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Defining the Parent's Duty After Rejection of Parent-Child Immunity: Parental Liability for Emotional Injury to Abandoned Children

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RECENT DEVELOPMENTS

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I. INTRODUCTION

Child neglect and abandonment are serious problems in the United States. The number of children in foster care in the United States has risen from a third of a million in 1971[1] to over 750,000 in 1979.[2] A significant number of these children have been abandoned voluntarily and permanently by their parents.[3] Abandoned children[4] suffer marked psychological consequences;[5] even after receiving the best available foster care, such children suffer adverse emotional effects throughout their adult lives.[6] Due to the traditional American rule granting parents immunity from personal injury suits by their minor children,[7] abandoned children generally have been uncompensated for these injuries. The recent trend toward abrogation of parental immunity,[8] however, suggests that the prospects for abandoned children are likely to improve.

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1. *See* SUBCOMM. ON CHILDREN AND YOUTH, SENATE COMM. ON LABOR AND PUBLIC WELFARE, 94TH CONG., 1ST SESS., FOSTER CARE AND ADOPTIONS: SOME KEY POLICY ISSUES 7 (Comm. Print 1975).

2. *See Abuse and Neglect of Children in Institutions, 1979: Hearings Before the Subcomm. on Child and Human Development of the Senate Comm. on Labor and Human Resources,* 96th Cong., 1st Sess. 193-94 (1979) (statement of Arabella Martinez).

3. *See* Burnette v. Wahl, 284 Or. 705, 718, 588 P.2d 1105, 1113 (1978) (Lent, J., concurring in part, dissenting in part). In 1975, an estimated 30.6% of New York City children in foster care or awaiting placement in foster homes were victims of "[p]arental unwillingness to care for child, including desertion." B. BERNSTEIN, D. SNIDER & W. MEEZAN, NEW YORK STATE BOARD OF SOCIAL WELFARE, FOSTER CARE NEEDS AND ALTERNATIVES TO PLACEMENT: A PROJECTION FOR 1975-1985, at 10-11 (1975), *reprinted in Foster Care: Problems and Issues, Joint Hearing Before the Subcomm. on Children and Youth of the Senate Comm. on Labor and Public Welfare and the Subcomm. on Select Education of the House Comm. on Education and Labor,* 94th Cong., 1st Sess. 173-74 (1975).

4. For purposes of this Recent Development, "abandoned children" includes both abandoned and neglected children.

5. *See* V. FONTANA, SOMEWHERE A CHILD IS CRYING 21-22 (1973). Neglected children will often exhibit such physical symptoms as untreated infections or malnutrition. Fontana, however, reports having seen abandoned children "who gave every appearance of being physically healthy, yet looked terribly lost, and who never laughed and seldom cried." *Id.* at 22. *See generally* Comment, *The Rights of Children: A Trust Model,* 46 FORDHAM L. REV. 669, 716-18 (1978).

6. *See* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 32-34 (1973).

7. *See* notes 10-32 *infra* and accompanying text.

8. *See* notes 56-88 *infra* and accompanying text.

After examining the history of parent-child immunity, this Recent Development details the numerous judicial limitations and exceptions that first signaled the doctrine's demise. This Recent Development then analyzes the reasoning of jurisdictions that have abrogated the rule and the problems faced by courts in determining the scope of parents' liability absent the doctrine's protection. Finally, this Recent Development examines three possible bases of recovery for emotional and physical injury when parents are not immune from suit.

II. The Demise of Parent-Child Immunity

A. *A Brief History*[9]

The notion that a minor child could not sue his parent in tort originated in *Hewlett v. George,*[10] an action brought by a minor daughter against her mother for false imprisonment in an insane asylum. Reasoning that society's interest is best served by preserving peace in the family, the court held that a minor child could not seek civil redress for personal injury against his parents.[11] Several years later, in *McKelvey v. McKelvey,*[12] the Tennessee Supreme Court upheld dismissal of a suit by a minor child against his father and stepmother for cruel and inhuman treatment. After noting that a parent has the right to control his child, the court, without any specific authority, attributed to common law the rule that a child had no remedy if the parent abused this right.[13] In addition, the

9. For a detailed treatment of the rise and decline of the immunity rule, see Comment, *Child v. Parent: Erosion of the Immunity Rule,* 19 Hastings L.J. 201 (1967).

10. 68 Miss. 703, 9 So. 885 (1891). The court cited no authority for this proposition. *See* W. Prosser, The Law of Torts § 122, at 865 (4th ed. 1971); Comment, *supra* note 9, at 201.

11. 68 Miss. at 711, 9 So. at 887. The court referred to the parent's "obligation to care for, guide and control" his child, but declined to enforce such obligation through civil law. The court stressed that "[t]he state, through its criminal laws, will give the minor child protection from parental violence and wrong-doing, and this is all the child can be heard to demand." *Id.*

12. 111 Tenn. 388, 77 S.W. 664 (1903).

13. *Id.* at 390, 77 S.W. at 664. In fact, no reported English cases deal with suits by minor children against parents. W. Prosser, *supra* note 10, § 122, at 865. American authority is split whether this silence means that such suits can or cannot be maintained. *See* Comment, *supra* note 9, at 201 n.3. The *McKelvey* court cites Cooley, who states that if the parent, in his exercise of authority,

> plainly exceeds all bounds, he is liable to criminal prosecution, but it seems never to have been held that the child might maintain a personal action for his injury. In principle there seems to be no reason why such an action should not be sustained; but the policy of permitting actions that thus invite the child to contest the parent's authority is so questionable, that we may well doubt if the right will ever be sanctioned.

T. Cooley, Law of Torts, 171 (1879), *cited in* 111 Tenn. at 390, 77 S.W. at 664. The court, noting that Cooley cites no cases sustaining such actions, cites *Hewlett* for its own holding. 111 Tenn. at 390, 77 S.W. at 664. Interestingly, although the *McKelvey* court points out that

court drew an analogy between the relationship of parent and child and that of husband and wife, reasoning that the same policies preventing a wife from suing her husband justify preventing a child from suing his parent.[14]

In *Roller v. Roller*[15] the Washington Supreme Court firmly established the doctrine of parent-child immunity in American jurisprudence. Plaintiff, a fifteen year old girl, brought a civil action seeking damages for rape against her father, who had already been criminally convicted of the same charges. The court dismissed the action on the grounds that a minor child may not sue her parent in tort.[16] The court reasoned that to allow such actions would be against public policy and would disrupt the tranquility of the household.[17] The court also expressed concern that it could draw no limitation once it permitted action by a child against her parents; any such action would have to be permitted, not only for "heinous crime," but for any tort.[18] The court noted further that if a child were to recover damages from a parent, the parent would become heir to the judgment should the child die.[19] Finally, the court suggested that one child should not appropriate the family estate at the expense of other minor children in whose welfare the public has an interest.[20]

These three decisions "constitute the great trilogy upon which the American rule of parent-child tort immunity is based."[21] They include most of the reasons commonly given in support of the rule: the concern for the preservation of the family unit;[22] the preserva-

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the right to control a child "grew out of the corresponding duty on [the father's] part to maintain, protect and educate it," it refused, as did the court in *Hewlett*, to enforce this duty in a civil action. *Id.*

14. *Id.* at 391, 77 S.W. at 665. *But see* W. PROSSER, *supra* note 10, § 122, at 859, 865 (suggesting that such an analogy is improper in that parent and child, unlike husband and wife, were never deemed at common law to be one person).

15. 37 Wash. 242, 79 P. 788 (1905).

16. *Id.*

17. *Id.* at 243-44, 79 P. at 788. The *Roller* court also cites Cooley, who asserts, without the support of any case law,

> that [f]or an injury suffered by the child in that relation no action will lie at the common law. The obligation of the parent to support him is only enforced by proceedings on behalf of the public, and not by suit in the name of or on behalf of the child.

T. COOLEY, LAW OF TORTS 276 (2d ed. 1888), *cited in* 37 Wash. at 245, 79 P. at 789.

18. 37 Wash. at 244, 79 P. at 789.

19. *Id.* at 245, 79 P. at 789.

20. *Id.*

21. Comment, *Tort Actions Between Members of the Family—Husband & Wife—Parent & Child*, 26 MO. L. REV. 152, 182 (1961).

22. *See, e.g.*, Rambo v. Rambo, 195 Ark. 832, 114 S.W.2d 468 (1938); Mesite v. Kirchenstein, 109 Conn. 77, 145 A. 753 (1929); Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891); Cowgill v. Boock, 189 Or. 282, 218 P.2d 445 (1950); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905).

tion of parental authority;[23] the preservation of the family exchequer;[24] the assertion that the injured child already has a remedy in criminal proceedings or in removal from his parents' custody;[25] the suggested analogy between the relationship of husband and wife and that of parent and child;[26] the possibility that the parent could inherit any judgment that the child might recover;[27] and the possibility that frivolous claims might flood the courts.[28] A more recent justification for the rule is the danger of fraud and collusion between the parties in cases involving insurance.[29]

B. *The Growth of Exceptions*

The majority of American courts quickly adopted the immunity rule[30] and applied it to both intentional[31] and negligent[32] torts. These courts, however, apparently displeased with the rule, also placed limitations on the scope of immunity. For example, courts did not extend immunity beyond personal torts and refused to adopt comparable immunity for contract or property actions.[33] In addition, several courts declined to apply the doctrine in tort cases involving solely property damage, such as trespass,[34] or pecuniary loss, as in most deceit cases.[35] Also, most courts did not grant the parent immunity if the child was an adult or an emancipated minor,[36] al-

23. *See, e.g.*, Shaker v. Shaker, 129 Conn. 518, 29 A.2d 765 (1942); Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927).

24. *See, e.g.*, Hastings v. Hastings, 33 N.J. 247, 163 A.2d 147 (1960); Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905).

25. *See, e.g.*, Mesite v. Kirchenstein, 109 Conn. 77, 145 A. 753 (1929); Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891); Cook v. Cook, 232 Mo. App. 994, 124 S.W.2d 675 (1939); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903).

26. *See, e.g.*, McKelvey v. McKelvey, 111 Tenn. 388, 391, 77 S.W. 664, 665 (1903).

27. *See, e.g.*, Barlow v. Iblings, 261 Iowa 713, 156 N.W.2d 105 (1968); Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905).

28. *See, e.g.*, Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905).

29. *See, e.g.*, Dennis v. Walker, 284 F. Supp. 413 (D.D.C. 1968); Barlow v. Iblings, 261 Iowa 713, 156 N.W.2d 105 (1968); Parks v. Parks, 390 Pa. 287, 135 A.2d 65 (1957); Ball v. Ball, 73 Wyo. 29, 269 P.2d 302 (1954).

30. *See* Comment, *supra* note 9, at 202 and cases cited therein.

31. *See, e.g.*, Smith v. Smith, 81 Ind. App. 566, 142 N.E. 128 (1924); Cook v. Cook, 232 Mo. App. 994, 124 S.W.2d 675 (1939).

32. *See, e.g.*, Bulloch v. Bulloch, 45 Ga. App. 1, 163 S.E. 708 (1932); Hastings v. Hastings, 33 N.J. 247, 163 A.2d 147 (1960); Chaffin v. Chaffin, 239 Or. 374, 397 P.2d 771 (1964); Stevens v. Murphy, 69 Wash. 2d 939, 421 P.2d 668 (1966).

33. Comment, *supra* note 9, at 203.

34. RESTATEMENT (SECOND) OF TORTS § 895G, Comment d (1977).

35. *Id. But see* Miller v. Pelzer, 159 Minn. 375, 199 N.W. 97 (1924).

36. *See, e.g.*, Shea v. Pettee, 19 Conn. Supp. 125, 110 A.2d 492 (1954); Farrar v. Farrar, 41 Ga. App. 120, 152 S.E. 278 (1930). Plaintiff daughter in *Hewlett* had been married prior to her cause of action, but was separated from her husband at the time. The court recognized

though some courts invoked the doctrine if the child was an unemancipated minor at the time the tort was committed.[37]

In additon to these limitations, courts developed several exceptions to the immunity rule. One early exception permitted suits against persons who stood in loco parentis.[38] The reason for this exception, however, is not clear. One court suggested that the exception was simply an early retreat from the immunity doctrine;[39] other courts concluded that a person standing in loco parentis does not have the same legal obligation to a child as does his natural parent.[40] Another exception arises when one or both parties to the action are deceased.[41] In such a case, the principal reason for the immunity doctrine—the interest in preserving family harmony or parental discipline—is absent.[42] Similarly, an exception to the immunity doctrine also exists in wrongful death actions.[43] Again, the family unit has been destroyed. Courts also reason that since wrongful death is a statutory action, there should be no immunity when the statute is silent on the issue.[44]

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that if she had been emancipated by her marriage, her suit could be maintained, but declined to assume that such was the case. 68 Miss. at 711, 9 So. at 887. The rationale for this exception is that in the case of an adult child or emancipated minor the rights and duties of the parent in the relationship have ended, and the harmony of the home no longer needs protection. *Id.*

37. *See, e.g.*, Nahas v. Noble, 77 N.M. 139, 420 P.2d 127 (1966).

38. *E.g.*, Treschman v. Treschman, 28 Ind. App. 206, 61 N.E. 961 (1901) (action to recover damages for assault and battery allowed against plaintiff's stepmother). *Accord*, Brown v. Cole, 198 Ark. 417, 129 S.W.2d 245 (1939) (action permitted against estate of stepfather who poisoned adopted son); Cwik v. Zylstra, 58 N.J. Super. 29, 155 A.2d 277 (1959) (suit permitted against grandparents standing in loco parentis). *Contra*, Bricault v. Deveau, 21 Conn. Supp. 486, 157 A.2d 604 (1960) (recognizing immunity for stepparent standing in loco parentis).

39. *See* W. PROSSER, *supra* note 10, § 122, at 865 (citing Treschman v. Treschman, 28 Ind. App. 206, 61 N.E. 961 (1901)).

40. *See* Burdick v. Nawrocki, 21 Conn. Supp. 272, 154 A.2d 242 (1959) (stepfather not under legal obligation to care for, guide, or control child when natural mother still living); Rayburn v. Moore, 241 So. 2d 675 (Miss. 1970) (stepfather not under legal obligation to support stepchild).

41. *See, e.g.*, Union Bank & Trust Co. v. First Nat'l Bank & Trust Co., 362 F.2d 311 (5th Cir. 1966) (applying Georgia law, action permitted against estate of deceased mother); Thurman v. Etherton, 459 S.W.2d 402 (Ky. 1970) (action by minor child permitted against deceased father's estate). *But see* Castellucci v. Castellucci, 96 R.I. 34, 188 A.2d 467 (1963).

42. Union Bank & Trust Co. v. First Nat'l Bank & Trust Co., 362 F.2d 311, 316 (5th Cir. 1966); Davis v. Smith, 126 F. Supp. 497, 506 (E.D. Pa. 1954) (applying Pennsylvania law and allowing suit by both minor son and widow of deceased).

Some courts deny a cause of action even though the parent is deceased. *See* Castellucci v. Castellucci, 96 R.I. 34, 188 A.2d 467 (1963) (suggesting that it is the province of the legislature to limit the immunity rule); Lasecki v. Kabara, 235 Wis. 645, 294 N.W. 33 (1940) (holding that to allow such an exemption would encourage litigation by unemancipated minors against the estates of deceased parents).

43. *See, e.g.*, Harlan Nat'l Bank v. Gross, 346 S.W.2d 482 (Ky. Ct. App. 1961); Shumway v. Nelson, 259 Minn. 319, 107 N.W.2d 531 (1961).

44. *See, e.g.*, Fowler v. Fowler, 242 S.C. 252, 130 S.E.2d 568 (1963). *But see* note 22 *supra*.

Several courts also recognize an exception when the tort is committed in connection with the parent's business activities.[45] Courts recognizing this exception emphasize that negligent acts in performance of employment or business are unrelated to the discharge of parental responsibilities; thus a cause of action under such circumstances is less likely to disturb family harmony.[46] An interesting variation of this exception deals with "dual relationships"—when in addition to the parent-child relationship, the parties may be characterized as carrier and passenger[47] or master and servant.[48] Courts generally reason that if such a dual relationship exists, the domestic relationship is incidental and therefore logically irrelevant to the cause of action.[49]

Another widely recognized exception to the immunity rule holds that a third party is not protected from liability for the parent's tort. For example, if the parent within the scope of his employment injures his child, the parent's employer will not be protected from suit by the parent's immunity.[50]

Finally, a particularly important exception permits suit against parents who intentionally inflict injury upon their children[51] or who engage in willful misconduct.[52] Courts adopting this exception generally reason that the parent has abandoned the parental relation and therefore cannot claim parental immunity.[53] Certainly, in the case of a particularly violent intentional tort, such as when a father murders his wife and commits suicide in his child's presence,[54] granting the father immunity from suit would not salvage the peace and tranquility of the home.[55]

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45. *See, e.g.*, Trevarton v. Trevarton, 151 Colo. 418, 378 P.2d 640 (1963); Worrell v. Worrell, 174 Va. 11, 44 S.E.2d 343 (1939).

46. *See* Dennis v. Walker, 284 F. Supp. 413 (D.D.C. 1968); Trevarton v. Trevarton, 151 Colo. 418, 378 P.2d 640 (1963).

47. *See* Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932).

48. *See* Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966). *But see* Luster v. Luster, 299 Mass. 480, 13 N.E.2d 438 (1938) (suggesting that a clear distinction between parental and business duties is not possible).

49. *See, e.g.*, Teramano v. Teramano, 6 Ohio St. 2d 117, 216 N.E.2d 375 (1966).

50. *E.g.*, Mi-Lady Cleaners v. McDaniel, 235 Ala. 469, 179 So. 908 (1938).

51. *See, e.g.*, Gillett v. Gillett, 168 Cal. App. 2d 102, 335 P.2d 736 (1959); Treschman v. Treschman, 28 Ind. App. 206, 61 N.E. 961 (1901); Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951).

52. *See, e.g.*, Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Oldman v. Bartshe, 480 P.2d 99 (Wyo. 1971). *But see* Teramano v. Teramano, 6 Ohio St. 2d 117, 216 N.E.2d 375 (1966) (immunity even for negligent and willful misconduct, absent showing of actual intent to injure child); Stevens v. Murphy, 69 Wash. 2d 939, 421 P.2d 668 (1966) (retaining immunity for gross negligence of parent acting in parental capacity).

53. *See, e.g.*, Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930).

54. Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951).

55. It is interesting to note that even though Maryland clings steadfastly to the immun-

C. *The Rejection of the Rule*

The various limitations and exceptions to parental immunity indicate an attempt by several courts to avoid unjust results while still operating within the confines of the rule.[56] In 1932, a Missouri appellate court first attempted to abrogate the rule entirely,[57] but other courts did not follow the decision.[58] It was not until 1963, with the Wisconsin Supreme Court's decision in *Goller v. White*,[59] that the parental immunity doctrine was abrogated. The case involved injury to a child whose father negligently allowed him to ride on the drawbar of a tractor. To support its finding of liability, the court pointed to the widespread judicial dissatisfaction with the rule as evidenced by the numerous exceptions.[60] Thus, the Wisconsin court abolished the immunity doctrine except in certain limited circumstances,[61] and a significant minority of jurisdictions have followed its lead.[62]

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ity doctrine, *see* Montz v. Mendaloff, 40 Md. App. 220, 388 A.2d 568, *cert. denied*, 283 Md. 736 (1978), the Maryland Supreme Court nonetheless permitted recovery for mental injuries accompanied hy physical manifestations in *Mahnke*. *See* 197 Md. at 69, 77 A.2d at 926, 927.

56. *See* W. PROSSER, *supra* note 10, § 122, at 867; RESTATEMENT (SECOND) OF TORTS § 895G, Comment d (1977).

57. Wells v. Wells, 48 S.W.2d 109 (Mo. App. 1932).

58. RESTATEMENT (SECOND) OF TORTS § 895G, Comment j (1977).

59. 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

60. *Id.* at 410, 122 N.W.2d at 197.

61. *Id.* at 413, 122 N.W.2d at 198. These exceptions are

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

Id. See RESTATEMENT (SECOND) OF TORTS § 895G, Comment j (1977).

62. In addition to Wisconsin, eleven states have abrogated the immunity, though with varying degrees of enthusiasm. California has taken the most liberal position. In a case involving the negligence of a father in instructing his son to correct the position of their towed vehicle on a dark highway, the California Supreme Court rejected immunity without limitation or exception and adopted a reasonable and prudent parent standard. *See* Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971).

The remaining cases have uniformly involved physical injuries as a result of the negligent operation of a motor vehicle. In this context, five states have rendered decisions similar in breadth to *Gibson*, rejecting immunity without any particular limitation or exception:

Maine. Black v. Solmitz, 409 A.2d 634 (Ne. 1979).

New Hampshire. Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966).

New York. Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969).

Pennsylvania. Falco v. Pados, 444 Pa. 372, 282 A.2d 351 (1971).

Three other states have rejected immunity with *Goller* limitations:

Kentucky. Rigdon v. Rigdon, 465 S.W.2d 921 (Ky. 1970).

Michigan. Plumley v. Klein, 388 Mich. 1, 199 N.W.2d 169 (1972).

Minnesota. Silesky v. Kelman, 281 Minn. 431, 161 N.W.2d 631 (1968).

The remaining three have rejected immunity with even more caution, not only adopting *Goller* limitations, but reserving the question of a parent's liability in cases other than those involving negligence in automobile accidents:

The reasons for abrogation of the doctrine relate directly to the reasons for the doctrine itself. One commentator has noted that the immunity doctrine arose as the result of a balancing process between the abridgement of a child's rights and the benefits to the child of a continuing family relationship.[63] The Second Restatement of Torts, however, has suggested that any such benefits cannot outweigh "the more urgent desirability of compensating the injured person, and particularly a child, for genuine harm which may cripple him for life and ruin his entire future."[64] Several courts have

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

Arizona. Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970).

New Jersey. France v. A.P.A. Transp. Corp., 56 N.J. 500, 267 A.2d 490 (1970).

In other jurisdictions that have permitted recovery by children in automobile injury cases it is difficult to determine whether the holding constitutes abrogation as such or is merely another of many exceptions. *See, e.g.,* Brennecke v. Kilpatrick, 336 S.W.2d 68 (Mo. 1960); Smith v. Kauffman, 212 Va. 181, 183 S.E.2d 190 (1971). Perhaps for this reason Illinois is often cited, erroneously, as having abrogated immunity. *See, e.g.,* Falco v. Pados, 444 Pa. 372, 379, 282 A.2d 351, 354 (1971) (citing Schenk v. Schenk, 100 Ill. App. 2d 199, 241 N.E.2d 12 (1968)). In fact Illinois disclaims having done so. *See* Johnson v. Myers, 2 Ill. App. 3d 844, 227 N.E.2d 779 (1972); Schenck v. Schenk, 100 Ill. App. 2d 199, 205-07, 241 N.E.2d 12, 14-15 (1968). Suffice it to say that these courts may be persuaded in future cases to limit their "abrogation" to auto injury cases.

Three states—Hawaii, Nevada, and Vermont—never adopted the parent-child immunity doctrine. *See* Petersen v. City and County of Honolulu, 51 Hawaii 484, 462 P.2d 1907 (1969); Rupert v. Stienne, 528 P.2d 1013 (Nev. 1974); Wood v. Wood, 135 Vt. 119, 370 A.2d 191 (1977).

North Dakota has permitted recovery by child against parent based on a statute establishing general liability for negligence. *See* Nuelle v. Wells, 154 N.W.2d 364 (N.D. 1967).

63. Comment, *supra* note 9, at 204.

64. The factor that apparently tipped the scales in favor of rejecting immunity is the development of liability insurance. *See* RESTATEMENT (SECOND) OF TORTS § 895G, Comment c (1977). A number of courts that have permitted suits by child against parent, whether the action is considered an exception to the otherwise accepted rule or a rejection of the rule entirely, have discussed insurance in reaching their decisions. *See, e.g.,* Hebel v. Hebel, 435 P.2d 8, 13 (Alaska 1967); Streenz v. Streenz, 106 Ariz. 86, 88-89, 471 P.2d 282, 284 (1970); Gibson v. Gibson, 3 Cal. 3d 914, 922, 479 P.2d 648, 653, 92 Cal. Rptr. 288, 293 (1971); Petersen v. City and County of Honolulu, 51 Hawaii 484, 486, 462 P.2d 1007, 1008 (1969); Plumley v. Klein, 388 Mich. 1, 7-8, 199 N.W.2d 169, 172 (1972); Silesky v. Kelman, 281 Minn. 431, 438-42, 161 N.W.2d 631, 636-38 (1968); Rupert v. Stienne, 528 P.2d 1013, 1015-17 (Nev. 1974); Briere v. Briere, 107 N.H. 432, 436, 224 A.2d 588, 591 (1966); France v. A.P.A. Transp. Corp., 56 N.J. 500, 505, 267 A.2d 490, 493 (1970); Gelbman v. Gelbman, 23 N.Y.2d 434, 438-39, 297 N.Y.S.2d 529, 531-32, 245 N.E.2d 192, 193-94 (1969); Falco v. Pados, 444 Pa. 372, 379-81, 282 A.2d 351, 355-56 (1971); Smith v. Kauffman, 212 Va. 181, 184-86, 183 S.E.2d 190, 193-95 (1971); Goller v. White, 20 Wis. 2d 402, 412, 122 N.W.2d 193, 197 (1963). In a number of actions by child against parent for personal injury torts, and especially in cases that involve automobile negligence, *see* RESTATEMENT (SECOND) OF TORTS § 895G, Comment c (1977), the real party in interest is the defendant's personal liability insurer. Thus, a number of courts rely on the possibility of fraud or collusion as justification for the immunity rule. *See, e.g.,* note 29 *supra. See generally* Note, *Intrafamily Tort Immunity in Virginia: A Doctrine in Decline,* 21 WM. & MARY L. REV. 273 (1979).

Although states abrogating the immunity insist that the mere existence of liability insurance does not itself create liability, *see, e.g.,* Hebel v. Hebel, 435 P.2d 8, 15 (Alaska 1967), two states permit recovery by the child to the extent of the parent's liability insurance. *See*

rejected the rule because they no longer consider its justifications compelling. One court has responded pragmatically to the argument that to allow actions by children against parents will disturb family harmony by noting that if such an action is brought at all there is probably no domestic tranquility to be destroyed.[65] Alternatively, if the case involves insurance, then family harmony will more likely be disrupted if the court denies the action.[66] In any event, the idea that an uncompensated tort promotes family harmony appears unfounded.[67] Indeed, it does not appear that family harmony would be any more adversely affected by tort actions than by contract or property actions.[68] Thus, in view of cases allowing tort actions between other members of the family,[69] the preservation of family harmony is not a convincing reason for cutting off the rights of children injured by their parents.

Similarly, the argument that to allow suit by children would undermine parental authority is not adequate justification for parental immunity. Rather, it is better to consider the merits of each individual case than to protect parental authority with a blanket immunity from suit.[70] In this regard, courts have argued that the possibility that children will cease to obey their parents if permitted to sue them for assaults is remote.[71] The immunity rule assumes that, like a sovereign, a parent can do no wrong.[72] In fact, a parent is more like a judge—not accountable for mere errors, but responsible when he oversteps his bounds.[73] Moreover, if the parent has, in the exercise of his authority, injured his child so severely that an action is brought, it would be unwise to protect summarily the exercise of authority to the child's detriment.

Courts have also rejected the argument that to allow suit would result in depletion of the family exchequer.[74] This argument certainly carries no weight if the defendant is insured.[75] In any event, this rationale "ignores the parent's power to distribute his favors as

Williams v. Williams, 369 A.2d 669 (Del. 1976); Sorenson v. Sorenson, 369 Mass. 350, 339 N.E.2d 907 (1975).

65. *See* Signs v. Signs, 156 Ohio St. 566, 576, 103 N.E.2d 743, 748 (1952).
66. W. PROSSER, *supra* note 10, § 122, at 868. *See generally* note 64 *supra.*
67. RESTATEMENT (SECOND) OF TORTS § 895G, Comment c (1977).
68. *See* Signs v. Signs, 156 Ohio St. 566, 576, 103 N.E.2d 743, 748 (1952).
69. *See* Comment, *supra* note 21, at 188 nn.197-204 and accompanying text.
70. *See* Comment, *supra* note 21, at 189.
71. *See, e.g.,* Dunlap v. Dunlap, 84 N.H. 352, 362-63, 150 A. 905, 910 (1930).
72. *Id.*
73. *Id.*
74. *See* note 24 *supra.*
75. Union Bank & Trust Co. v. First Nat'l Bank & Trust Co., 362 F.2d 311, 314 (5th Cir. 1966).

he will, and leaves out of the picture the depletion of the child's assets of strength and health through the injury."[76] Moreover, under normal circumstances a parent would pay the costs of any nontortious injury to his child. Thus, it is unlikely that abrogation of the doctrine would significantly alter a family's financial status.

The availability of criminal remedies also is not a convincing argument for denying a private cause of action to an injured child. Criminal remedies do not compensate a child for his damages.[77] Moreover, it is unrealistic to believe that such proceedings will disrupt family harmony any less than a tort action.[78]

Analogizing parental immunity to spousal immunity also appears to be an insufficient reason for retention of the parental immunity doctrine. At common law husband and wife were considered a legal unit; there was, however, no such unity between parent and child.[79] Moreover, the marital immunity itself has been subject to considerable criticism; in fact, a number of states have abrogated it.[80] Indeed, Prosser suggested that "[t]he height of inconsistency is reached by [those] courts which permit action by the wife but deny it to the child."[81]

The argument that a parent might fall heir to judgment against him in favor of his child is also not convincing.[82] First, the possibility of such an occurrence is remote, and second, to the extent that it exists, the same could occur in a property case.[83]

Finally, the criticism that rejection of immunity for certain serious torts logically would result in rejection for all torts also does not justify retaining the parental immunity rule. Concededly, courts inclined to permit actions between parent and child do not distinguish between intentional torts and negligent torts.[84] The concern that permitting all such actions will result in a flood of litigation, however, is an insufficient rationale for immunity. Indeed, the

76. Dunlap v. Dunlap, 84 N.H. 352, 361, 150 A. 905, 909 (1930).

77. Comment, *supra* note 21, at 192. *See also* Burnette v. Wahl, 284 Or. 705, 730, 588 P.2d 1105, 1119 (1978) (Linde, J., dissenting).

78. Comment, *supra* note 21, at 192. *See also* Burnette v. Wahl, 284 Or. 705, 730, 588 P.2d 1105, 1119 (1978) (Linde, J., dissenting).

79. *See* Dunlap v. Dunlap, 84 N.H. 352, 353, 150 A. 905, 905-06 (1930).

80. *See* RESTATEMENT (SECOND) OF TORTS § 895G (Tent. Draft No. 18, 1972) and cases cited therein.

81. W. PROSSER, *supra* note 10, § 122, at 865 n.75 (citing Rambo v. Rambo, 195 Ark. 832, 114 S.W.2d 468 (1938)); Mesite v. Kirchenstein, 109 Conn. 77, 145 A. 753 (1929); Redding v. Redding, 235 N.C. 638, 70 S.E.2d 676 (1952); Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927)).

82. *See* Comment, *supra* note 9, at 205.

83. *Id.*

84. *See, e.g.*, Hebel v. Hebel, 435 P.2d 8 (Alaska 1967).

American Law Institute has observed that "[t]his seems a poor reason for denying liability for real harm to a child, which ought to be compensated. . . . It is the business of the courts to deal with the flood of actions if they arise."[85] Similarly, with regard to the concern over fraud and collusion between parent and child, courts should inquire into the possibility of such fraud and collusion in individual cases rather than bar all suits by children against their parents.[86] The possibility of fraud or collusion is no greater in tort actions between parent and child than in other actions generally permitted by the courts, such as contract or property suits between parent and child, or suits between driver and guest or master and servant.[87]

Because of the less than compelling reasons for retaining parent-child immunity, a growing minority of courts have abrogated the doctrine. Significantly, in response to this trend the American Law Institute has also rejected parent-child immunity in the Second Restatement of Torts.[88] The abrogation of parental immunity raises some important questions regarding the extent to which parents will be held liable for tortious injury to their children.

III. Defining the Scope of Parental Liability: *Burnette v. Wahl* and the Attempt to Recover for Emotional Injury

In *Burnette v. Wahl*[89] a sharply divided Oregon Supreme Court attempted to define the limits of parental liability in the wake of Oregon's foresaken parent-child immunity rule. *Burnette* was an action brought by minor children, through their guardian, against their mothers seeking damages for emotional and psychological injuries caused by the alleged failure of defendants to perform their parental duties.[90] These duties, according to the complaint, included a general obligation to "provide plaintiff with care, custody, parental nurturance, affection, comfort, companionship, support, regular contact and visitation."[91] More specifically, plaintiffs accused defendants of violating Oregon criminal statutes that prohib-

85. Restatement (Second) of Torts § 702A, at 26 (Tent. Draft No. 14, 1969). This section refers to the liability of persons who induce a parent to leave his minor child.

86. *See* Restatement (Second) of Torts § 895G, Comment c.

87. *See* W. Prosser, *supra* note 10, § 122, at 865-66; Comment, *supra* note 21, at 192.

88. Restatement (Second) of Torts § 895G.

89. 284 Or. 705, 588 P.2d 1105 (1978).

90. Plaintiffs, wards of the Klamath County Juvenile Court, were in the custody of the Children's Services Division of the Department of Human Resources of the State of Oregon. Three identical actions brought by their guardian ad litem, the Portland Metropolitan Public Defender, were consolidated for appeal.

91. 284 Or. at 707, 588 P.2d at 1107.

ited parents from abandoning,[92] neglecting,[93] or failing to support their children.[94] The Oregon Supreme Court rejected plaintiffs' claims, holding that neither these statutes nor the common law provide a civil remedy for the wrongs alleged.[95] The disparate opinions in *Burnette* offer evidence of the difficulty courts are likely to face in determining the scope of parents' liability to their children.

Justice Holman's majority opinion focused upon the lack of legislative authority for such suits[96] and suggested that to allow a cause of action would upset a complex legislative scheme designed to deal with the problems of child abuse, neglect, and abandonment.[97] These statutes, according to Justice Holman, expressed a legislative policy of reuniting the family when possible.[98] Justice Holman feared that to allow a cause of action based on these statutes would interfere with the state's effort to restore the family.[99] Moreover, for the same reasons, he refused to create a new tort of parental desertion.[100] Justice Tongue concurred in the result, stating more directly, however, that the doctrine of parental immunity should not be abandoned with respect to liability for mental and emotional injuries.[101]

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92. OR. REV. STAT. § 163.535 (1977) states:

Abandonment of a child. (1) A person commits the crime of abandonment of a child if, being a parent, lawful guardian or other person lawfully charged with the care or custody of a child under 15 years of age, he deserts the child in any place with intent to abandon it.

(2) Abandonment of a child is a Class C felony.

93. OR. REV. STAT. § 163.545 (1977) states:

Child neglect. (1) A person having custody or control of a child under 10 years of age commits the crime of child neglect if, with criminal negligence, he leaves the child unattended in or at any place for such period of time as may be likely to endanger the health or welfare of such child.

(2) Child neglect is a Class A misdemeanor.

94. OR. REV. STAT. § 109.010 (1977) states that "[p]arents are bound to maintain their children who are poor and unable to work to maintain themselves; and children are bound to maintain their parents in like circumstances." OR. REV. STAT. § 163.555 (1977) states:

Criminal nonsupport. (1) A person commits the crime of criminal nonsupport if, being the parent, lawful guardian or other person lawfully charged with the support of a child under 18 years of age, born in or out of wedlock, he refuses or neglects without lawful excuse to provide support for such child.

. . . .

(3) Criminal nonsupport is a Class C felony.

In addition, plaintiffs alleged alienation of affections as a result of the stated failures and violations. The court summarily dealt with this allegation by noting that the legislature had abolished this particular tort. *See* OR. REV. STAT. § 30-840 (1977).

95. 284 Or. 705, 588 P.2d 1105.

96. *Id.* at 710, 588 P.2d at 1108-09.

97. *Id.* at 712, 588 P.2d at 1109.

98. *Id.* at 712, 588 P.2d at 1109-10.

99. *Id.* at 714, 588 P.2d at 1110-11.

100. *Id.* at 717, 588 P.2d at 1112.

101. *Id.*

Justice Lent, concurring in part and dissenting in part, agreed with the result only because plaintiffs failed technically in their pleadings to state a cause of action for "outrageous conduct."[102] He insisted, however, that the court should permit a civil cause of action for damages upon a properly drafted complaint.[103] Justice Lent examined the costs of caring for abandoned children, including both the monetary loss to the community[104] and the "loss of human potential" caused by psychological and emotional harm to abandoned children,[105] and concluded that offending parents "should shoulder so much of the burden as [their] resources permit."[106]

In his dissent, Justice Linde noted that it is not uncommon for courts to award civil damages for violations of prohibitory laws[107] and concluded that parents could be held liable for mental and emotional damages inflicted maliciously, intentionally, and with cruel disregard of the consequences.[108] Justice Linde insisted that the majority's desire to protect the legislative policy of preserving family unity would preclude suits for torts resulting in physical as well as mental injury.[109] Finally, the dissent accused Justice Holman of applying the doctrine of parent-child immunity even though Oregon courts had abandoned the doctrine with respect to intentional torts.[110]

Although Justice Holman did not attempt to embrace the immunity doctrine as the basis for his decision, his concern that there could be no limitation on a parent's liability to his child for purely emotional injuries is reminiscent of the rationale traditionally proffered to justify immunity. Justice Holman observed that "[t]here are probably as many children who have been damaged in some manner by their parents' failure to meet completely their physical, emotional and psychological needs as there are people."[111] The court suggested, as an example of the high exposure of parents to liability for emotional injuries, that a child might sue his parents for emo-

102. *Id.* at 717, 588 P.2d at 1112 (Lent, J., concurring in part, dissenting in part); *accord,* RESTATEMENT (SECOND) OF TORTS § 46 (1965) (Outrageous Conduct Causing Severe Emotional Distress).

103. 284 Or. at 717, 588 P.2d at 1112.

104. *Id.* at 719, 588 P.2d at 1113.

105. *Id.*

106. *Id.* at 723, 588 P.2d at 1115.

107. *Id.* at 724, 588 P.2d at 1116 (Linde, J., dissenting).

108. *Id.* at 729, 588 P.2d at 1118 (Linde, J., dissenting).

109. *Id.* at 730, 588 P.2d at 1118 (Linde, J., dissenting).

110. *Id.* at 731, 588 P.2d at 1118 (Linde, J., dissenting); *see* Cowgill v. Boock, 189 Or. 282, 218 P.2d 445 (1950).

111. 284 Or. at 716, 588 P.2d at 1111. *Cf.* Roller v. Roller, 37 Wash. 242, 244, 79 P. 788, 789 (1905) (suggesting that if a suit against a parent hy a child for the "heinous crime" of rape were permitted, no distinction for other torts could be made).

tional damages resulting from the parents' divorce on the theory that reasonable persons would conclude that harm was substantially certain to result from such an act.[112] Justice Holman's reasoning sounds very much like the rationale generally offered to justify parental immuity—that the abrogation of immunity would result in a flood of frivolous litigation. Indeed, Justice Tongue went so far as to argue that such immunity should be preserved for claims alleging emotional injury. Thus, *Burnette* vividly illustrates the principal difficulty courts are likely to face when attempting to place limitations upon parental liability after they have abandoned the immunity doctrine. Even though parental immunity has been abandoned, such courts must face the same considerations that couched the immunity-no immunity debate. As a result, the rationale that a court must use for limiting parental liability in a particular context will likely be the same rationale that the court rejected when it abandoned parental immuity in the first place. Justice Linde's dissent apparently recoguized this inconsistency when it noted that the majority's rationale for precluding suits for emotional injury, if logically applied, would also preclude suits for physical injury.

IV. Parental Liability for Child Neglect and Abandonment

The *Burnette* case illustrates the analytic problems in barring suits for mental and emotional injuries in jurisdictions that have abrogated the parent-child immunity doctrine or have adopted certain of the widely recoguized exceptions to the rule.[113] It seems incongruous for any jurisdiction that has accepted the arguments for rejection of immunity to refuse to entertain claims alleging mental and emotional injury. If such a jurisdiction accepts the general principle that it is possible to inflict mental or emotional injury, either intentionally or recklessly,[114] and if the jurisdiction recoguizes that such injury may cause economic consequences as serious as do physical injuries,[115] then by allowing only claims for physical injury, the jurisdiction leaves a particular class of children uncompensated without justification. Analytic consistency requires that these jurisdictions permit recovery for emotional injury as well as for physical injury. The demise of parental immunity has made any distinction between the two logically impossible. Rather than focus on the na-

112. 284 Or. at 716, 588 P.2d at 1111.

113. This dilemma exists in states that permit suits for intentional torts hased on the rationale that the defendant parent may have ahandoned the parental relation. *See* notes 51-55 *supra* and accompanying text.

114. *See* Restatement (Second) of Torts § 46 (1965).

115. *See* W. Prosser, *supra* note 10, § 12, at 50-51.

ture of the child's injury, courts in these jurisdictions should focus on whether the parent has a duty to the child and whether that duty has been breached.[116]

A. *Statutes as Defining Parental Duty*

Since each of the fifty states has laws prohibiting child neglect, abuse, or abandonment,[117] it is possible for courts to define parental duties by reference to these statutes.[118] Courts often adopt the standard of conduct set forth in a penal statute as the standard of conduct required of a reasonable and prudent person in negligence cases.[119] In addition, statutes have been held to define a defendant's duty for other torts.[120] Thus, a court might construe a statute which provides that

> [a]ny adult person who willfully causes or permits a child who is less than 18 years of age to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or who willfully causes or permits a child to be placed in a situation where the child may suffer physical pain or mental suffering as a result of abuse or neglect is guilty of a gross misdemeanor[121]

as creating a duty in a parent not to neglect willfully a child so as to cause the child mental distress. The court could then elect to enforce this duty by granting a civil remedy for its violation.

When a criminal child neglect statute neither expressly provides civil remedies for its violation nor expressly prohibits such remedies, courts may attempt to determine whether the legislature intended a civil remedy.[122] If the court is unable to find an express

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116. *See* Comment, *supra* note 9, at 219. The article opines that jurisdictions abrogating the immunity without reservation may find it necessary to limit these decisions or face suits by children that, for example, charge their parents with negligently failing to have the child's cavity filled. *Id.* It seems possible, and indeed preferable, however, to define a parent's duty to his child in such a way as to limit a parent's exposure to actions, rather than to retain any notion of immunity. *See* notes 140-42 *infra* and accompanying text.

117. 46 FORDHAM L. REV. at 720. *See, e.g.,* ARK. STAT. ANN. §§ 42-807 to -818 (1977); CAL. PENAL CODE § 273a (West 1970); CONN. GEN. STAT. §§ 53-21, -23 (1979); NEV. REV. STAT. § 200.508 (1977). *See also* Katz, Howe & McGrath, *Child Neglect Laws in America,* 9 FAM. L.Q. 1 (1975).

118. *See* RESTATEMENT (SECOND) OF TORTS § 874A.

119. *See, e.g.,* Osborne v. McMasters, 40 Minn. 103, 41 N.W. 543 (1889); Stachniewicz v. Mar-Cam Corp., 259 Or. 583, 488 P.2d 436 (1971); W. PROSSER, *supra* note 10, § 36.

120. "[S]tatutory provisions have been accepted by the courts as a basis for civil liability in actions for torts other than negligence, such as trespass, deceit, nuisance, or even strict liability." RESTATEMENT (SECOND) OF TORTS § 286, Comment d (1965).

121. NEV. REV. STAT. § 200.508 (1977).

122. The Restatement (Second) of Torts notes that there are three possible reasons for a statute's silence as to civil remedies. First, the legislature may have intended civil liability to be imposed, but failed to include a private cause of action. Second, the legislature may have intended no civil liability. Third, the legislature may not have considered the possibility of civil remedies at all. RESTATEMENT (SECOND) OF TORTS § 874A, Comment c (1977).

or an implied private remedy in the statute, it is under no compulsion to apply the statute to create civil liability for defendant's conduct.[123] Nevertheless, the court is at liberty to do so if it determines that a civil remedy would promote the policy underlying the statute;[124] the court's inquiry is whether a tort remedy is first, consistent with the statute and second, necessary for assuring its effectiveness.[125] The court might also take into account the adequacy of existing remedies,[126] the extent to which a tort action would supplement or interfere with existing remedies and enforcement,[127] the burden that the new cause of action might place on the judicial machinery,[128] the extent of the change in tort law, and whether the particular facts resemble existing torts or extend the scope of a tort in a desirable direction.[129]

The advantage of relying on statutes to define parental duty lies in its relative simplicity; the legislature has already considered the policy questions involved and prohibited certain conduct. Similarly, a court relying on an abandonment statute to define a parent's civil duty might argue that the existence of the criminal duty is evidence that society has recoguized the importance of deterring the conduct in question.[130] In addition, a cause of action based upon a statute provides built-in limitations upon the parent's liability. For example, the court can look to precedents in criminal cases for guidance in determining what actions constitute violation of the civil duty.

Certain problems arise, however, when courts attempt to apply statutory standards of conduct to civil cases. As previously noted, courts are under no particular obligation to apply these standards.[131] Thus, it is possible that their application will not be uniform. An-

123. *Id.;* W. PROSSER, *supra* note 10, § 36, at 191.

124. RESTATEMENT (SECOND) OF TORTS § 874A, Comment d (1977); *see* Phoenix Rev. Co. v. Powell, 251 S.W.2d 892, 896-97 (Tex. Civ. App. 1952). Prosser calls this practice of promoting the policy of a statute "something in the nature of judicial legislation." W. PROSSER, *supra* note 10, § 36, at 191.

125. *See* Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 39 (1977); Cort v. Ash, 422 U.S. 66, 78 (1975).

126. *See* Cort v. Ash, 422 U.S. at 78 (suggesting an examination of the entire legislative scheme in order to ascertain the underlying policy). *Cf.* Burnette v. Wahl, 284 Or. 705, 588 P.2d 1105 (1978); notes 98-101 *supra* and accompanying text.

127. RESTATEMENT (SECOND) OF TORTS § 874A, Comment h (1977).

128. *Id. But see* W. PROSSER, *supra* note 10, § 12, at 51, noting that the possibility that a large number of trivial actions might ensue

> is a poor reason for denying recovery for any genuine, serious mental injury. It is the business of the law to remedy wrongs that deserve it, even at the expense of a "flood of litigation," and it is a pitiful confession of incompetence on the part of any court of justice to deny relief on such grounds.

129. RESTATEMENT (SECOND) OF TORTS § 874A, Comment h (1977).

130. *See* Burnette v. Wahl, 284 Or. 705, 728, 588 P.2d 1105, 1118 (1978).

131. *See* note 123 *supra*.

other disadvantage of applying statutory standards of conduct is that they can be quite inflexible. While a prosecutor can decide on a case-by-case basis whether to prosecute depending on the facts,[132] courts have no such discretion. If a plaintiff is able to show that he is a member of the class that the statute is designed to protect, that the defendant violated the statute, and that the plaintiff was thereby injured, then he will establish his case.[133] Furthermore, because it is unlikely that the legislature considered the existence of civil remedies when it established the standard,[134] a court cannot be blamed for refusing to establish such remedies based on that standard. It is unlikely, therefore, that liability per se will be widely adopted as a theory of recovery for abandoned children.[135]

B. Common Law Torts

The voluntary and permanent abandonment of a child by his parents might be said to constitute a violation of the parents' duty not to cause severe emotional distress by intentionally or recklessly engaging in extreme and outrageous conduct.[136] The tort of mental distress would be particularly appropriate for dealing with child abandonment because "[t]he extreme and outrageous nature of the conduct may arise not so much from what is done as from abuse by the defendant of some relation or position which gives him actual or apparent power to damage the plaintiff's interests."[137] Although this statement refers generally to affirmative acts such as extortion or excessive methods of debt collection, a court could reason that a parent is in a unique position to inflict severe mental distress upon his child.

Precisely because the parent is in such a unique position to affect his child's interest, the parent would be especially vulnerable to liability unless some practical limitation is placed upon that liability. For this reason, the Wisconsin Supreme Court in *Goller v.*

132. *See* 284 Or. at 714, 588 P.2d at 1110.

133. *See, e.g.*, Stachniewicz v. Mar-Cam Corp., 259 Or. 583, 488 P.2d 436 (1971).

134. *See* note 122 *supra* and accompanying text.

135. There may be some question as to the constitutionality of child neglect statutes in their present form. *See* Note, *Constitutional Limitations on the Scope of State Child Neglect Statutes*, 79 COLUM. L. REV. 719 (1979). Interference with family relationships may be a violation of the due process clause of the fourteenth amendment. *Id.* at 722-27. In addition, they may be unconstitutionally overbroad. *Id.* at 732. If these contentions are valid, then the very features that make statutes attractive as a basis of civil liability may disappear as these statutes are made more specific and therefore more rigid in application. Further, legislatures may be precluded from specifically providing civil remedies for children because these remedies would be an interference with domestic relations.

136. *See* RESTATEMENT (SECOND) OF TORTS § 46 (1965).

137. W. PROSSER, *supra* note 10, § 12, at 56.

White[138] elected to retain parental immunity for the "exercise of parental authority" and "parental discretion with respect to the provision of food, clothing, housing, medical and dental services and other care."[139] It can be argued, however, that although a parent has discretion to decide what form and manner these services shall take, he has no discretion not to provide them at all.

A sense of dissatisfaction arises from the *Goller* limitations.[140] As discussed in Part III, courts must find a better way to limit the potential liability of parents than to retain the shreds of the tattered immunity rule. The American Law Institute suggests that a particular act or omission on the part of a parent may be privileged and thus not tortious.[141] This limitation would apply, for example, to "[f]amily romping, even roughhouse play and momentary flares of temper not producing serious hurt."[142] In addition, the *Goller* limitations may be unnecessary because the majority of incidents result in minor injuries and thus would not lead to a civil action. For example, the unsupervised child who falls and scrapes his knee will have his wound attended by the parent and the damage will be negligible. Even more serious accidental injuries will normally be recompensed by the parent or his insurance. Also, in cases that are ultimately litigated, the plaintiff child must meet his burdens of proof[143] and causation.[144] Thus, the trier of fact can always find that the defendant-parent did not violate the standard of conduct required of a reasonable and prudent parent.[145]

Although the common law tort of mental distress may provide abandoned children with a remedy for their emotional injuries, the problems that courts might encounter in ascertaining its limits may discourage reliance upon it.[146] Nevertheless, courts that reject parental immunity must recognize its theoretical application.

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138. 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

139. *Id.* at 413, 122 N.W.2d at 198.

140. The draft of the Restatement refers to the limitations as "dicta" and suggests that parental authority is more properly characterized as a privilege and that parental discretion involves no breach of duty and thus no tort. RESTATEMENT (SECOND) OF TORTS § 895H, Note 2, at 82 (Tent. Draft No. 18, 1972).

141. RESTATEMENT (SECOND) OF TORTS § 895G(2) (1977).

142. *Id.* Comment k at 430.

143. *See generally* W. PROSSER, *supra* note 10, §§ 37-40.

144. *See generally id.* §§ 41-45.

145. *See, e.g.*, Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); Hansen v. Hansen, 5 FAM. L. REP. (BNA) 2516 (Colo. Dist. Ct. Mar. 29, 1979).

146. *See* Burnette v. Wahl, 284 Or. at 716, 588 P.2d at 1111 (raising the possibility that children might bave a cause of action for the reckless infliction of mental distress as a result of their parents' divorce).

C. A New Tort of Abandonment

A court may create a new tort in order to vindicate rights, either because the court believes a statute requires a civil remedy to assure its effectiveness or because it wishes to protect an interest that it deems sufficiently important.[147] For example, a court might undertake to create a new tort of abandonment either to protect the interests of children in the absence of other remedies or to enhance the enforcement of already existing child abandonment statutes.[148]

The advantage of creating a new tort of abandonment is that the parent's duty could be carefully defined so as to avoid the possibility of limitless liability for parents.[149] Moreover, a judicially created tort remedy would be more flexible than a statutorily based remedy; rather than place defendants into categories of liability or nonliability based upon violation or nonviolation of a statute,[150] a court could examine the merits of individual cases and provide a remedy appropriate either to the reunification of the family or to compensation of the child. The problem with the judicial creation of a new tort, however, is that a court might be accused of overstepping its authority by being too active in such a controversial field as intrafamily relationships; the legislature, as a deliberative body, is more suited to conducting the sort of policy analysis needed for social engineering.[151]

IV. Conclusion

Prior to 1963, when states began to reject the doctrine of immunity between parent and child, a minor child could not sue his parent for damages resulting from mental and emotional injuries. This left a large number of abandoned children to bear the emotional scars of childhoods spent in foster homes even though states simultaneously recognized the right of physically abused children to recover damages for their injuries.

Today, with increased rejection of the parental immunity rule, courts have the opportunity to mitigate the damage caused by child abandonment and to impose a duty of emotional as well as physical care upon parents for the well-being of their children. Courts that reject or severely limit the immunity doctrine will soon confront claims of children who have suffered mental injury as a result of

147. Restatement (Second) of Torts § 874A, Comment f (1977).

148. The *Burnette* court was asked to create a new tort of parental desertion, but declined the invitation. 284 Or. at 717, 588 P.2d at 1112.

149. *See* note 146 *supra* and accompanying text.

150. *See* note 133 *supra* and accompanying text.

151. *See* 284 Or. at 715, 588 P.2d at 1111.

parental abandonment. To protect the interests of these children, courts should utilize the following theories of liability: liability per se for violation of statute, liability for mental distress or negligence, or possibly a new tort theory of liability for child abandonment. In defining parental duty under whatever theory it pursues, a court must consider the parent's exposure to potentially limitless liability while nonetheless assuring that the parent assume appropriate responsibility.

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