these problems are apparent in all areas of law, not just in suits between parents and children.<sup>119</sup> Thus, the small possibility that collusion and fraud might occur between parties is not an adequate justification to preclude all children from recovery due to a parent's negligent conduct.<sup>120</sup> Therefore, the *Cates* court properly rejected the two common rationales which support the parental tort immunity doctrine.

Although the Illinois Supreme Court rejected the two most common justifications for parental immunity,<sup>121</sup> the court conveniently retained immunity when certain conduct fits within its ambiguous definition.<sup>122</sup> Thus, a parent may still act negligently without having to remedy the situation.<sup>123</sup> Parents must simply define the alleged tortious conduct as that which will fit within the ambiguous and excessively broad definition,<sup>124</sup> as long as they characterize their conduct as supervision or authority over a child, they are given full permission to act negligently toward their children.<sup>125</sup> In short, parental immunity rewards a parent for misconduct and prevents a child from recovering for its injuries.<sup>126</sup>

---

118. *Id.*

119. Hollister, *supra* note 7, at 501. "A rule which seeks to incidentally attack fraud by withholding legal protection for all claimants, regardless of the justice of their claims, 'employs a medieval technique which, however satisfying it may be to defendants, . . . is scarcely in keeping with the acknowledged function of a modern legal system.' " *Id.* (quoting Leflar and Sanders, *Mental Suffering and its Consequence—Arkansas Law*, 7 U. ARK. L. SCH. BULL. 43, 60 (1939)). Similarly, in *Klein v. Klein*, the California Supreme Court stated:

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

*Klein v. Klein*, 376 P.2d 70, 73 (Cal. 1962).

120. *Klein*, 372 P.2d at 73.

121. *Cates*, 619 N.E.2d at 726-28.

122. *Id.* at 729. In rejecting the justifications, yet retaining immunity, the court simply made a "distinction without a difference" which "places a foot in the door to abrogate the doctrine of parent-child immunity . . ." *Sumwalt v. Allstate Ins. Co.*, 466 N.E.2d 544, 547 (Ohio 1984) (Holmes, J., dissenting).

123. *Cates*, 619 N.E.2d at 729.

124. *Id.*

125. Grobart, *supra* note 1, at 321. "There is no viable rationale for allowing a parent to act with impunity toward his child merely because the parent's conduct may be described as the exercise of 'parental authority' or 'ordinary discretion'." *Id.*

126. *But see* Lemmen v. Servais, 158 N.W.2d 341, 344 (Wis. 1968).

[Immunity] . . . is accorded the parent, not because he [or she] is a parent, but because as a parent he [or she] pursues a course within the family constellation which society exacts of him [or her] and which is beneficial to the state. The parental nonliability is not . . . a reward, but . . . a means of en-

This outcome is antithetical to the very purpose of tort law. The aim of tort law is to provide a remedy to those injured, including children, and to deter members of our society, including parents, from wrongdoing.<sup>127</sup> The current parental tort immunity doctrine does not accomplish this aim; it neither acts as a deterrent nor provides an adequate remedy.

Since a parent is not liable for any negligence when supervising or caring for a child, the parent has little incentive to exercise ordinary and reasonable care. However, our society expects all other members to exercise ordinary and reasonable care towards that same child.<sup>128</sup> If any other person negligently caused injury to a child for a failure to supervise, he or she would be held liable.<sup>129</sup> By allowing the parent to escape liability under parental immunity, the parent has little deterrent from acting in a negligent and injurious way.

Moreover, by shielding a parent from judicial accountability in certain circumstances, a child loses the right to a remedy from the parent.<sup>130</sup> Had a third person, not a parent, proximately caused the injury, the child could recover damages.<sup>131</sup> However, since a *parent* negligently caused the injury and no liability exists, no recovery can be made. Therefore, the result is contrary to the purpose of tort law.

Finally, a fourth problem is that the problems with the immunity doctrine detrimentally affect areas other than parent-child situations. The ambiguous definition and continual misapplication of the doctrine has already had an effect on several other type of suits, not simply actions between a child and parent. Immunity

---

abling the . . . discharge [of] duties which society exacts.

*Id.*

127. PROSSER, *supra* note 29, § 2, at 6 (defining the law of torts as "a body of law which is directed toward the compensation of individuals, rather than the public, for losses which they have suffered in respect of all their legally recognized interests, rather than one interest only, where the law considers compensation is required").

128. Cynthia Ann Tolch, Note, *Will Junior's First Words Be "I'll See You In Court!?"*, 58 MO. L. REV. 251, 255 (1993) (paraphrasing *Hartman v. Hartman*, 821 S.W.2d 852 (Mo. 1991)).

129. It is important to note that immunity simply exempts a parent from liability in tort. WILLIAM L. PROSSER ET AL., *TORTS: CASES AND MATERIALS* 608 (8th ed. 1988).

[The immunity] does not deny the tort, but [denies] the resulting liability. The immunity does not mean that conduct that would amount to a tort on the part of other defendants is not still equally tortious in character, but merely that for the protection of the particular defendant, or of interest that the defendant represents, absolution from liability is granted.

*Id.*

130. *Id.*

131. See Hollister, *supra* note 7, at 524 (stating that "[t]he immunity sacrifices the child in the name of protecting the family").

from negligent tort actions pertains to all people standing in the place of parents or guardians.<sup>132</sup> As a result, the immunity doctrine affects teachers,<sup>133</sup> foster parents,<sup>134</sup> and even the State of Illinois.<sup>135</sup>

A fitting example is a suit in which a child sues a teacher. During school hours, a teacher is said to be in "stand[ing] in the relation of parents and guardians."<sup>136</sup> Thus, teachers can assert the same immunities and defenses any parent would claim as long as the conduct took place on school grounds.<sup>137</sup>

In fact, after *Cates*, an Illinois appellate court grappled with the definition of "conduct concern[ing] parental discretion in discipline, supervision and care of the child" as it pertained to teachers.<sup>138</sup> The court held that immunity should only apply when the teacher gives medical treatment, supervises the child on

---

132. See *infra* note 133 and accompanying text for a discussion of teachers' immunity when they stand in the place of parents.

133. *Stiff v. Eastern Ill. Area of Special Educ.*, 621 N.E.2d 218, 221 (Ill. App. Ct. 1993), *appeal denied*, 631 N.E.2d 718 (Ill. 1994).

We find the *Cates* opinion requires a finding that teachers "stand[ing] in the relation of parents and guardians" (citation omitted) can also be subjected to negligence claims, except where the conduct constitutes the exercise of teacher authority and supervision over the child, or in the exercise of discretion in the provision of care to the child.

*Id.*

134. See HOROWITZ & DAVIDSON, *supra* note 80, at 361-62 (explaining the relationship foster parents have with the natural parents, the children, and the state agency); see also *Mitchell v. Davis*, 598 So. 2d 801 (Ala. 1992) (affording parental immunity to foster parents standing in the relation of parents and guardians).

135. Although both foster parents and the individual state agency placing the child in the foster parents' care are standing in the relation of a parent, the agency is in charge of the supervision of the foster parents and as well retains legal power regarding the child. HOROWITZ & DAVIDSON, *supra* note 80, at 362. In other words, the state agency has the power to determine educational, medical and disciplinary issues. *Id.* The foster parents are legally required to follow all orders given by the state agency in charge. *Id.* Federal law mandates that all state agencies notify the appropriate court or law enforcement agency of any child abuse of neglect taking place in any residence or agency building receiving funds for foster care. *Id.*; see 42 U.S.C. § 671(a)(9) (requiring state agencies to notify particular agencies of any forms of child abuse occurring in federally funded programs).

136. *Stiff*, 621 N.E.2d at 221; see also 105 ILCS 5/24-24 (1991) (granting educators the standing of *in loco parentis* as parent or guardian of students).

137. *Stiff*, 621 N.E.2d at 220 (noting the 1975 amendment of the former statute included the language "including schoolgrounds . . . used for school purposes and activities").

138. *Id.* at 221. This case involved a handicapped student who was injured when falling from a bridge. *Id.* at 219. The student sued the school district and teachers for failing properly to supervise her. *Id.* The court determined it would have to interpret the recent *Cates* case and apply the holding to the statute according teachers the standing of parents and guardians. *Id.* at 221. The court held that the teachers were immune from any liability as a result of ordinary negligence. *Id.* at 222.

the playground, on school outings, and in the overall maintenance of the classroom.<sup>139</sup> Therefore, the court created another list of exceptions to immunity dealing particularly with teachers.

However, since an appellate court created this, it is not binding authority upon the Illinois Supreme Court or appellate courts from other districts. Other judges may add, subtract, or completely change the enumerated list created in the previous case. Due to this fact, there is still no one definition that can be given to judges and juries when deciding whether immunity should apply to the teacher's conduct. A variety of interpretations of "parental discretion" pertaining to teachers and all others standing in loco parentis will follow and thus inconsistency will result. Thus, the problems with the parental tort immunity doctrine are magnified in that they affect negligence suits involving persons other than those in an interfamily relationship. To solve these problems, states should abolish the doctrine and implement suitable substitutes.

### B. Current Judicial Replacements Employed By Other States

There are two current replacements to the parental tort immunity doctrine installed in state court systems.<sup>140</sup> The two replacements have opposite effects on the number of negligence suits entertained by courts. One restricts a great number of suits<sup>141</sup> and the other allows a great number of suits.<sup>142</sup>

#### 1. The New York Replacement

New York has completely abrogated the parental tort immunity doctrine.<sup>143</sup> In its stead, the Court of Appeals allows a child recovery from *any* breach of duty owed by the general public.<sup>144</sup>

---

139. *Id.* at 221. In clarifying "school outings," the court extended immunity to all extracurricular outings, including field trips which "expand children's knowledge." *Id.* "Any other interpretation of the statute would discourage teachers in providing the best educational opportunities for their students." *Id.*

140. *Gibson v. Gibson*, 479 P.2d 648, 653 (Cal. 1971); *Holodook v. Spencer*, 324 N.E.2d 338 (N.Y. 1974).

141. *Holodook*, 324 N.E.2d at 346; see also Kevin Fularczyk, Note, *Parent-Child Immunity After Carey v. Meijer, Inc.*, 35 WAYNE L. REV. 153, 157 (examining the "spectrum" of different standards and approaches). The court in *Holodook*, after completely abolishing the parental tort immunity doctrine five years earlier, stated that a parent did not owe a duty of supervision to a child. *Holodook*, 324 N.E.2d at 346. Thus, a child had to allege a duty owed to the general public to maintain a valid cause of action. *Id.*

142. *Gibson*, 479 P.2d at 653. The court abrogated parental tort immunity and replaced the doctrine with the reasonable prudent parent standard.

143. *Gelbman v. Gelbman*, 245 N.E.2d 192 (N.Y. 1969) (abolishing all intrafamily immunity).

144. *Holodook*, 324 N.E.2d at 346. "[W]here a duty is ordinarily owed, apart from

However, the court expressly provided that the parent has no legal duty to supervise the child.<sup>145</sup> Thus, any injuries which result from a failure to supervise do not constitute a breach of duty.<sup>146</sup>

In *Holodook v. Spencer*, New York's highest court gave several reasons for its holding.<sup>147</sup> First, the court highlighted the concern that a negligence action brought by the child might place an undue burden on a parent by restricting the parent's necessary discretion in raising the child.<sup>148</sup> Second, the court expressed worry that a parent might not properly hold the money for the child and use the money paid by a third party as a refund from the amount paid by the parent.<sup>149</sup> Third, the *Holodook* court pointed out the fear that a third party would seek contribution from a parent.<sup>150</sup> Because of the possibility of being impleaded, the parent would thus be reluctant to bring suit as a representative for the child.<sup>151</sup>

Several courts have criticized New York's reasoning behind the holding that a parent owes no duty to supervise a child.<sup>152</sup> With regard to the first reason, the unwillingness to place an undue burden on parents' discretion, courts argue that the judicial system is capable of determining what parental conduct is acceptable and unacceptable.<sup>153</sup> Parents must only confine their con-

the family relation, the law will not withhold its sanctions merely because the parties are parent and child." *Id.* In *Holodook v. Spencer*, New York's highest court gave several reasons why the approaches in other jurisdictions should not be applied in New York. *See id.* at 344-48 (discounting many other suggested approaches that are followed in other jurisdictions).

145. *Id.* at 346. "By contrast, the cases before us involve parent's duty to protect his child from injury—a duty which not only arises from the family relation but goes to its very heart." *Id.* *Gelbman* did not pave the way for the law's imposition of this duty. *Id.*

146. *Id.* at 343. Negligent supervision has not and will not continue to be a tort in New York. *Id.* The difference between holding that a parent is *immune* from a tort action, as the parental tort immunity doctrine holds, and that a parent *owes no duty* to supervise, as in *Holodook*, is significant. Grobart, *supra* note 1, at 320. To hold a parent immune absolves the parent from liability. PROSSER, *supra* note 29, § 127, at 904. On the other hand, "[a] holding that the defendant owes no duty, however, means that the conduct is not tortious." Hollister, *supra* note 7, at 517.

147. *See Holodook*, 324 N.E.2d at 344-48 (discounting many other suggested approaches that are followed in other jurisdictions).

148. The court specifically was concerned that a child, as well as estranged spouses, might use a lawsuit in a vengeful or retaliatory way. Moreover, the court was troubled that a parent's conduct would too easily be construed as unnecessary and unreasonable simply because the jury would view the conduct to be unusual. *Id.* at 345.

149. *Holodook*, 324 N.E.2d at 344; Hollister, *supra* note 7, at 520.

150. *Holodook*, 324 N.E.2d at 344; Hollister, *supra* note 7, at 520.

151. *Holodook*, 324 N.E.2d at 344.

152. It is important to note that the author has yet to see an article or case that praises the New York Court of Appeals in the *Holodook* case.

153. Hollister, *supra* note 7, at 520. "[T]he judicial system has proved to be capa-



duct to "ordinary care" in the supervision and authority over children; they are not required to exhibit extraordinary care to protect a child from all potential injuries. Therefore, no undue burden on the parent's discretion exists.

In response to the second reason, the potential for misappropriation of the child's funds, courts recognize that children may wait until they are adults to bring suit.<sup>154</sup> In a negligence action, the statute of limitations does not begin to run until the child reaches the age of majority.<sup>155</sup> Even if the child chooses not to wait until she reaches majority and sues as a minor, the court can withhold the money award from the parent for the injured child by placing the award in a trust.<sup>156</sup> Thus, the threat of the misappropriation of children's funds is instantly eliminated.

Criticism with the third reason, the contribution factor, concerns the rights of children and rights of third parties. Under New York law, the child will only recover if injured by a third party.<sup>157</sup> If the third party can sufficiently prove that the lack of parental supervision, not the third party's negligent conduct, was the legal cause of the injury, the child may not recover.<sup>158</sup> The parent, the very actor causing the injuries, could claim immunity.<sup>159</sup> Thus, a child has no recourse under this system if only the parent was negligent. However, courts which disfavor New York's approach argue that, although a parent may be reluctant to bring suit if not immune, the denial of recourse to the child and unfairness to third parties outweighs the possibility of impleader.

Opponents criticize the New York approach because it not only fails to address the needs and rights of the child, it also pun-

---

ble of distinguishing acceptable parental conduct from that which should not be countenanced. The real need to recognize parental prerogatives does not require that the courts permit parents to act negligently toward their children with impunity." *Id.*

154. *Id.* at 521. In almost every state, the statute of limitations for a child to bring an action begins once he/she reaches the age of majority as specified by each state. HOROWITZ & DAVIDSON, *supra* note 80, at 78. In Illinois, even if the child has been appointed a guardian ad litem, the child may bring suit anytime before he/she reaches the age of majority and until the statute of limitations runs after he/she reaches the age of majority. *Eiseman v. Lerner*, 380 N.E.2d 1033, 1033 (Ill. App. Ct. 1978).

155. 750 ILCS 45/8(a)(1) (1992). "An action brought by or on behalf of a child shall be barred if brought later than two years after the child reaches the age of majority . . ." *Id.*

156. *Grobart*, *supra* note 1, at 320. The Uniform Gifts to Minors Act, UNIF. PROB. CODE § 5-424 (1969), which has been adopted in some form in every state, creates a method for adults to transfer or give non-real property to children under the age of majority. HOROWITZ & DAVIDSON, *supra* note 80, at 56; *see, e.g.*, 760 ILCS 20/1 et seq. (1992).

157. *Hollister*, *supra* note 7, at 522.

158. *Id.*

159. *Id.*

ishes third parties who injure an improperly-supervised child.<sup>160</sup> The third party may not, according to the New York Court of Appeals, seek contribution from the parents.<sup>161</sup> This is because the parent did not breach a duty owed to the child.<sup>162</sup> If a third party is only fifty percent at fault, that party must pay the entire amount of damages since the third party cannot seek contribution. But for the parent's status, the parent would necessarily have to pay the fair share of the award. Due to the requirement that the third party pay damages in full, the negligent parent ultimately becomes financially enriched since the family is one economic unit.<sup>163</sup>

Moreover, in a case where a third party kills an improperly supervised child, the parents could bring a wrongful death action<sup>164</sup> against the third party.<sup>165</sup> In turn, the parents could

160. *Id.*

161. *Holodook v. Spencer*, 324 N.E.2d 343, 344 (N.Y. 1974).

162. *Id.* at 346.

163. *Hollister*, *supra* note 7, at 522. "[The family] is a single economic unit and recovery by a third party against the parent ultimately diminishes the value of the child's recovery." *Holodook*, 324 N.E.2d at 344; *see also* RESTATEMENT OF THE LAW OF RESTITUTION § 3 (1937); DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 5.15, at 414 (1973).

164. The wrongful death action was created by the Lord Campbell's Act of 1846. Fatal Accidents Act, 1954, 9 & 10 Vict., ch. 93; Stacey L. Ross, Casenote, *The Parental Tort Immunity Doctrine Applied to Wrongful Death Actions: A Rule Without Reason*, *Chamness v. Fairtrale*, 158 Ill. App. 3d 325, 511 N.E.2d 839 (S.J.H. Dist. 1987), 13 S. ILL. L.J. 175, 182 (1988).

The wrongful death cause of action was adopted in Illinois in 1853. *Id.* The revised statute states:

Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

740 ILCS 180/1 (1992). Justice Canton commented on the statute as follows:

This is a new cause of action given by this statute, and unknown to the common law, and should not be extended beyond the fair import of language used; but this it would be difficult to do, for the language is very broad and comprehensive, embracing, in direct and positive terms, all cases, where if death had not ensued, the injured party could have maintained an action for the injury. This would seem to leave no room for construction, but refers us at once to the inquiry, whether an action could have been maintained by the child, for the injury, had he survived it. The act says, "then, and in every such case," the action shall be maintained. To give a further limitation than this would be, not to construe the statute, but to expunge or disregard a portion of it.

Ross, *supra*, at 183 n.63 (quoting *City of Chicago v. Mayor*, 18 Ill. 349, 357 (1857)).

165. *Hollister*, *supra* note 7, at 522.

recover the entire amount of allowable damages, even though they were also at fault. Similarly, a third party that becomes injured due to a negligently supervised child may not maintain a cause of action against the parents. In New York, an unknown driver of a vehicle who is injured while slamming on his car's brakes and swerving into a telephone pole to avoid an unsupervised toddler playing in the street could not recover from the child's parents.<sup>166</sup> Since the parents had no duty to supervise the infant, they in turn breached no duty, and negligence cannot be maintained. Therefore, New York's approach unfairly requires a third party to pay a child for misconduct because the parent who is also at fault may use the parental tort immunity doctrine as a shield from liability. Moreover, the immunity prevents an injured non-parental party from seeking a remedy.

For the above reasons, the New York Court of Appeals' holding lacks rational justification. If applied in Illinois, the New York approach would have an even more detrimental effect than the current immunity doctrine. To hold that every other person in the world owes a duty to a child except for the parents is illogical and contrary to tort law.<sup>167</sup> It is ludicrous to declare that a parent owes no duty to a child with regard to supervision and authority.<sup>168</sup> Having a child is a choice, and with the privilege and joy of having children comes moral and legal duties.<sup>169</sup> On the contrary, the New York courts attempt to protect the parents since the "enforcement [of the parent's duty to supervise the child] can depend only on love."<sup>170</sup> In attempting to protect parents, children and third parties will suffer.<sup>171</sup> All people owe a duty to society at large to use a reasonable amount of care in all areas of conduct and activities.<sup>172</sup>

---

166. *Id.* A similar problem was addressed in *Noleczek v. Gesuale*, 385 N.E.2d 1268, 1273 (N.Y. 1978). A partially blind child was given a motorcycle by his parent. The child was fatally injured when riding the motorcycle. Although the court stated that the parents did not owe a duty to their child, and thus were not liable to the child for negligence, the court suggested that the parent may owe a duty to third parties to refrain from entrusting their child with dangerous instruments. *Id.* at 1274.

167. Dean Prosser described the losses which should be compensable in tort law as follows: "The law of torts . . . is concerned with the allocation of losses arising out of human activities; and since these cover a wide scope, so does this branch of the law." PROSSER, *supra* note 29, at 6.

168. Grobart, *supra* note 1, at 320. "It is paradoxical to hold that other relationships involve a duty properly to supervise a child, but that a parent does not owe such a duty to his own child." *Id.*

169. *Id.*

170. *Holodook v. Spencer*, 324 N.E.2d 343, 346 (N.Y. 1974).

171. Hollister, *supra* note 7, at 524.

172. Rooney & Rooney, *supra* note 3, at 1178. "The bedrock of modern tort law is the recognition that two people who have a relationship of some sort owe each

The fundamentals of tort law support the imposition of a duty to supervise on parents.<sup>173</sup> Liability is based on relationships with individuals or entire groups of people.<sup>174</sup> Historically, states have affirmatively placed duties on the parent, such as the requirement for education for the child.<sup>175</sup> *The Restatement (Second) of Torts* acknowledges the existence of several affirmative duties, not simply moral duties, present between parent and child.<sup>176</sup> Legislatures and courts have created negative duties by establishing and interpreting criminal statutes with respect to the parent-child relationship.<sup>177</sup> Legal relationships, such as a parent-child relationship, establish even greater duties, including the

other a duty of at least reasonable care." *Id.*

173. PROSSER, *supra* note 29, § 2 at 5. "[L]iability in tort is based upon the relations of men [and women] with another; and those relations may arise generally, with large groups or classes of persons, or singly, with an individual." *Id.*

174. *Id.*

175. Rooney & Rooney, *supra* note 3, at 1178.

176. RESTATEMENT (SECOND) OF TORTS, § 895G cmt. k (1979).

177. Rooney & Rooney, *supra* note 3, at 1178. State legislatures have also enacted statutes making the parent financially liable for the negligence of their children. See 740 ILCS 115/5 (making a parent liable for money damages up to \$1000 to a third party for the willful and malicious acts of the child). Foster parents and state agencies are not usually vicariously liable for the tortious acts of the children to which they are entrusted. HOROWITZ & DAVIDSON, *supra* note 80, at 101; see also TENN. CODE ANN. § 37-10-103 (1994):

37-10-103 Circumstances under which parent or guardian liable.

(a) A parent or guardian shall be liable for the tortious activities of a minor child that cause injuries to persons or property where the parent or guardian knows, or should know, of the child's tendency to commit wrongful acts which can be expected to cause injury to persons or property and where the parent or guardian has an opportunity to control the child but fails to exercise reasonable means to restrain the tortious conduct.

(b) A parent or guardian shall be presumed to know of a child's tendency to commit wrongful acts, if the child has previously been charged and found responsible for such actions.

*Id.* But see TENN. CODE ANN. § 37-10-101 (1994) (limiting the parent's liability to \$10,000.00). For additional statutes that relate to a parent's liability for the acts of the child, see ALA. CODE § 6-5-380 (1975); ARK. CODE ANN. § 9-25-102 (Michie 1987); KY. REV. STAT. ANN. § 405.025 (Baldwin 1994); MISS. CODE ANN. § 93-13-2 (1972); MO. ANN. STAT. § 537-045 (Vernon 1994); N.C. GEN. STAT. § 1-539.21 (1994); VA. CODE ANN. § 8.01-43 (Michie 1994).

Parental responsibility laws have been challenged constitutionally in federal courts. The challengers argue that their property had been taken without due process in violation of the 14th Amendment. U.S. CONST. amend. XIV. However, "courts have identified legitimate legislative goals: the compensation of injured property owners and the deterrence of juvenile vandalism." HOROWITZ & DAVIDSON, *supra* note 80, at 101 (citing *General Ins. Co. of Am. v. Faulkner*, 130 S.E.2d 645 (N.C. 1963); *Kelley v. Williams*, 346 S.W.2d 434 (Tex. Ct. App. 1961)); see also *In re Sorrell*, 315 A.2d 110 (Md. Ct. Spec. App. 1974) (basing decision on both the compensation and vandalism deterrence grounds); *Board of Educ. v. Caffiero*, 431 A.2d 799 (N.J. 1981), *appeal dismissed*, 454 U.S. 1025 (1981) (making a parent liable for a child's damage to school property).

duty to rescue.<sup>178</sup> In states with distinctions between invitee, licensee, and trespasser, a child certainly is an invitee.<sup>179</sup> With the status of invitee comes a duty to protect against unreasonable risk of harm and to exercise reasonable care to protect against danger.<sup>180</sup> Even in states that have abolished this distinction, the landowner or occupant still has a duty to guard against and warn others of possible danger.<sup>181</sup> Proper supervision is a legal duty several state courts have placed on a variety of groups,<sup>182</sup> such as schools,<sup>183</sup> grandparents,<sup>184</sup> babysitters,<sup>185</sup> and Boy Scout leaders.<sup>186</sup> "Negligent supervision 'if done by one ordinary person to another' is tortious; it is equally wrongful when engaged in by a parent."<sup>187</sup>

A parent should owe a duty to exercise reasonable care in any situation with regard to their child. This is not to say that an injury to a child is always a result of a parent's failure to conform to the standards. The rules of negligence tort law should restrict several causes of action; once establishing a duty owed to the injured party, the injured child must show a breach of that duty and that the breach proximately caused the injury.<sup>188</sup> Thus, a

178. *Lindsey v. Miami Dev. Corp.*, 689 S.W.2d 856, 859 (Tenn. 1985). The *Lindsey* court stated:

While paying lip-service to the common law rule that a stranger owes no duty exist to render aid to another in peril, courts have recognized that such a duty exists where some special relationship between the parties has afforded justification for the creation of such a duty. Thus, a carrier has been required to take reasonable affirmative steps to aid a passenger in peril and an innkeeper to aid his guest . . . [T]here is now quite a general tendency to extend the same duty to any employer when his employee is injured or endangered in the course of his employment.

*Id.*

179. "An invitee is one who is either expressly or impliedly invited onto the premises of another." *Campbell v. Weathers*, 111 P.2d 72, 76 (Kan. 1941) (citation omitted).

180. "[T]he owner of the premises has a duty to exercise reasonable care in keeping the premises reasonably safe for use by the invitee." *Barmore v. Elmore*, 403 N.E.2d 1355, 1357 (Ill. App. Ct. 1980).

181. Moreover, the Restatement (Second) of Torts states that "[a] possessor of land is subject to liability for physical harm [even to] trespassing children . . ." RESTATEMENT (SECOND) OF TORTS § 339 (1979). Even when children have been warned of specific dangers prior to entering land, courts have held that the warning is insufficient to guard against injury to the child. See *Shannon v. Butler Homes, Inc.*, 428 P.2d 990, 995-96 (Ariz. 1967); *Di Gildo v. Caponi*, 247 N.E.2d 732, 735-36 (Ohio 1969); RESTATEMENT (SECOND) OF TORTS § 343B cmt. b (1979).

182. *Hollister*, *supra* note 7, at 524.

183. *Stiff*, 621 N.E.2d at 221.

184. *Oakley v. State*, 298 N.E.2d 120 (N.Y. 1973).

185. *Standifier v. Pate*, 282 So. 2d 261, 262 (Ala. 1973).

186. *Kearney v. Roman Catholic Church*, 295 N.Y.S.2d 186 (N.Y. 1968).

187. *Hollister*, *supra* note 7, at 524 (quoting *Holodook*, 324 N.E.2d at 342; *Gabel v. Koba*, 463 P.2d 237, 240 (Wash. Ct. App. 1969)).

188. William L. Prosser stated the elements of a cause of action sounding in neg-

jury may determine whether the elements of actionable negligence exist after considering the case before them.<sup>189</sup> In summary, the New York approach is ineffective and inappropriate because it fails to recognize a duty of a parent. On the other hand, California courts take a much more effective and appropriate approach.

## 2. *The California Replacement*

Like New York, the California Supreme Court also abolished parental tort immunity. However, California replaced the doctrine with the reasonable parent principle.<sup>190</sup> In an effort to define a duty owed to a child by a parent, the California Supreme Court created the "reasonable prudent parent" standard: "[t]he standard to be applied is the traditional one of reasonableness, but viewed in light of the parental role."<sup>191</sup> Thus, the determination of whether the parent should be held liable for the alleged misconduct is left to the jury, instead of the courts.<sup>192</sup>

There are two criticisms of this replacement. One popular criticism is that the citizens' views of the reasonable parent are so diverse and different that a general standard would not apply to all cases.<sup>193</sup> The New York Court of Appeals stated that "[c]onsidering the different economic, educational, cultural, ethnic and religious backgrounds which must prevail, there are so many combinations and permutations of parent-child relationships that may result that the search for a standard would necessarily be in vain."<sup>194</sup> A second criticism is that applying a general standard

---

ligence, including the requirement of proximate or legal cause: "a reasonable close causal connection between the conduct and the resulting injury." PROSSER, *supra* note 29, § 30, at 143.

189. Grimm, *supra* note 104, at 334.

190. *Gibson*, 479 P.2d at 653. In the *Gibson* case, a parent told a child to get out of an automobile and onto a highway at night. As a result of the instruction, a passing vehicle struck the child and the child sustained injuries. The child sued his father for the negligent instruction. The California Supreme Court held that the child had a valid cause of action and was not barred from maintaining the suit by parental tort immunity. *Id.*

191. *Id.*

192. *Nolechek v. Gesuale*, 385 N.E.2d 1268, 1277 (N.Y. 1974) (Fuchsberg, J., concurring). Judge Fuchsberg set forth several suggested factors to be used in the determination of liability:

[A]side from the facts relating to the negligence itself, such variable matters as age, mental and physical health, intelligence, aptitudes and needs of the child involved; the presence in the family of other children competing for parental time and attention; and the economic, social and physical environment in which the parental conduct occurs, all may be expected to play a part.

*Id.*

193. *Holodook*, 324 N.E.2d at 346.

194. *Id.*; see also *Pedigo v. Rowley*, 610 P.2d 560, 563 (Idaho 1980) (stating that it is not possible to develop a proper standard considering the various ethnic, reli-

of reasonableness restricts a parent's discretion of what amount of discipline and authority is necessary.<sup>195</sup> These criticisms have a single underlying theme: the jury system does not belong in parent-child lawsuits.<sup>196</sup>

These criticisms are, however, without merit. The foundation of the American judicial system rests on the belief that a representative jury would be the fairest trier of fact.<sup>197</sup> The jury is in the best position to take into account all factors of the parent-child relationship in each particular case.<sup>198</sup> After comparing the

gious and cultural backgrounds).

195. *The "Reasonable Parent Standard": An Alternative to Parent-Child Tort Immunity*, *supra* note 99, at 809. However, the reasonableness standard is "not calculated to subject parents to liability for every mistake, but rather to subject parental conduct to judicial scrutiny in order that clearly unacceptable conduct give rise to tort liability." *Id.*

Justice Rogosheske's dissent also describes the defects in applying an objective standard to parent-child suits. *Anderson v. Stream*, 295 N.W.2d 595, 602 (Minn. 1980) (Rogosheske, J., dissenting). He stated:

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

*Id.*

196. The common argument among critics is that the adversarial process will not be able to determine the difference between a failure to conform to the parental "duty" and simply not conforming to "normal methods." Grobart, *supra* note 1, at 324.

197. *Reid v. Sledge*, 587 N.E.2d 1156, 1160 (Ill. App. Ct. 1992). "The weight and credibility accorded . . . testimony is best determined by the trier of fact who, having observed the . . . trial, is in the best position to make such a determination, and a reviewing court must grant such determinations great deference." *Id.*

198. *Anderson*, 295 N.W.2d at 599. The court stated:

We reject the contention that juries are incapable of rationally and equitably deciding whether a parent has acted negligently in exercising his [or her] parental control and discretion. Our system of justice places great faith in juries, and we see no compelling reason to distrust their effectiveness in the parent-child context.

*Id.*

[W]e constantly depend on . . . juries . . . to sift evidence in order to determine the facts and arrive at proper verdicts. . . . Experience has shown that

factors of the reasonable parent-child relationship, the jury may determine whether a duty exists and whether a breach of duty occurred. To reduce the subjectivity that inherently exists in any jury trial, the court instructs the jury.<sup>199</sup> Within the instructions, the court reminds the jury that there is no one best method for raising children and that reasonable parents may disagree as to which method is the best.<sup>200</sup> Moreover, the court instructs the jury as to what evidence it should consider and what conduct the jury should determine as reasonable or unreasonable.<sup>201</sup> With adequate instructions, the jury will adhere to a blueprint provided by the court. This ensures that a parent's conduct is not automatically deemed unreasonable by a jury simply because it disagrees with the techniques employed by the parent; a jury must not only disagree with these techniques, it must determine them to be an unreasonable exercise of authority.<sup>202</sup> Thus, "the reasonable parent standard does not prevent a parent from exercising ordinary discretion in choosing the appropriate manner in which to raise his children; it only provides an injured child recourse against a parent who fails to provide the care a 'reasonable parent' would have provided under like circumstances."<sup>203</sup> Since the standard allows a child recovery as a result of a parent's negligent conduct, the standard is more equitable and effective than the parental tort immunity doctrine.

However, there is one problem with the reasonable "parent" standard. There should be no difference between the reasonable parent standard and the reasonable person standard. "The question of what the reasonable and prudent *person* would do in similar circumstances is equivalent to asking what the reasonable and

---

the courts are quite adequate for this task. In litigation between parent and child, judges and juries would naturally be mindful of the relationship, and would be even more on the alert for improper conduct [exercised by the parent against the child].

Sorenson v. Sorenson, 339 N.E.2d 907, 914-15 (Mass. 1975). "It would be unjust to bar arbitrarily the claims of injured minors deserving of relief solely because some cases may involve possible collusion between two parties." *Id.* at 915.

199. See Fleming James, Jr., *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667, 677 (1949) (noting several areas in which the judge may instruct the jury).

200. *Id.*

201. *Id.*

202. ILLINOIS SUPREME COURT COMMITTEE ON JURY INSTRUCTIONS, ILLINOIS PATTERN JURY INSTRUCTIONS (CIVIL) §10.02 (1989), *Ordinary care—Adult—Definition*; Illinois Pattern Jury Instructions §B21.02.02, *Burden of Proof on the Issues—One Plaintiff and One Defendant—Negligence and Wilful and Wanton Counts—Causes of Action Accruing On and After 11/25/86*.

203. Carolyn L. Andrews, Comment, *Parent-Child Torts in Texas and the Reasonable Prudent Parent Standard*, 40 BAYLOR L. REV. 113, 123 (1988).



prudent *parent* would do in similar circumstances."<sup>204</sup> A trier of fact should always consider the circumstances of a tort case before it, including the status of the parties.<sup>205</sup> A jury must consider whether a driver of a car acted unreasonably in colliding with another automobile, whether a security guard was reasonable in the apprehension of a suspected shop-lifter, and whether a parent was reasonable in slapping a child.

Thus, the defendant's status always replaces the word "person" in the reasonable person standard.<sup>206</sup> In a case involving a car driver, the question is, "What would the reasonable prudent driver of an automobile do in similar circumstances?" In a case involving a parent, the standard is the reasonable parent standard. A stranger would certainly be unreasonable if he or she strikes a child; however, when a parent strikes a child, it may not be unreasonable.<sup>207</sup> Thus, although the reasoning behind the California standard is rational and sensible, only the name is incorrect. The standard to be applied should be one of reasonableness;<sup>208</sup> the same standard to be applied in all negligence cases, not merely those involving a parent and a child.<sup>209</sup>

### III. PROPOSED REPLACEMENTS FOR PARENTAL TORT IMMUNITY IN ILLINOIS: A STATUTE AND PATTERN JURY INSTRUCTION

The doctrine of parental tort immunity can only result in confusion and inequity within our judicial system.<sup>210</sup> Therefore, this Note advocates total abrogation of the doctrine to resolve these problems. Take the situation in Illinois, for example. With its current doctrine, the Illinois courts have arbitrarily determined

---

204. Rooney & Rooney, *supra* note 3, at 1174.

205. *Id.*

206. *Id.*

207. See Rooney & Rooney, *supra* note 3, at 1174. "Spanking one's child is generally considered perfectly proper conduct for a parent (or one in loco parentis), yet it would be almost always considered improper conduct for a stranger to engage in." *Id.* "[A] parent may spank a child who has misbehaved without being liable for battery, or he may temporarily order the child to stay in his room as punishment, yet not be held responsible for false imprisonment." *Gibson v. Gibson*, 478 P.2d 648, 652 (Cal. 1971).

208. The reasonable person standard is the most adaptable and "amoebic" standard existing in modern American jurisprudence. The "reasonableness" standard can be used in several circumstances. *Grimm*, *supra* note 104, at 335; see *Burget v. Saginaw Logging Co.*, 86 P.2d 1117, 1118 (Wash. 1939) (altering the reasonable person standard to take into account a child's age, intellectual abilities, experience and knowledge); *Hanson v. Washington Water Power Co.*, 5 P.2d 1025, 1027 (Wash. 1931) (amending the standard to consider what a reasonably prudent child would have done in the same circumstances); *Masterson v. Lennon*, 197 P. 38 (Wash. 1921) (altering the standard to consider a person's blindness).

209. *Gibson v. Gibson*, 479 P.2d 648, 653 (Cal. 1971).

210. *McArdle*, *supra* note 45, at 820.

which conduct should be actionable and which are immune.<sup>211</sup> In doing so, the courts have in effect created public policy.<sup>212</sup> However, because the courts are not representatives of the state's residents; the power to determine public policy and make laws pursuant to public policy should rest in the legislature.<sup>213</sup> Therefore, this Note proposes a statute regarding parental immunity.

By creating a statute specifically defining parental immune conduct, the people of a state, like Illinois, through its elected representatives, can convert public policy into law. On the other hand, if a state chooses not to address the issue via legislation, a jury is also correctly suited to determine how much discretion a parent should have, whether a parent abused that discretion,<sup>214</sup> and if the abuse proximately caused the child's injury individual circumstances.<sup>215</sup> Therefore, this Note also proposes the use of a jury instruction which employs the "reasonableness" standard.

### A. Abrogation Of Parental Tort Immunity

Opponents of the abrogation of the parental tort immunity doctrine argue it would create an incentive for children to bring meritless and trivial claims against their parents.<sup>216</sup> However, this argument is unrealistic.<sup>217</sup> Certainly, the number of suits filed by a child against a parent will increase after the abolishment of immunity. However, just as the abolition of intraspousal immunity<sup>218</sup> did not affect a large increase in suits, the increase

---

211. See *supra* notes 94-110 and accompanying text for a discussion of the history of Illinois decisions regarding parent-child suits.

212. See *Cates v. Cates*, 619 N.E.2d 715, 731 (Ill. 1993) (Miller, C.J., dissenting) (noting that the majority cites public policy as a major reason for its holding).

213. *Id.* (noting that the legislature is the intended branch of government that determines and codifies public policy, not the judicial branch). "[A]ny modification or abolition of the parental immunity doctrine should be left to the prerogative of the legislature." *Hill v. Giordano*, 447 So. 2d 164 (Ala. 1984).

214. See *Grimm*, *supra* note 104, at 337 (noting that the "reasonable person is the personification of each court's or jury's social judgment after hearing the merits of the case"). See generally CHARLES W. JOINER, *CIVIL JUSTICE AND THE JURY* 35-38, 64-68 (1962); Tom C. Clark, *The American Jury: A Justification*, in *SELECTED READINGS: THE JURY* 1 (Glenn R. Winters ed., 1962) (stating the jury is better able to declare the societal norms).

215. *Grimm*, *supra* note 104, at 337. This determination would be in light of the circumstances with which the parent was confronted.

216. *Hollister*, *supra* note 7, at 525; *Tolch*, *supra* note 128, at 260.

217. *Hollister*, *supra* note 7, at 525; *Tolch*, *supra* note 128, at 260. Even if a great increase in the amount of suits filed would result, that fact alone should not preclude modification and change of an inefficient doctrine. *Fularczyk*, *supra* note 141, at 167. The introduction of the theory of strict liability for defective products resulted in a "flood of litigation, but the social policies supporting the doctrine outweigh concerns over judicial economy." *Id.*; see also *PROSSER*, *supra* note 29, § 105, at 692.

218. 750 ILCS 65/1 (1992). The statute allows a husband and wife to sue each

in parent-child suits may not be as drastic as some have argued.<sup>219</sup> Since the Illinois Supreme Court abolished intraspousal immunity, a very small number of suits between husband and wife have followed. In fact, only two cases have reached the appellate level after the abrogation, and one of them involved allegations of an intentional tort.<sup>220</sup>

Moreover, the considerable costs involved in a suit will act as a deterrent against the filing of frivolous claims.<sup>221</sup> In addition, the necessary elements required in proving a parent's negligence will act as a barrier for meritless claims.<sup>222</sup> Actual injury to the child must result from the parent's alleged negligence to maintain an action.<sup>223</sup> Trivial claims that do not result in an injury to a child cannot result in liability since the element of injury to the plaintiff of a negligent tort does not exist.<sup>224</sup> Lastly, the American Bar Association acts as a final check against baseless suits. The American Bar Association's Model Rules<sup>225</sup> and Canons of Ethics<sup>226</sup> prevent attorneys from taking non-meritorious cas-

---

other for any tort that occurred during their marriage. Before the amendment was passed, a husband and wife were prohibited from suing each other for any negligent tort.

219. Tolch, *supra* note 128, at 255.

220. Kim v. Kim, 554 N.E.2d 621, 623 (Ill. App. Ct. 1990) (wife suing husband for alleged negligent operation of an automobile); Kukla v. Kukla, 540 N.E.2d 510, 511 (Ill. App. Ct. 1989) (wife suing husband for intentional infliction of emotional distress and invasion of privacy).

221. Tolch, *supra* note 128, at 256.

222. *Id.*; see also Downey v. Mitchell, 835 S.W.2d 554, 555 (Mo. Ct. App. 1992); PROSSER, *supra* note 29, § 31, at 143-44 (listing the elements of negligence and its reason for each element). Other judicial tools, such as pretrial discovery conferences, perjury charges, the possibility to cross-examine, and summary judgment motions, can be used to expose fraudulent or collusive claims. Jilani v. Jilani, 767 S.W.2d 671, 674-75 (Tex. 1988) (Mauzy, J., concurring) (citing Kirchner v. Crystal, 474 N.E.2d 275, 277 (Ohio 1984)); McLeod, *supra* note 37, at 732.

223. Tolch, *supra* note 128, at 256.

224. However, Justice Gonzales fears that, if the immunity doctrine is abolished, attorney "runners" would quickly fly to the hospitals to prey on the injured children and solicit suits against negligent parents. Jilani v. Jilani, 767 S.W.2d 671, 679 (Tex. 1988) (Gonzalez, J., dissenting). *But see* MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1983) (stating that a lawyer cannot solicit employment from a "prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain"); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(A) (1980) (barring a lawyer from representing a person with whom he gave unsolicited advice to unless that person is a former or current client, relative, or close friend); ILLINOIS RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1990) (providing that a lawyer shall not solicit employment financial gain unless the prospective client is a family member, friend, or someone with whom the attorney or law firm already had a relationship).

225. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983). Lawyers should not assert a claim unless they, in good faith, believe it not to be frivolous. *Id.*

226. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1980). Law-

es.<sup>227</sup> Therefore, the opponents' fear of an increase in the number of suits is unwarranted. In the final analysis, the problems of the parental tort immunity doctrine greatly outweigh the unfounded fears. Alternatives to the doctrine, including legislation and a jury instruction employing a standard of reasonableness, are discussed in the next sections.

### B. Legislation

Some state legislatures have chosen to codify certain aspects of the parental tort immunity doctrine.<sup>228</sup> The author proposes that states abrogate the doctrine by statute:

#### PARENTAL TORT IMMUNITY—ABROGATION

Parental immunity is no longer applicable in this state. All actions between parent and child shall be adjudicated in the state court system by the use of the reasonableness standard.

Most courts, like those in Illinois, are reluctant to defer the issue of parental tort immunity to the legislature because the doctrine is a creation of the courts.<sup>229</sup> Since the courts created the doctrine, the Illinois Supreme Court claims the sole right to modify and interpret the doctrine "to correspond with prevalent considerations of public policy needs."<sup>230</sup> The only support for the immunity doctrine in Illinois is public policy concerns.<sup>231</sup>

Yet, the pronouncement of public policy legitimately belongs

yers should not assert a claim obviously intended to harass or injure another. *Id.*  
227. See ILLINOIS RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1990).

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good-faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

*Id.*

228. See CONN. GEN. STAT. ANN. § 52-572c (Supp. 1990) (abrogating immunity in actions against a parent for the negligent operation of an automobile, aircraft, or watercraft); N.C. GEN. STAT. § 1-539.21 (Supp. 1990) (abolishing immunity in automobile cases).

229. See *Nudd v. Matsoukas*, 131 N.E.2d 525, 531 (Ill. 1956). The Illinois Supreme Court stated: "[T]he announcement of this doctrine [should not] be left to the legislature. The doctrine . . . was created by courts. It is especially for them to interpret and modify that doctrine to correspond with prevalent considerations of public policy and social needs." *Id.*; see also *Cates v. Cates*, 619 N.E.2d 715, 730 (Ill. 1993).

230. *Cates*, 619 N.E.2d at 730.

231. The court claims that it ought not to be involved in parent-child disputes since the parent and child are both "uniquely equipped" to handle the conflict. *Id.* at 728. Moreover, the court addressed both the family harmony argument and the fraud and collusion arguments. *Id.* at 726-28.

to the representative body of the general public, the legislature.<sup>232</sup> The courts do not have the resources nor the ability to fulfill this duty efficiently.<sup>233</sup> The legislature is better equipped to make a fundamental determination of what the Illinois residents believe to be public policy.<sup>234</sup> In this instance, although a dissenting justice specifically noted that the judicial branch is ill-equipped to make public policy decisions, the Illinois Supreme Court has assumed the legislature's duty of articulating the public's concerns.<sup>235</sup>

Although the legislature is the more appropriate institution, the courts do have the power and authority to create, modify, and interpret the parental tort immunity doctrine.<sup>236</sup> In the event that the legislature fails to act,<sup>237</sup> the court will presumably act in its place. Therefore, in addition to legislation which abrogates the doctrine, courts should implement a reasonableness standard by a jury instruction as a replacement to immunity.<sup>238</sup>

### C. A Jury Instruction: The Reasonable Person Standard

The substitution of the reasonable person standard in the place of parental tort immunity solves the problems inherent to the Illinois approach with its numerous exceptions, as well as the

---

232. *Id.* at 731 (Miller, C.J., dissenting).

233. *Id.*

234. *Cates*, 619 N.E.2d at 732 (Miller, C.J., dissenting). "The legislature, with its vastly different functions and resources, is better able to undertake a thorough examination of the different concerns that underlie a matter such as this. The judicial branch is not equipped to perform that mission." *Id.*

235. *Id.*; see *People v. Felella*, 546 N.E.2d 492 (Ill. 1989) (stating that public policy declaration is to be made by the legislature).

236. *Id.*

By leaving the issue of whether or not to change the prevailing law to the state legislature, or at least giving it the first opportunity to act, all of the populace's thoughts, opinions, and beliefs can be heard as opposed to having an appellate court deciding the issue from a fact specific case. As is often said, a hard case makes bad law. Allowing elected representatives the chance to review and weigh the policies supporting immunity seems to be the fairest method of testing the continuing validity of the parental tort immunity doctrine. Of course, judicially created rules can be changed by other judges, but given the conflicting rights and duties of parent and child and third-parties, the legislative branch appears best equipped to handle the task of outlining the contours of parental tort liability into the next century.

Rooney & Rooney, *supra* note 3, at 1181.

237. See *Nudd*, 131 N.E.2d at 531 (announcing that the legislature should not modify or abolish the doctrine); see also *Cates*, 619 N.E.2d at 730.

238. Since the people of each state should be the ultimate drafters of the applicable statute defining which parental conduct is immune, the author refuses to draft a model. Without input and feedback from the citizens of the particular state creating the statute, it is impossible to determine what the contents of the statute should include.

New York and California approaches. A representation of the state citizens, the jury, would determine the liability of a parent, as opposed to the courts.

An adequate and efficient addition to the reasonable person standard is a special jury instruction given solely in parent-child suits. Without the immunity doctrine, and with the addition of the reasonableness standard, parental liability can be treated as a question of fact to be addressed by a jury. The determination whether the parent will be liable to the child only applies in a case-by-case basis and will have no result on other decisions.<sup>239</sup> The jury will make its determination after viewing and listening only to relevant information.<sup>240</sup> In sum, the jury will "decide only on the particular merits and unique equities of the case before it,"<sup>241</sup> and determine whether the parent's conduct or failure to act constitutes actionable negligence.<sup>242</sup> With the introduction of the reasonable person standard, the jury can be specifically instructed as to the correct standard to apply.<sup>243</sup>

The instruction will serve as a reminder to both the court and jury that the standard of reasonableness should be "viewed in light of the parental role."<sup>244</sup> Through a combination of instructions given by the court, the jury will follow a step-by-step process in the determination of whether the parent's alleged act is negligent and if the child is deserving of a remedy. Along with the usual negligence instructions, instructions to the jurors will include what evidence to take into account, what duty the parent owes to the child, what the definition of ordinary care is, the definition of "burden of proof," and what amount of proof the child must show to meet that burden. Only after the jury complies with the court's directions can a verdict be found.

This Note proposes that a court give the following jury instruction specifically designed for suits by a child against a parent.<sup>245</sup> This instruction closely resembles Illinois' present pat-

---

239. Francis H. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111, 112 (1924). "The decision of a jury determines the standard for one case, and for that case only. It has no force, binding or persuasive, in determining whether identical conduct under identical circumstances is right or wrong." *Id.*

240. James, *supra* note 199, at 677; Grimm, *supra* note 104, at 338. In order to limit the jury, the judge rules on the sufficiency of proof offered by the plaintiff, instructs the jury, and rules on evidence. James, *supra* note 199, at 679-85.

241. Bohlen, *supra* note 239, at 116-17; Grimm, *supra* note 104, at 337.

242. Grimm, *supra* note 104, at 338. "A jury would consider the practical responsibilities, expectations, and limitations that flow from the parent-child relationship." *Id.* A jury is to be instructed that it should compare the parent's conduct with the conduct exhibited by a reasonable and prudent person in similar instances. *Grand Trunk Ry. of Canada v. Ives*, 144 U.S. 408, 416 (1891); *Chadwick v. Ek*, 95 P.2d 398 (Wash. 1939); *Morehouse v. City of Everett*, 252 P. 157 (Wash. 1926).

243. James, *supra* note 199, at 679-85.

244. *Gibson v. Gibson*, 479 P.2d 648, 653 (Cal. 1971).

245. 305 ILCS 5/10-2 (1992). All *italicized* material in the proposed instructions

tern jury instructions with modifications noted in italics. The proposed instruction provides:

NEGLIGENCE: PARENT-CHILD RELATIONSHIP

It was the duty of the *defendant-parent*, before and at the time of the occurrence, to use ordinary care *in the supervision and authority over the child for the safety of that child.*<sup>246</sup> That means it was the duty of the defendant to be free from negligence *in any exercise of discretion in the provision of care to the child.* When I use the words "ordinary care," I mean the care a reasonably careful person (*in the exact place of the parent*) would use under circumstances similar to those shown by the evidence. *The law does not say how a reasonably careful parent would act under these circumstances.* That is for you to decide. *However, keep in mind that an unusual child-rearing method does not equate to a negligent method.*<sup>247</sup> *Simply because you disagree with the parent's choice of how to supervise and exercise authority over the child does not justify a finding of negligence. In order to find negligence, you must determine that the method, unusual or common, was an exercise of unreasonable conduct.*

*Also, keep in mind the unique, special relationship between a child and parent. The relationship involves elements of love, trust, confidence, and independence that must be exercised continuously by parents in carrying out their demanding and burdensome duties.*<sup>248</sup> *In some situations, an act by a stranger would necessarily be wrongful, such as the striking of a child. On the other hand, the striking of a child by the parent is not always a negligent act, as long as the parent exercised "ordinary care."*<sup>249</sup>

*Finally, remember that, although your economic, cultural, educational, ethnic and religious background may be different from that of the defendant-parent,<sup>250</sup> your decision on whether a reasonable parent would have acted as the defendant did should not in any way be affected. If you find from your consideration of all the evidence that the child has proved all of the propositions required of the child, then your verdict should be for the child, no matter how much the negligence of the child contributed to the injury. However, if you determine that the child's injury was in no way caused by the parent or could not have been deterred by the parent through the*

are additions to the Illinois Pattern Jury Instruction designed for general negligence cases.

246. This language is directly taken from the opinion in *Cates*, 619 N.E.2d at 729. The language describes what conduct should be deemed "conduct inherent to the parent-child relationship; such conduct constitutes an exercise of parental authority and supervision over the child or an exercise of discretion in the provision of care to the child." *Id.*

247. This sentence, as well as the following sentence, is included to counteract the "possibility of jury bias against unconventional child-rearing practices." See Hollister, *supra* note 7, at 527.

248. *Jilani v. Jilani*, 767 S.W.2d 671, 677 (Tex. 1988) (Cook, J., dissenting).

249. *Gibson*, 478 P.2d at 652; *Rooney & Rooney*, *supra* note 3, at 1174.

250. *Holodook v. Spencer*, 324 N.E.2d 338, 346 (N.Y. 1974).

*exercise of ordinary care, then your verdict should be for the parent.*<sup>251</sup>

The above instruction reminds the jury of the uniqueness of the parent-child relationship, as well as eliminates the affirmative defense of contributory negligence on the part of the child. The instruction reminds jurors that factors such as unusual child-rearing methods and societal backgrounds have no bearing in the decision of whether the parent was negligent. Also, if the jury deems the parent's actions negligent, the child will be able to recover, even though the injury-producing conduct was innate to the provision of care to the child.<sup>252</sup> This is due to an assumption that all children act negligently. Thus, the instruction provides that a parent has a duty to supervise the child to *prevent* the child from harming himself or harming others. If the parent breaches that duty, the parent becomes liable for any injury proximately resulting from the breach even if the child was partly responsible.<sup>253</sup> Therefore, the instruction disallows the defense of contributory negligence. On the other hand, if the jury finds that the parent exercised ordinary care, no liability exists. With

---

251. This instruction serves to disallow a parent from alleging contributory negligence. This is an alteration from the general pattern instruction used in Illinois which instructs a jury:

If you find from your consideration of all the evidence that there is no count in which each of the propositions has been proved, then your verdict should be for the defendant. But if, on the other hand, you find from your consideration of all the evidence that all of the propositions in any count has been proved [by the plaintiff], then you must next consider the defendant's claim that the plaintiff was contributorily negligent as to [any] count.

Illinois Pattern Jury Instruction, B21.02.02, *Burden of Proof—One Plaintiff and One Defendant—Negligence and Wilful and Wanton Counts—causes of Action Accruing On and After 11/26/86*.

252. Notice that all negligent conduct is actionable, even if that conduct takes place in the provision of childcare. The author believes that the parent is responsible for the well-being of the child at all times and liability for the failure to act reasonably is both equitable and just. Thus, the following sentences are included in the instruction:

It was the duty of the defendant-parent, before and at the time of the occurrence, to use ordinary care in the supervision and authority over the child for the safety of that child. That means it was the duty of the defendant to be free from negligence in any exercise of discretion in the provision of care to the child.

253. Some states have put a cap on the amount of recovery by limiting the money damages to the amount of liability insurance coverage. HOROWITZ & DAVIDSON, *supra* note 80, at 87; *see, e.g.*, *Williams v. Williams*, 369 A.2d 669, 673 (Del. 1976); *Ard v. Ard*, 414 So.2d 1067, 1070 (Fla. 1982). However, this is unfair to the recovering child. If the jury determines that the parent's negligent conduct proximately causes injury to the child, why restrict the child from recovering the true amount in damages? To limit the recovery to the amount of insurance coverage provides an incentive for the parents to save money on premiums by acquiring only a small amount of insurance.



the application of the jury instruction the problems with the parental tort immunity are effectively resolved.

### CONCLUSION

The historical expansion of children's rights is a welcomed advancement in the American society. Children may now own property and sue a parent for intentional torts.<sup>254</sup> However, there remains an obstacle in the children's road to equality. Presently, in most states, children may not sue a parent for some types of negligence, including negligent conduct that is inherent to the parent-child relationship.<sup>255</sup> Consequently, the present doctrine protects parents from liability and responsibility for negligent actions, yet punishes injured children by denying them compensation for their injuries.<sup>256</sup>

The problems with the parental tort immunity doctrine, the ambiguity, misapplication, inequity, and adverse affects on other areas, necessitate legislative and judicial substitutes. The state legislatures are the correct institutions to abrogate the doctrine and pronounce public policy regarding whether children can sue their parents and for what misconduct they will be permitted to sue for.<sup>257</sup> Unfortunately, the state legislators, including those in Illinois, defer the issue to the courts.<sup>258</sup> An appropriate judicial substitute for the parental tort immunity in this situation is the application of the reasonable person standard in all cases involving negligent torts.<sup>259</sup> This standard, in the form of the proposed jury instruction, will allow a jury to determine the pertinent issues in parent-child suits.<sup>260</sup> As it stands now, the state judges have assumed the citizens' role and continue to retain the parental tort immunity doctrine in some form.<sup>261</sup> Therefore, as it

---

254. Hollister, *supra* note 7, at 505.

255. *Cates v. Cates*, 619 N.E.2d 715, 729 (Ill. 1993).

256. See *supra* Part II for a discussion of the negative effects of the parental tort immunity doctrine.

257. See *supra* Part III.B for a discussion of the reasons for a legislative body to determine public policy, as opposed to the judicial system.

258. See *Nudd v. Matsoukas*, 131 N.E.2d 525, 531 (Ill. 1956) (announcing that the legislature should not modify or abolish the doctrine); see also *Cates*, 619 N.E.2d at 730.

259. See *supra* notes 204-09 and accompanying text for a discussion of the reasonable parent standard.

260. See *supra* Part III.C for a discussion of the author's proposed jury instruction. "It is the anvil of litigation, the heat of trial, and the collective wisdom of twelve citizens which most effectively protects the rights and interests of all parties to a cause of action sounding in tort between parent and child." Andrews, *supra* note 203, at 126.

261. *Cates v. Cates*, 619 N.E.2d 715, 732 (Ill. 1993) (Miller, C.J., dissenting); see *People v. Felella*, 546 N.E.2d 492 (Ill. 1989) (stating that public policy declaration is to be made by the legislature); Rooney & Rooney, *supra* note 3, at 1181.

stands in Illinois, the doctrine can only be eliminated by the Illinois Supreme Court. Intervention by the court is called for since "a judicial creation [such as the doctrine at hand] has become outmoded [and] unjust in application."<sup>262</sup> The citizens of Illinois should call upon their legislators to make a change. Without change, the doctrine will persist to unjustifiably deny children recompense.

Geoffrey A. Vance<sup>263</sup>

---

262. *Hurst v. Capitell*, 539 So. 2d 264, 266 (Ala. 1989) (citing *Lloyd v. Serv. Corp.*, 453 So. 2d 735, 740 (Ala. 1984)); E. Russell March III, Casenote, *Torts-Personal Injury-Doctrine of Parental Immunity Extended to Foster Parents Standing In Loco Parentis For Claims of Simple Negligence*, *Mitchell v. Davis*, 598 So.2d 801 (Ala. 1992), 23 CUMB. L. REV. 483, 493 (1993).

263. Special thanks to the Vances and the Knittels for all the love, patience and encouragement.

