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Comment: Parent-Child Tort Immunity: Time for Maryland to Abrogate an Anachronism

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COMMENT

PARENT-CHILD TORT IMMUNITY: TIME FOR MARYLAND TO ABROGATE AN ANACHRONISM

"What some see as a doctrine of law that serves the best interest of family unity, . . . I perceive to be an antiquated idea that not only fails to accomplish that end, but may well have the opposite effect . . . ."[1]

I. INTRODUCTION

Few institutions of American society have been held as dearly or championed as eagerly as the family. To protect the integrity and traditional structure of the family, many jurisdictions have sought to insulate parental behavior from judicial interference by adopting the parent-child tort immunity. Originally formed to preclude a child from recovering damages in a tort action against his parent, this immunity has been expanded to bar a parent's tort action against a child.

Since the conception of the immunity in an 1891 case,[2] many of the factors which had formed its underpinnings have been removed or nullified. The increased incidence of child abuse has created a strong societal interest in judicial investigation of intentionally inflicted injuries. In addition, the prevalence of liability insurance has reduced the threat that family resources would be diverted to one family member to the detriment of all others.

Application of the immunity has not only failed to fortify the family but has, in effect, penalized those individuals who maintain the family unit. The parent-child tort immunity, intended to protect the parent or child-defendant, paradoxically has been invoked to frustrate a parent's or child's recovery from the other's insurer, employer, and from any third party whose liability depends upon establishing the liability of the parent or child tort-feasor.

In response to the widening gap between the intended effect of the immunity and its actual consequences, a growing number of jurisdictions have abolished the immunity.[3] Maryland, once a forerunner in

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1. Montz v. Mendaloff, 40 Md. App. 220, 226, 388 A.2d 568, 571 (Gilbert, C.J., concurring), *cert. denied,* 283 Md. 736 (1978).
2. Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891).
3. Twenty-one states have limited or abolished the immunity: Hebel v. Hebel, 435 P.2d 8 (Alaska 1967); Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970); Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971) (en banc); Ooms v. Ooms, 164 Conn. 48, 316 A.2d 783 (1972) (construing CONN. GEN. STAT. ANN. § 52-572 (West Supp. 1982)); Tamashiro v. DeGama, 51 Hawaii 74, 450 P.2d 998 (1969); Schenk v. Schenk, 100 Ill. App. 2d 199, 241 N.E.2d 12 (1968); Rigdon v. Rigdon, 465 S.W.2d 921 (Ky. 1971); Rouley v. State Farm Mut. Auto. Ins. Co., 235 F. Supp. 786 (W.D. La. 1964) (applying Louisiana law); Sorensen v. Sorensen, 369 Mass. 350, 339 N.E.2d 907 (1975); Plumley v. Klein, 388 Mich. 1, 199 N.W.2d 169 (1972); Silesky v. Kelman, 281 Minn. 431, 161 N.W.2d 631 (1968); Ruperty v.

this trend by virtue of a 1951 decision which excluded "outrageous torts" from the immunity,[4] has not advanced beyond this isolated exception.[5] Deferring to the state legislature to abrogate the immunity, the Maryland appellate courts have refused to modify this anachronistic defense.[6] This comment examines the origin, development and demise of the immunity and analyzes the effect of abrogation upon the family and the insurance company.

II. THE ORIGIN OF THE PARENT-CHILD TORT IMMUNITY

A. The Common Law Parental Privilege to Govern

Common law recognized that a parent possesses the privilege to govern and discipline the minor child because the parent is responsible for the child's development.[7] The type of behavior protected by this parental privilege was limited, however, and the common law set forth that unreasonable or immoderate parental behavior would constitute tortious injury to the child.[8] In a treatise that foreshadowed the guidelines applied more than one hundred years later to determine criminal

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Stienne, 90 Nev. 397, 528 P.2d 1013 (1974); Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966); France v. A.P.R. Transp. Corp., 56 N.J. 500, 267 A.2d 490 (1970); Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969); N.C. GEN. STAT. § 1-539.21 (Supp. 1979); Nuelle v. Wells, 154 N.W.2d 364 (N.D. 1967); Falco v. Pados, 444 Pa. 372, 282 A.2d 351 (1971); Smith v. Kaufman, 212 Va. 181, 183 S.E.2d 190 (1971); Lee v. Comer, 224 S.E.2d 721 (W. Va. 1976); Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963); *see* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 122 (4th ed. 1971) [hereinafter cited as PROSSER]; Casey, *The Trend of Interspousal and Parental Immunity—Cakewalk Liability,* 45 INS. COUNSEL J. 321, 321-22 (1978) [hereinafter cited as Casey].

4. Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951).
5. The Court of Special Appeals of Maryland refused to modify the immunity in the following cases: Shell Oil Co. v. Ryckman, 43 Md. App. 1, 403 A.2d 379 (1979) (child injured on parent's business premises denied cause of action); Montz v. Mendaloff, 40 Md. App. 220, 388 A.2d 568 (child barred from recovering for injuries incurred by mother's negligent driving), *cert. denied,* 283 Md. 736 (1978); *cf.* Latz v. Latz, 10 Md. App. 720, 272 A.2d 435 (father's claim for damages for lethal injuries suffered by his wife due to his daughter's negligent driving barred), *cert. denied,* 261 Md. 726 (1971).
6. The Court of Special Appeals of Maryland has refused to limit or abrogate the immunity and has held that the appropriate forum for such changes is the legislature. Shell Oil Co. v. Ryckman, 43 Md. App. 1, 8, 403 A.2d 379, 385 (1979); Montz v. Mendaloff, 40 Md. App. 220, 229, 388 A.2d 568, 575, *cert. denied,* 283 Md. 736 (1978); Latz v. Latz, 10 Md. App. 720, 728, 272 A.2d 435, 441, *cert. denied,* 261 Md. 726 (1971).
7. T. REEVE, THE LAW OF BARON AND FEMME 420, 421 (3d ed. 1862) [hereinafter cited as REEVE].
8. The parental privilege at common law established that a parent is liable for all actions not within the scope of moderate chastisement. REEVE, *supra* note 7, at 420-21; *see* Gould v. Christianson, 10 F. Cas. 857 (S.D.N.Y. 1836) (No. 5,636) (parent could be liable for battery that injured a child's health); Nelson v. Johansen, 18 Neb. 180, 24 N.W. 730 (1885) (parent could be liable for gross negligence); Lander v. Seaver, 32 Vt. 114 (1859) (parent could be liable for battery). *See generally* Annot., 41 A.L.R.3d 904, 910-11 (1972).

child abuse, Justice Reeve of Connecticut defined the parental privilege in 1816 by stating:

> The parent has the right to govern his minor child . . . . [H]e has power to chastise him moderately . . . . He may so chastise his child as to be liable in an action by the child against him for a battery. The child has rights which the law will protect against the brutality of a barbarous parent . . . . [W]hen the punishment is . . . unreasonable, and it appears that the parent acted, *malo animo,* from wicked motives, under the influence of an unsocial heart, he ought to be liable to damages.[9]

This philosophy guided the courts in the three earliest American cases addressing the liability of a parent for tortiously injuring a child.

The triad of American cases applying the parental privilege before 1891 refused to recognize a parental immunity and stressed the potential liability of a parent for any harm suffered by a child that was caused by behavior unrelated to the administration of discipline or beyond the limits of moderate punishment.[10] Whether the parental behavior was immoderate depended upon three factors: the sensibility of the child; the circumstances surrounding the punishment; and the instrumentality used.[11] The right of a minor child to recover from a parent tort-feasor, established in each of these cases, would, however, soon be curtailed by the 1891 holding of *Hewlett v. George.*[12]

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9. REEVE, *supra* note 7, at 420.
10. Gould v. Christianson, 10 F. Cas. 857 (S.D.N.Y. 1836) (No. 5,636); Nelson v. Johansen, 18 Neb. 180, 24 N.W. 730 (1885); Lander v. Seaver, 32 Vt. 114 (1859). In *Gould,* the plaintiff-sailor alleged that the captain's injurious acts were beyond the moderate discipline that a parent or one standing in the place of a parent could administer with impunity. The court determined that the punishment was not inordinately severe and was, therefore, within the parental authority extended to the ship captain. The parental privilege, however, was only applied by the court as one factor determining the appropriateness of the captain's behavior and was not used as a complete defense. 10 F. Cas. at 863-65. In *Lander,* a student punished by a teacher for an incident that had occurred after school and beyond school grounds sued to recover for tortious injury. The Court of Appeals of Vermont, in an approach consistent with that in *Gould,* applied a limited parental privilege to acts of moderate discipline. 32 Vt. at 117. Unlike the two prior cases, which addressed the potential liability of the tort-feasor for intentional injury, *Nelson* addressed the potential liability of a parent or one acting in the place of a parent for negligent injury to a child. In *Nelson,* a child sustained severe injury after walking over a mile across the Nebraska prairie in unsuitable clothing. The court stated that had the defendant knowingly permitted the child to cross the prairie as dressed, he would have been liable for her ensuing illness. 18 Neb. at 188, 24 N.W. at 738. Although each of these cases involved a defendant acting in the place of a parent at the time of the injurious act, the courts applied the same factors and did not alter the substitute parents' responsibilities or privileges from those possessed by a natural parent.
11. Gould v. Christianson, 10 F. Cas. 857, 858-61 (S.D.N.Y. 1836) (No. 5,636); REEVE, *supra* note 7, at 420-21.
12. 68 Miss. 703, 9 So. 885 (1891).

B. The Birth of Parent-Child Tort Immunity — The Hewlett *Decision*

The tort in *Hewlett* arose when the plaintiff's mother placed her in an insane asylum in order to obtain the daughter's property.[13] After being released, the daughter brought an action seeking compensation for the tortious injury she had suffered as a result of her mother's act. Disregarding prior case law, the court in *Hewlett* attempted to preserve societal well-being by precluding a child from pursuing a tortious injury action against a parent.[14] The nature of the tort, the intent of the tort-feasor, and the injury caused to the plaintiff were never examined by the court in reaching its conclusion. The court focused solely upon the filial relationship of the plaintiff to the defendant and applied its novel conception of the parental right as encompassing all tortious injury to the child.[15]

The *Hewlett* approach to resolving a tort claim differed markedly from that used in prior cases. Previously, a court faced with a child's tort claim against a parent first determined whether the tortious act involved the administration of discipline. If the act was one of discipline, and thus potentially within the parental privilege, the court balanced the severity of the act against the child's right to be protected from brutal behavior.[16] A parent found by the court to have overstepped the bounds of permissible conduct would be liable to the child. In *Hewlett,* however, the court neither attempted to classify the parental behavior as an act of discipline nor acknowledged a child's right to be free from parental abuse.[17] Under *Hewlett,* a parent's responsibility for the child impermeably protected the parent from the child's claim, even if the alleged tort was repugnant to the parent's protective role. To support its holding, the court cited no authority but, instead, reasoned that the

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13. *Id.* at 703, 9 So. at 885.
14. The court in *Hewlett* justified its holding by stating:
> [S]o long as the parent is under an obligation to care for, guide, and control, and the child is under a reciprocal obligation to aid and comfort and obey, no such action as this can be maintained. The peace of society . . . forbid[s] [to] the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hand of the parent.

Id. at 705, 9 So. at 887.
15. *Id.* The court determined that the daughter's claim should be barred, but did not ascertain that the plaintiff was actually in a child-parent relationship with the defendant. Noting that the daughter had been married and appeared to have only returned to the defendant's house temporarily, the court stated, "Whether she had resumed her former place in her mother's house, and the relationship, with its reciprocal rights and duties, of a minor child to her parent, does not sufficiently appear." *Id.*
16. *See* Gould v. Christianson, 10 F. Cas. 857 (S.D.N.Y. 1836) (No. 5,636); Nelson v. Johansen, 18 Neb. 180, 24 N.W. 730 (1885); Lander v. Seaver, 32 Vt. 114 (1859).
17. The court in *Hewlett* did not evaluate whether false imprisonment was within the scope of the parental privilege to govern a child or if the culpability of the act overshadowed any existing parental privilege.

general peace of society requires that a minor child be forbidden to assert a civil action against a parent.[18]

Despite the dearth of supporting authority in *Hewlett,*[19] the immunity was enthusiastically adopted by other states.[20] For example, in 1903, a minor child in Tennessee was denied a civil remedy for the injuries she sustained after being brutally beaten by her father and stepmother.[21] Two years later, a child in Washington was precluded from recovering in a civil action against her father who had been convicted of raping her.[22] These courts did not deny that the parent had tortiously injured the child but rather acted to preserve family harmony by precluding the child's recovery.[23] Despite ample factual bases for the conclusion that these families had little harmony or integrity to protect,[24] the courts viewed societal well-being to be better served when the rights of an injured child-plaintiff were sacrificed to protect all parents from becoming potential defendants.

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18. 68 Miss. 703, 705, 9 So. 885, 887 (1891).
19. No authority from case law, common law, treatises, or legislative acts was cited by the *Hewlett* court to support its holding, probably because none existed. Comment, *The Demise of Parent-Child Tort Immunity,* 12 WILLAMETTE L.J. 605, 606 n.7 (1976) [hereinafter cited as *Demise*]. One commentator has noted that "no case has been found prior to 1891, either in England or in the United States, which even presented the question of a civil cause of action in tort [between parent and child] for personal injuries." McCurdy, *Torts Between Parent and Child,* 5 VILL. L. REV. 521, 527 (1960) [hereinafter cited as *Torts*]; *cf.* Small v. Morrison, 185 N.C. 577, 585, 118 S.E. 12, 16 (1923), in which the court stated: "If this restraining doctrine were not announced by any of the writers of the common law, because no such case was ever brought before the courts of England, it was unmistakably and indelibly carved upon the tablets of Mount Sinai." *Id.*
20. Tennessee was the first state to rely upon *Hewlett,* in the case of McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903). The immunity, as established in *Hewlett,* has been adopted in some form in forty-two states, the District of Columbia, and Puerto Rico. *Demise, supra* note 19, at 606. For a list of these jurisdictions, see *id.* at 606 n.10. *See generally* Annot., 41 A.L.R.3d 904 (1972).
21. McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903).
22. Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905). *Roller* was mentioned in many later decisions that allowed an exception for intentional torts. *See, e.g.,* Emery v. Emery, 45 Cal. 2d 421, 425, 289 P.2d 218, 221 (1955); Mahnke v. Moore, 197 Md. 61, 65, 77 A.2d 923, 926 (1951); Cowgill v. Boock, 189 Or. 282, 286, 218 P.2d 445, 449 (1950). For a discussion of the general exception to the immunity for intentional tort actions, see Paulsen, *The Legal Framework for Child Protection,* 66 COLUM. L. REV. 679, 687 (1966).
23. In each of these cases, neither the parent's tortious act nor the actual relationship between the child-plaintiff and the parent-defendant was examined. A normal, protective relationship was erroneously presumed in each of these three early cases. *See* Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891) (child imprisoned by parent); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903) (child brutally beaten by parents); Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905) (child raped by parent).
24. In light of the lack of harmony reflected in the family situation in *Roller,* in which the parent raped the child, it is unclear why the court did not decide to limit the scope of the immunity. The court was bound by no prior decision, nor is there any evidence of any influential act of the legislature. Roller v. Roller, 37 Wash. 242, 243, 79 P. 788, 788 (1905).

III. THE JUSTIFICATIONS FOR THE IMMUNITY

In addressing a child's tort action against a parent, courts in those jurisdictions adopting the immunity routinely list three reasons for applying the parent-child tort immunity: (1) protection of the family's resources from the disproportionate enrichment of the plaintiff family member;[25] (2) protection of family integrity and harmony;[26] and (3) protection of parental discretion in the discipline and care of the child.[27] Each of these justifications, however, is an inappropriate basis for denying a child's claim.

Protection of the family's resources from disproportionate allotment is an invalid justification.[28] When a child's potential mental, physical, or emotional growth has been handicapped or his future earning power limited as a result of his parent's acts, the child has suffered a legally calculable loss and should be compensated.[29] In addition, this justification is based upon the presumption that the family's resources are regularly shared by the family members. Although a parent has the duty to support a minor child, a parent is not bound to disperse funds equally between minor children.[30] It is an unfounded assumption that a parent who has injured a child would, in the absence of a judicial award, disperse the family resources fairly with a proportionate share being given to the injured child. By refusing to allow a civil remedy, the court, in effect, aids the parent in the disproportionate deprivation suffered by the child. In addition, preservation of family harmony is not a valid reason to deny a child's action when the nature of a parent's tortious behavior has refuted the presumption that family harmony exists.[31] Finally, protection of parental discretion should not be used to support the immunity's invocation when the discretion has been uncon-

25. This rationale was first expressed in Small v. Morrison, 185 N.C. 577, 584, 118 S.E. 12, 15 (1923), and is based upon the assumption that the family functions as one economic and social unit. Under this theory, it is reasoned that if a child receives compensatory damages for the tortiously inflicted injury he suffers, then the child withdraws a proportionate amount of the family's wealth. The welfare of other family members is therefore jeopardized while the plaintiff is inordinately rewarded. *Id.* This concept presumes that an injured child has not suffered a loss that can be appropriately compensated and that any recovery would be too large.

26. Hewlett v. George, 68 Miss. 703, 707, 9 So. 885, 888 (1891).

27. Luster v. Luster, 299 Mass. 480, 486, 13 N.E.2d 438, 444 (1938).

28. For a discussion of the policy reasons favoring recovery from the parent, see Lee v. Comer, 224 S.E.2d 721, 722-27 (W.Va. 1976); McCurdy, *Torts Between Persons in Domestic Relations,* 43 HARV. L. REV. 1030, 1069 (1930) [hereinafter cited as *Domestic Relations*].

29. *Domestic Relations, supra* note 28, at 1068-75.

30. Rice v. Andrews, 127 Misc. 826, 217 N.Y.S.2d 528 (1926). The child has no legally recognized claim to any portion of the parents' property or any guarantee of an equal portion. *Id.* at 829, 217 N.Y.S.2d at 530-31.

31. As one judge stated: "[That a child's] pains must be endured for the peace and welfare of the family is something of a mockery." Badigian v. Badigian, 9 N.Y.2d 472, 482, 174 N.E.2d 718, 724, 112 N.Y.S.2d 234, 245 (1961) (Fuld, J., dissenting).

scionably abused.[32] The immunity should not be applied to shield a parent from liability when the parent has deserted his protective role by becoming a force from which the child needs to be protected.[33]

IV. LIMITATIONS ON THE IMMUNITY

After the application of the parent-child tort immunity failed to further its stated objectives, many jurisdictions re-examined the immunity they had previously embraced.[34] These courts recognized the unconscionable result often reached when the immunity was applied, and they sought to effectuate the legal maxim that each man should bear responsibility for his own acts.[35] In light of these factors, an increasing number of courts abrogated the immunity, and some courts restricted certain aspects of the bar against parent-child tort recovery.[36]

Limitation of the immunity served a dual purpose in those jurisdictions choosing to restrict rather than abrogate the immunity. By narrowing the scope of the immunity, the court could allow recovery when necessary to reach a just result and still invoke the immunity to protect other aspects of parental behavior.[37]

Various methods were used to limit the immunity. Some courts restricted the immunity by limiting its application to those parties who were occupying a strictly defined parent-minor child relationship at the time of the tortious injury.[38] Under this first approach, the immunity would not apply to a suit between a parent and an emancipated child[39] or between a parent and a child who were in an auxiliary relationship, such as an employer-employee relationship, at the time of the tortious

32. Materese v. Matarese, 47 R.I. 131, 136, 131 A. 198, 203 (1925).
33. Gibson v. Gibson, 3 Cal. 3d 914, 917-18, 479 P.2d 648, 651, 92 Cal. Rptr. 288, 242 (1971) (en banc).
34. Sorensen v. Sorensen, 369 Mass. 350, 355, 339 N.E.2d 907, 911 (1975); Lee v. Comer, 224 S.E.2d 721, 724-26 (W. Va. 1976). The two cases that formed the vanguard in this area were Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930), and Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951). *See generally* J. BATES, THE CHILD AND THE LAW 9 (1976); 48 U. CIN. L. REV. 940 (1979).
35. Lee v. Comer, 224 S.E.2d 721, 723 (W. Va. 1976).
36. *See, e.g.,* Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930); Lee v. Comer, 224 S.E.2d 721 (W. Va. 1976). *See generally* Cooperrider, *Child v. Parent in Tort: A Case for the Jury?,* 43 MINN. L. REV. 73 (1958); Sanford, *Personal Torts Within the Family*, 9 VAND. L. REV. 823 (1956) [hereinafter cited as Sanford]. For a list of states that have abrogated or restricted the immunity, see note 3 *supra.*
37. Some states that have retained the immunity have allowed the child to maintain a suit in many situations. *See* Brown v. Cole, 198 Ark. 417, 129 S.W.2d 245 (1939) (child permitted to recover from adoptive parent); Shea v. Pettee, 19 Conn. Supp. 125, 110 A.2d 492 (1954) (child permitted to recover upon maintaining burden of proving emancipation); Wright v. Wright, 85 Ga. App. 721, 70 S.E.2d 152 (1952) (child permitted to recover for willful or malicious tort); Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951) (child permitted to recover for outrageous tort); Cowgill v. Boock, 189 Or. 282, 218 P.2d 445 (1950) (child permitted to recover for act of gross negligence). *See generally Demise, supra* note 19.
38. *See, e.g.,* Perkins v. Robertson, 140 Cal. App. 2d 536, 295 P.2d 972 (1956).
39. Waltzinger v. Birsner, 212 Md. 107, 128 A.2d 617 (1956).

injury.[40] Other courts restricted the immunity to certain types of tortious behavior. Injury caused by behavior adjudged too unreasonable to be included within the immunity was freely actionable under this second approach.[41] Other courts viewed the presence of liability insurance as an extrinsic factor that eliminated the policy reasons for applying the immunity.[42]

A. Restrictive Definition of the Parent-Child Relationship

1. Emancipation of the Child

When the parent's duty to support and govern a child has terminated, the correlative immunity is removed.[43] The parental duty is legally terminated when the child reaches the statutory age of majority; thereafter he is considered emancipated.[44] An emancipated child is granted all the rights and responsibilities of adulthood, including the responsibility to provide for his own care and the right to pursue legal action in his own name. An emancipated child may pursue any tort action against a parent as long as the tort occurred after the child was emancipated.[45] Several reasons have been set forth by the courts for refusing to allow an action by an emancipated child for a wrong inflicted upon him while he was still a minor. The courts have reasoned that an injury that would not have been actionable at the time it arose should be forever barred.[46] Other courts have expressed that the likelihood of fraud in this particular situation outweighs the probable benefit to the parties.[47]

2. Adoptive Parents and Persons Acting *In Loco Parentis*

One of the presumptions that supports the parental privilege to discipline and the parental immunity is that the love of the natural parent for his child acts as a check against child abuse.[48] A minority of the

40. *See, e.g.,* Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952).
41. *See, e.g.,* Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955).
42. *E.g.,* Ooms v. Ooms, 164 Conn. 48, 316 A.2d 783 (1972) (construing CONN. GEN. STAT. ANN. § 52-572c (West Supp. 1982)); Lee v. Comer, 224 S.E.2d 721, 723-35 (W. Va. 1976).
43. *See* Waltzinger v. Birsner, 212 Md. 107, 126, 128 A.2d 617, 627 (1956).
44. There are five methods by which the disabilities of minority may be removed. These forms have been stated as occurring when (a) by written or oral agreement or some act the parent relinquishes parental control; (b) the parent abandons, neglects, or is cruel to the child; (c) the infant marries; (d) the child reaches an age when, by statutory authority, he is allowed to exercise the rights of majority; and (e) the child is enlisted in military service. 12 MD. L. REV. 201, 211 (1951).
45. PROSSER, *supra* note 3, § 122.
46. Lasecki v. Kabara, 235 Wis. 645, 648-49, 294 N.W. 33, 36 (1940); *see* Downs v. Poulin, 216 A.2d 29, 34 (Me. 1966). *See generally Domestic Relations, supra* note 28, at 1067.
47. *See, e.g.,* Waltzinger v. Birsner, 212 Md. 107, 114, 128 A.2d 617, 623 (1956); *Demise, supra* note 19, at 611.
48. Burdick v. Nawrocki, 21 Conn. Supp. 272, 276, 154 A.2d 242, 246 (1959). *See generally Torts, supra* note 19, at 1041-43.

courts have refused to cloak the adoptive parent with the immunity's protection because they have assumed that the adoptive parent lacks the affection felt by the natural parent for the child.[49] Other courts have excluded the surrogate parent based solely upon a lack of consanguinity, regardless of the affection exhibited between adoptive parent and child.[50] In the majority of cases, however, no distinction is made between natural and adoptive parents.[51] When executing parental responsibilities, the adoptive parent is afforded the protection of the immunity.[52]

Teachers and others temporarily entrusted with the care of a child are considered to be acting *in loco parentis,* in the place of the parent, and are afforded the immunity's protection only to the extent that their behavior is within the scope of their authority.[53] Although shielded by the immunity from claims based upon negligence in the execution of an authorized act, the temporary guardian remains liable for acts of wilful misconduct, intentional tortious behavior, and negligence outside the scope of the guardian's authority.[54]

3. Death of the Parent-Defendant

When the parent is deceased at the time the child brings suit, the need to protect parental discretion disappears and the child is allowed to seek compensation.[55] The minority view, however, refuses to make the parent's death an exception to the immunity for two reasons. First, this exception would discriminate against similarly injured children whose parents are living.[56] In addition, it is feared that the child's monetary recovery would financially deprive the surviving spouse and siblings.[57]

4. Auxiliary Relationships Between Parent and Child — The Business Exception

When a child is injured by a parent's negligence in a business envi-

49. *Demise, supra* note 19, at 613; *see, e.g.,* Brown v. Cole, 198 Ark. 417, 420, 129 S.W.2d 245, 247-48 (1939).
50. *E.g.,* Burdick v. Nawrocki, 21 Conn. Supp. 272, 154 A.2d 242 (1959); *see Demise, supra* note 19, at 613.
51. *Torts, supra* note 19, at 1042; *see* REEVE, *supra* note 7, at 420-21 (those acting *in loco parentis* specifically included within the parental privilege); *Demise, supra* note 19, at 613 n.8.
52. *See* PROSSER, *supra* note 3, § 122; *Demise, supra* note 19, at 613.
53. *See* PROSSER, *supra* note 3, § 122.
54. *Id.*; *see, e.g.,* Chaffin v. Chaffin, 239 Or. 374, 397 P.2d 771 (1964).
55. The policy reasons for denying a cause of action usually die with the relationship. Barnwell v. Cordle, 438 F.2d 236 (5th Cir. 1971) (applying Georgia law); Krause v. Home Mut. Ins. Co., 14 Wis. 2d 666, 112 N.W.2d 134 (1962); *see* Davis v. Smith, 126 F. Supp. 497 (E.D. Pa. 1954) (applying Pennsylvania law); Lasecki v. Kabara, 235 Wis. 645, 294 N.W. 33 (1940). *See generally Torts, supra* note 19.
56. *See, e.g.,* Downs v. Poulin, 216 A.2d 29, 34 (Me. 1966).
57. *E.g.,* Lasecki v. Kabara, 235 Wis. 645, 651, 294 N.W. 33, 38 (1940).

ronment, the child is usually permitted to seek recovery.[58] This is referred to as the business exception and may be applied in two situations.[59] First, if a child is negligently injured while visiting a parent who is working within the scope of his employment, the child may seek recovery from the parent's employer.[60] The second situation occurs when the child is employed by the parent and is injured by the parent's negligence during work. This child may bring an action against the parent-employer.[61] The courts presented with the latter situation allow the child's claim by focusing upon the employer-employee rather than the parent-child aspect of the parties' relationship and, therefore, hold the parent-child tort immunity to be inapplicable.[62]

The application of the business exception is often based upon the presence of the employer's business insurance[63] and the same justifications for allowing automobile negligence claims between parent and child in the presence of liability insurance apply.[64] Additionally, because the injurious act is unrelated to the parental role, the claim is unlikely to jeopardize any of the immunity's objectives.[65] The advantages of applying this exception are diminished, however, when the employer is allowed to seek contribution from the negligent parent for the injured child's monetary recovery.[66] If the employer is successful in this claim, the employer's liability for the total award is decreased by the amount proportional to the parent's negligence in causing the injury.[67] Some courts that do not allow the child's tort claim directly

58. *E.g.,* Trevarton v. Trevarton, 151 Colo. 418, 378 P.2d 640 (1963); Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930); Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952); Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932). The court in *Dunlap* used three factors to justify this exception to the immunity: (1) the injury arose from tortious conduct in a business environment; (2) the parent would not be forced to decrease family funds to compensate the child because the business owner possessed insurance that indemnified the business for injuries to or injuries caused by employees; and (3) the child was present at the place of business primarily to provide labor. 84 N.H. at 354-56, 150 A. at 906-07.

59. *See, e.g.,* Trevarton v. Trevarton, 151 Colo. 418, 378 P.2d 640 (1963); Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952).

60. *E.g.,* Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952); Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932).

61. *E.g.,* Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930).

62. Signs v. Signs, 156 Ohio St. 566, 571, 103 N.E.2d 743, 747 (1952); *Demise, supra* note 19, at 610.

63. Trevarton v. Trevarton, 151 Colo. 418, 378 P.2d 640 (1963); *see* Dunlap v. Dunlap, 84 N.H. 352, 359-64, 150 A. 905, 911-15 (1930). *But see* Barlow v. Iblings, 261 Iowa 713, 156 N.W.2d 105 (1968) (son injured in father's restaurant; recovery refused although insurance was present).

64. *See* text accompanying notes 91, 95-105 *infra.*

65. Dunlap v. Dunlap, 84 N.H. 352, 359-64, 150 A. 905, 911-15 (1930).

66. Dole v. Dow Chem. Co., 30 N.Y.2d 143, 151-53, 282 N.E.2d 288, 296-98, 331 N.Y.S.2d 382, 391-94 (1972). *See also* Shell Oil Co. v. Ryckman, 43 Md. App. 1, 403 A.2d 379 (1979).

67. For a discussion of the repercussions of this type of third-party claim, see Holodook v. Spencer, 36 N.Y.2d 35, 44-47, 324 N.E.2d 338, 346-48, 364 N.Y.S.2d 859, 868 (1974) (dissenting opinion).

against the parent also forbid the employer from seeking contribution from the parent.[68]

B. Characterization of the Tort Action

The term "emancipation," as previously discussed, refers to an exception to the immunity which allows a child to bring suit against a parent when the child has attained the statutory age of majority.[69] Many courts have used this same term to describe quite a different exception to the immunity, one that is caused by the parent's termination of the parent-child relationship by tortious behavior which exemplifies the parent's failure to protect and provide for the child.[70] The degree of parental malfeasance and the type of tortious behavior that will trigger a parent's liability has varied from "complete abandonment of the parental role" by the commission of an outrageous tort[71] to temporary "abdication of parental responsibility" by wilful misconduct.[72] Although cruel behavior was initially required to emancipate the child in this manner, presently the commission of any intentional tort is considered sufficient by some courts to remove the immunity.[73] The three cases that highlight the range of tortious behavior removing the immunity are *Mahnke v. Moore,*[74] *Wright v. Wright,*[75] and *Hoffman v. Tracy.*[76]

In the 1951 case of *Mahnke v. Moore,*[77] the Court of Appeals of Maryland allowed a minor child to maintain a cause of action for intentional infliction of emotional distress. In this case, the tort arose when Moore shot the child's mother and then committed suicide in the presence of his child.[78] The court, in its first limitation upon parent-child tort immunity, refused to protect this parental behavior from judicial scrutiny.[79] *Mahnke* established that a child may maintain an ac-

68. *See, e.g.,* Shell Oil Co. v. Ryckman, 43 Md. App. 1, 403 A.2d 379 (1979).
69. See text accompanying notes 43-47 *supra.*
70. Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951); Lucas v. Maryland Drydock Co., 182 Md. 54, 31 A.2d 637 (1943).
71. *See* Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951).
72. This was the standard applied in Hoffman v. Tracy, 67 Wash. 2d 31, 406 P.2d 323 (1965).
73. *Demise, supra* note 19, at 611-12; *see, e.g.,* Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Teramano v. Teramano, 6 Ohio St. 2d 117, 216 N.E.2d 375 (1966).
74. 197 Md. 61, 77 A.2d 923 (1951).
75. 85 Ga. App. 721, 70 S.E.2d 152 (1952).
76. 67 Wash. 2d 31, 406 P.2d 323 (1965).
77. 197 Md. 61, 77 A.2d 923 (1951).
78. *Id.* at 63, 77 A.2d at 924.
79. *Id.* at 68, 77 A.2d at 926. The child in *Mahnke* was afforded the right to bring an action against her parent because the parent had abandoned the parental role of protecting the child. In a similar situation involving a wife's claim against a husband, the husband forfeited his spousal immunity when he committed an outrageous tort against his wife. Lusby v. Lusby, 283 Md. 334, 336-41, 390 A.2d 77, 79-83 (1978). In *Lusby,* the court held that the outrageousness of the husband's acts

tion against a parent for an outrageous act that refutes the existence of a parent-child relationship.[80]

One year after the *Mahnke* decision, the Court of Appeals of Georgia, in *Wright v. Wright,*[81] prohibited the application of the immunity when a parent's act was "wilful and malicious."[82] In *Wright,* the court allowed a child to recover damages for injuries resulting when the child was a passenger in an automobile driven by his intoxicated parent at excessive speeds.[83] The parent's act was considered "wilful and malicious" and was deemed sufficiently egregious to remove the immunity.[84]

By labeling reckless, drunken driving an intentional act, *Wright* obfuscated the standards of negligent and intentional tortious behavior that would allow a child to pursue his cause of action.[85] Other courts, unwilling to allow recovery in a claim based upon any degree of negligence and fearing that such a ruling would transform slight acts of negligence, inevitable in a family environment, into potential causes of action, labeled such acts of gross negligence "wilful misconduct" and allowed the cause of action.[86]

The basis for an action founded upon gross negligence was explored by the Supreme Court of Washington in the 1965 case of *Hoff-*

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constituted an abandonment of the marital relationship. *Id.* at 337, 390 A.2d at 80. Upon abandoning the relationship, the corresponding privilege of spousal immunity is forfeited. For a discussion of the reasons that support abrogation of the interspousal immunity, see 8 U. BALT. L. REV. 584, 596-97 (1979).

80. The *Mahnke* court never defined the tort injury as intentional, but described the defendant's behavior as wanton and malicious. Subsequent Maryland cases have limited the application of the *Mahnke* exception to intentional acts. *See* Shell Oil Co. v. Ryckman, 43 Md. App. 1, 403 A.2d 379 (1979); Latz v. Latz, 10 Md. App. 720, 272 A.2d 435, *cert. denied,* 261 Md. 726 (1971).

81. 85 Ga. App. 721, 70 S.E.2d 152 (1952).

82. The court expressed this view by stating:

> [A] parent shall be liable for a wilful or malicious wrong against an unemancipated minor child who is living with such parent and under his custody and control if the wrong is such an act as would authorize a judgment of a court of competent jurisdiction depriving the parent of parental power over the child.

Id. at 723, 70 S.E.2d at 155.

83. *Id.* at 722-24, 70 S.E.2d at 153-55. The required degree of parental malfeasance was much less in *Wright* than in *Mahnke.* In *Wright,* the child met his burden of proving emancipation by demonstrating that his parent had vacated the protective parental role. The significance of this difference becomes more apparent when the extremely abusive acts necessary for a *Mahnke* exception are compared with those acts required under *Wright.*

84. "Malicious" is used in this situation to describe behavior that does not exhibit malice in its legal or general sense. A court's classification of behavior as malicious allows a child-plaintiff to pursue a cause of action whereas classification of this same act as one of gross negligence would, due to prevailing policy reasons, preclude the suit. For a discussion of the distinction between wilful and grossly negligent conduct, *see Demise, supra* note 19, at 611-12.

85. 85 Ga. App. 721, 722-24, 70 S.E.2d 152, 153-55 (1952).

86. *See Demise, supra* note 19, at 611-12.

man v. Tracy.[87] In a factual setting similar to *Wright,*[88] the court decided that an intoxicated parent who drove her automobile with her child as a passenger abdicated the parental role. The child was therefore free to pursue civil damages against the parent.[89] Gross negligence, although not labeled as such by the court,[90] became a ground for removing the immunity.

C. *The Presence of Insurance*

Aware of the prevalent use of automobile liability insurance, the courts were faced with a great conflict in applying the immunity to automobile injury cases between parent and child. If the court barred the child's claim, the family would be burdened with the cost of the child's medical care even though a parent had purchased insurance to compensate any victim of his negligence. If, on the other hand, the child's claim against the negligent parent were successful, the parent's insurer would compensate the child, and the resources that would otherwise be diverted for the child's medical expenses would be protected.[91] Nevertheless, it was difficult for the courts to justify allowing an action against an insured parent negligently operating an automobile while barring a child's claim against a parent for domestic negligence.

In the early cases, the legal truism "insurance does not create liability" was invoked to bar consideration of the presence of insurance.[92] This approach was founded upon a gross misunderstanding of the interplay between the purpose of the immunity, tort liability, and the role of insurance. The immunity was never based on the lack of a parent's liability for his child's injury, but was founded upon the public policy

87. 67 Wash. 2d 31, 406 P.2d 323 (1965).

88. Both *Hoffman* and *Wright* involved the actions of an intoxicated driver. For a discussion of the tort as one of gross negligence, *see Demise, supra* note 19, at 611-12.

89. 67 Wash. 2d 31, 35-36, 406 P.2d 323, 326-27 (1965).

90. The court interpreted the parent's failure to take precautions against resulting injury to be an act of intent. *Id.* at 35, 406 P.2d at 327. *See Demise, supra* note 19, at 611-12. This abandonment need not be total, as in *Mahnke,* but must demonstrate that the injurious behavior was inconsistent with the parent's obligation to protect the child. *See* Wright v. Wright, 85 Ga. App. 721, 70 S.E.2d 152 (1952). *But cf.* Chaffin v. Chaffin, 239 Or. 374, 397 P.2d 771 (1964) (court refused to create an exception for gross negligence because the father's behavior did not demonstrate a cruel or wicked intent).

91. Smith v. Kaufman, 212 Va. 181, 183 S.E.2d 190 (1971); *see* Immer v. Risko, 56 N.J. 482, 267 A.2d 481 (1970). In *Immer,* the court noted, "Domestic harmony may be more threatened by denying a cause of action than by permitting one where there is insurance coverage." *Id.* at 489-90, 267 A.2d at 485. For a discussion of the effect of liability insurance on the immunity, see Lee v. Comer, 224 S.E.2d 721, 723-25 (W. Va. 1976); Casey, *supra* note 3, at 324-28.

92. Luster v. Luster, 299 Mass. 480, 483, 13 N.W.2d 438, 440 (1938); James, *Accident Liability Reconsidered: The Impact of Liability Insurance,* 57 YALE L.J. 549, 553 (1948) [hereinafter cited as James]; *see, e.g.,* Harralson v. Thomas, 269 S.W.2d 276 (Ky. 1954); Chaffin v. Chaffin, 239 Or. 374, 397 P.2d 771 (1964).

of protecting the family from internal strife.[93] By providing a means of compensating the injured child without straining family resources, insurance furthers the immunity's policy objectives without denying the child recovery.[94]

The presence of insurance in a parent-child tort claim caused many courts to restrict the immunity. Some courts chose to view the insurer, not the parent, as the defendant and held that the immunity did not apply.[95] In these cases, recovery was often restricted to the extent of insurance coverage[96] because allowing additional recovery would render the parent liable for the excess. Other courts that remove the immunity when automobile insurance is present have based their decisions on different factors. In *Gelbman v. Gelbman,*[97] the Court of Appeals of New York noted that automobile insurance was compulsory in that state[98] and ruled that intra-family claims arising out of an automobile accident caused by a family member's negligence were actionable. In *Goller v. White,*[99] the Supreme Court of Wisconsin allowed an action between parent and child for an injury that arose from an automobile accident because driving was not viewed to be an act specific to the parent-child relationship.[100] The court abrogated the immunity for all claims between parent and child except those that alleged negligence in the parent's provision of food, medical care, and housing.[101] Focusing upon the presence of automobile insurance, the court additionally noted that the insurance company rather than the parent assumed the financial consequences of litigation and, therefore, the court permitted the child to recover.[102] Additionally, the Supreme Court of

93. Hewlett v. George, 68 Miss. 703, 705, 9 So. 885, 887 (1891).
94. Sorensen v. Sorensen, 369 Mass. 350, 358, 339 N.E.2d 907, 914 (1975). The stumbling block before the widespread recognition of the exception in the presence of insurance was that the nature of the tort involved in an automobile accident is negligence. A tort action based upon carelessness or an error in judgment in the course of the family relationship remains abhorrent in some jurisdictions. Cowgill v. Boock, 189 Or. 282, 297-98, 218 P.2d 445, 451-52 (1950); *see* Chaffin v. Chaffin, 239 Or. 374, 397 P.2d 771 (1964); *Demise, supra* note 19, at 611.
95. *See* Lee v. Comer, 224 S.E.2d 721 (W. Va. 1976); Casey, *supra* note 3, at 325-29. *See generally* Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930); Cooperrider, *Child v. Parent in Tort: A Case for the Jury?,* 43 MINN. L. REV. 73 (1958); Sanford, *supra* note 36.
96. *See, e.g.,* Union Bank & Trust Co. v. First Nat'l Bank & Trust Co., 362 F.2d 311 (5th Cir. 1966) (applying Georgia law), *aff'd,* 396 F.2d 795 (5th Cir. 1968).
97. 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969).
98. Maryland has a similar legislative enactment that requires all Maryland drivers to possess insurance or other proof of financial ability to compensate a victim of an automobile accident. MD. TRANSP. CODE ANN. § 17-103(b)(1) (1977).
99. 20 Wis. 2d 402, 122 N.W.2d 193 (1963).
100. *Id.* at 409, 122 N.W.2d at 198. Injuries caused by vehicular negligence have been held actionable based upon the rationale that driving is not an activity specific to the parent-child relationship. Sorensen v. Sorensen, 369 Mass. 350, 358-60, 339 N.E.2d 907, 913-15 (1975).
101. 20 Wis. 2d 402, 409, 122 N.W.2d 193, 198 (1963); *see Demise, supra* note 19, at 615.
102. 20 Wis. 2d 402, 408, 122 N.W.2d 193, 197 (1963).

Errors of Connecticut, in *Ooms v. Ooms,*[103] noting that the loss-spreading function of liability insurance benefits the insured public, provided that the insured family member would not be excluded from this benefit.[104] Connecticut created an exception to the immunity when insurance was present but retained the immunity for all other intra-family tort actions.[105] Regardless of the different rationales set forth by these courts, each succeeded in furthering the objectives of the immunity without denying any family member his right to a civil remedy.

V. THE IMMUNITY IN MARYLAND

A. Maryland Adopts the Parent-Child Tort Immunity

The Court of Appeals of Maryland adopted the parent-child tort immunity in the 1930 case of *Schneider v. Schneider.*[106] The parent in *Schneider,* injured while a passenger in a car driven negligently by her eighteen-year-old son, brought suit against her son for monetary damages. In denying the mother's claim, the court placed great emphasis on case law from jurisdictions which had adopted the immunity and viewed recovery as abhorrent to the "purity of family relationships,"[107] even if the awarded damages would be furnished by the insurance company.[108] The court based its decision to deny recovery upon two grounds. First, the court noted that a parent entrusted with the guardianship of a child's financial interests should not be allowed to diminish his child's property. Second, due to a parent's influence over his child, a child may not have the independence necessary to protect his individual legal rights.[109]

In the 1937 case of *Yost v. Yost,*[110] the plaintiff-child alleged that the parent had failed to fulfill his statutory duty to provide adequate monetary support. The court of appeals, characterizing the suit as one brought by a minor child against his parent for the negligent exercise of his parental duty, held that the action fell squarely within the ambit of the immunity.[111] The court, however, distinguished behavior involving the exercise of parental duty and discretion, which would be protected

103. 164 Conn. 48, 316 A.2d 783 (1972).
104. *Id.* (construing CONN. GEN. STAT. ANN. § 52-572c (West Supp. 1982)).
105. CONN. GEN. STAT. ANN. § 52-572c (West Supp. 1982); *see* Ooms v. Ooms, 164 Conn. 48, 316 A.2d 783 (1972); *Demise, supra* note 19, at 613.
106. 160 Md. 18, 152 A. 498 (1930).
107. *Id.* at 24, 152 A. at 500 (quoting P. SCHOULER, LAW OF DOMESTIC RELATIONS § 223 (3d ed. 1882)) ("Both natural and politic law, morality, and the precepts of revealed religion alike demand the preservation of this relation in its full strength and purity."); *accord,* Hastings v. Hastings, 33 N.J. 247, 250, 163 A.2d 147, 150 (1960).
108. 160 Md. 18, 22, 152 A. 498, 499 (1930). In 1930, the immunity had not yet been challenged extensively. *See Torts, supra* note 19, at 1056-72.
109. 160 Md. 18, 22-23, 152 A. 498, 499-500 (1930).
110. 172 Md. 128, 190 A. 753 (1937).
111. *Id.* at 131, 190 A. at 756.

by the immunity, from overtly tortious behavior.[112] By making this distinction, *Yost* appeared to indicate that a child's claim founded upon a parent's intentional tort would be actionable.[113] Limiting the immunity's protection to behavior that is "incident to the parental relationship," the court, in dicta, suggested a standard that would be used by another jurisdiction to restrict the immunity thirty-one years later.[114]

B. Maryland Restricts the Immunity

In Maryland, an emancipated child is allowed to bring suit[115] against a parent for all tort claims arising after the child has reached the statutory age of majority.[116] After emancipation, the action becomes one between two adults, neither of whom bear the privilege or responsibility to control the other.[117] Maryland has not yet addressed whether an emancipated child may pursue an action based upon an injury occurring during minority. The majority of jurisdictions bar this action, reasoning that the child would not have been allowed to bring the action during minority and, therefore, should not be allowed to bring the action upon reaching majority.[118] The likelihood that a party would fraudulently allege an injury occurred during minority has been set forth as an additional reason for excluding this type of claim.[119]

An additional form of emancipation allows a minor child who has been subjected to cruelty, neglect, or abandonment to bring an action against his parent. In the 1943 case of *Lucas v. Maryland Drydock Co.*,[120] the Court of Appeals of Maryland determined that a parent who attempted to strangle his child had abdicated his parental role, lost his parental privileges, and in effect, emancipated the child. The court determined that a parent who tortiously subjected a child to cruelty,

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112. As the court in *Yost* stated:

> [S]uch an action as this cannot be maintained by or on behalf of a minor child, against its parent for nonfeasance as to the performance of moral duties of support, or for neglect. These acts, as distinguished from overt acts of tort, grow out of and pertain to the relation of parent and child. . . . [F]or such acts of passive negligence incident to the parental relation, there is no liability.

Id.

113. *Id.* This standard was applied in Schenk v. Schenk, 100 Ill. App. 2d 199, 203, 241 N.E.2d 12, 15 (1968).
114. *See* Schenk v. Schenk, 100 Ill. App. 2d 199, 203, 241 N.E.2d 12, 15 (1968).
115. Waltzinger v. Birsner, 212 Md. 107, 128 A.2d 617 (1956).
116. *Id.* Although the parent has the burden of proving the existence of the parent-child relationship, the one who alleges emancipation has the burden of proving it. Holly v. Maryland Auto. Ins. Fund, 29 Md. App. 498, 506, 349 A.2d 670, 675 (1975).
117. Waltzinger v. Birsner, 212 Md. 107, 108, 128 A.2d 617, 618 (1956).
118. *E.g.,* Shea v. Pettee, 19 Conn. Supp. 125, 110 A.2d 492 (1954); Nahas v. Noble, 77 N.M. 139, 420 P.2d 127 (1966); Tucker v. Tucker, 395 P.2d 67 (Okla. 1964); *see* Lee v. Comer, 224 S.E.2d 721, 722 (W. Va. 1976); *Torts, supra* note 19, at 1072.
119. *Torts, supra* note 19, at 1072-73.
120. 182 Md. 54, 31 A.2d 637 (1943).

neglect, or abandonment could not rely upon the court to enforce the protection due him as a parent. Not only is a child free to pursue a civil remedy for tort injury arising after the parent's emancipating behavior but, in addition, a child is allowed to seek recovery for the very act that severed the relationship.[121]

There is an inherent technical inconsistency, however, in allowing the victimized child to sue the parent for the very act that terminated the relationship. If a child emancipated by parental cruelty is governed by the same limitations that apply to a child emancipated by attaining majority,[122] then only those injuries occurring after emancipation would be actionable. At the time of the emancipating act, however, as well as at all times prior, the child is considered an unemancipated minor and consistent application of the immunity would prohibit the child from bringing this initial action. To permit the action and to reconcile this apparent inconsistency between the judicial treatment of these two forms of emancipation, the child should be considered emancipated immediately prior to the time of the injurious act.

In 1951, the Court of Appeals of Maryland in *Mahnke v. Moore*[123] declared that the father-defendant's act was "outrageous"[124] and established that a child injured by a tort within this category would be allowed to pursue monetary recovery.[125] The court began this hallmark decision by examining the three justifications for invoking the immunity and determined that all were inapplicable. The facts of the case rendered the protection of family harmony and parental discretion inappropriate considerations.[126] In addition, a monetary award did not threaten to create a disproportionate allotment of family resources to one family member because at the time of the action, no other family members were alive.[127]

The novel approach of the court in *Mahnke,* which examined whether barring the claim would further the objectives of the immunity, had a pervasive effect upon subsequent courts' application of the immunity.[128] Courts' adoption of this same analytic process resulted in exceptions to the immunity and foreshadowed the doctrine's abroga-

121. Mahnke v. Moore, 197 Md. 61, 64-66, 77 A.2d 923, 924-26 (1951).
122. A child, upon reaching majority, is generally barred from bringing suit for an injury occurring during minority. *Torts, supra* note 19, at 1072.
123. 197 Md. 61, 77 A.2d 923 (1951).
124. The court framed the issue as whether an illegitimate child could recover for personal injuries that resulted from the tortious acts of her father. Two prongs of this issue invited judicial determination: (1) whether an illegitimate child may sue her father despite the immunity; and (2) whether a child may maintain an action in tort when the parent's actions were outrageous. The court ignored the first question and resolved the latter affirmatively. *Id.* at 69, 77 A.2d at 926.
125. *Id.* at 69-70, 77 A.2d at 926-27.
126. *Id.* at 62, 77 A.2d at 924.
127. *Id.*
128. *See, e.g.,* Sorensen v. Sorensen, 369 Mass. 350, 355, 339 N.E.2d 907, 911-12 (1975); Smith v. Kaufman, 212 Va. 181, 185, 183 S.E.2d 190, 194 (1971).

tion in factual settings in which the policy reasons would no longer be furthered by the immunity's application.[129]

C. *Application of the Immunity After* Mahnke

In *Sherby v. Weather Brothers Transfer Co.*,[130] the United States Court of Appeals for the Fourth Circuit applied Maryland law and refused a minor child's civil action against his father's employer. In *Sherby,* a child sustained injuries when he was a passenger in a tractor-trailer unit owned by Weather Brothers and operated by the child's father in the course of the father's employment.[131] If a child may not maintain a tort action directly against his father, the court held, the child may not seek recovery from his father's employer for an injury caused by the father's negligence. In denying the child's claim, the court failed to employ the *Mahnke* approach but relied upon a section of the *Mahnke* opinion supporting the decision to deny the child's claim.[132]

Employing the analytical approach of *Mahnke,* Judge Butzner, in dissent, argued that the child's claim should have been allowed because the immunity's justifications were inapplicable in this case.[133] Judge Butzner reasoned that while the father was working within the scope of his employment, anyone harmed by the father's negligence would be compensated by the employer, who in turn would be reimbursed by his business insurance underwriter. The insurer would not be allowed to claim contribution from the father and, therefore, the suit would not disrupt family harmony or threaten family resources. The majority in *Sherby,* as Judge Butzner additionally pointed out, ignored Maryland's strong policy of compensating innocent victims of a driver's negligence.[134]

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129. When the Court of Appeals of New York, in Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969), considered these policy reasons, it decided that the purpose sought would best be attained by abandoning the immunity. The Supreme Court of Wisconsin, in Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963), reached the same conclusion. In Maryland, however, the test that the court of appeals established in *Mahnke* has never been applied in a later parent-child tort immunity case, even though the *Mahnke* dictum has been frequently cited. *See* Montz v. Mendaloff, 40 Md. App. 220, 224, 388 A.2d 568, 572 (recovery denied despite the benefit the daughter would have received through her mother's insurance policy), *cert. denied,* 283 Md. 736 (1978); Latz v. Latz, 10 Md. App. 720, 726, 272 A.2d 435, 440 (father was denied recovery for injury sustained after wife was killed by the daughter's negligent driving), *cert. denied,* 261 Md. 726 (1971).

130. 421 F.2d 1243 (4th Cir. 1970).

131. *Id.* at 1244.

132. *Id.* at 1245.

133. *Id.* at 1247-48 (Butzner, J., dissenting).

134. *Id.* at 1247 (Butzner, J., dissenting). As an illustration of the state's strong policy of compensating victims of negligent drivers, the Maryland legislature has established the Uninsured Motorist Fund, MD. ANN. CODE art. 48A, § 243H (1979), and has required that all Maryland drivers possess insurance or some other form

The Court of Special Appeals of Maryland first requested that the General Assembly abrogate the immunity in the 1971 case of *Latz v. Latz.*[135] In *Latz,* a parent was killed while a passenger in an automobile negligently driven by her minor child. Bound by the forty-year-old court of appeals' decision in *Schneider v. Schneider,*[136] the court failed to make an exception in the presence of insurance and barred the plaintiff-parent from pursuing a wrongful death action against the child.[137] The court deferred to the legislature, stating that it is "particularly fitting that any change in the parent-child immunity rule should be by legislative action."[138] In the later case of *Sanford v. Sanford,*[139] the court barred the minor child's claim for injuries sustained while a passenger in a car driven negligently by his father. Because the defendant's acts were not wanton or malicious, the court determined that the *Mahnke* exception was inapplicable.[140]

The court of special appeals had its first opportunity to allow a child's claim based upon alleged gross negligence in *Montz v. Mendaloff.*[141] Although some jurisdictions have formed exceptions to the immunity for a claim alleging gross negligence or for actions arising from negligent driving,[142] neither exception was adopted by this court. *Montz* deferred modification of the immunity to legislative action, despite the court's recognition that the court in *Latz* had requested the legislature to remove the immunity seven years ago and the legislature had been silent.[143]

Chief Judge Gilbert, concurring, emphasized that the court, rather than the legislature, should abrogate the doctrine.[144] Referring to the

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of financial security to compensate the victims of negligent driving within Maryland. *Id.* § 539; MD. TRANSP. CODE ANN. § 17-103 (1977 & Supp. 1982).

135. 10 Md. App. 720, 727-28, 272 A.2d 435, 442, *cert. denied,* 261 Md. 726 (1971).

136. 160 Md. 18, 152 A. 498 (1930). In addition, *Latz* incorporated the portion of the *Schneider* opinion which stated that any reference to insurance policies owned by either party would be irrelevant because the suit was not based upon an insurance policy. Latz v. Latz, 10 Md. App. 720, 728-29, 272 A.2d 435, 440, *cert. denied,* 261 Md. 726 (1971).

137. The court in *Latz* failed to distinguish the circumstances in *Schneider* and did not note that the justifications for the *Schneider* decision, if valid in the 1930's, were no longer valid in 1971. If insurance was not prevalent during the time *Schneider* had been decided, the use of insurance was widespread by the time of the *Latz* decision. Latz v. Latz, 10 Md. App. 720, 729 n.10, 272 A.2d 435, 440 n.10, *cert. denied,* 261 Md. 726 (1971). For a discussion of the role of insurance in parent-child tort immunity cases, see James, *supra* note 92.

138. 10 Md. App. 720, 734, 272 A.2d 435, 442-43, *cert. denied,* 261 Md. 726 (1971).

139. 15 Md. App. 390, 290 A.2d 812 (1972).

140. *Id.* at 395, 290 A.2d at 814.

141. 40 Md. App. 220, 388 A.2d 568, *cert. denied,* 283 Md. 736 (1978).

142. *E.g.,* Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Wright v. Wright, 85 Ga. App. 721, 70 S.E.2d 152 (1952); Teramano v. Teramano, 6 Ohio St. 2d 117, 216 N.E.2d 375 (1966); Hoffman v. Tracy, 67 Wash. 2d 31, 406 P.2d 323 (1965).

143. Montz v. Mendaloff, 40 Md. App. 220, 223, 388 A.2d 568, 570, *cert. denied,* 283 Md. 736 (1978).

144. Chief Judge Gilbert stated:

immunity, he stated, "What some see as a doctrine of law that serves the best interest of family unity, . . . I perceive to be an antiquated idea that not only fails to accomplish that end, but may well have the opposite effect . . . ."[145] Chief Judge Gilbert also noted that *Hewlett v. George*[146] had been decided before the widespread use of automobiles and the prevalence of automobile liability insurance.[147] Actions arising from automobile injuries, therefore, could not have been considered by the *Hewlett* court, and recovery for these actions should not be precluded by the immunity.[148]

In 1979, the court of special appeals refused to form a business or contractual exception to the immunity in *Shell Oil Co. v. Ryckman.*[149] Unlike prior Maryland cases, however, the *Ryckman* decision benefited the family members involved in the litigation. Ryckman's son was injured at the service station his father had leased from Shell Oil Company. The oil company offered to compensate the son for his injuries but sought indemnification from the boy's father. Ryckman successfully raised the defense of parental immunity to bar Shell's claim.[150] Although some jurisdictions have carved an exception to the immunity for claims arising when the parent and child are engaged in a business activity, Maryland has never recognized this exception.[151] The court

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> I think the time has come for the Court of Appeals to re-examine the parental immunity doctrine . . . . Perhaps, the Court will now hear the beat of a different drummer than that heard by its predecessors and march with those who have denounced *Hewlett,* at least to the extent of permitting an unemancipated minor to recover in motor tort cases to the limits of his or her parents' automobile liability insurance for injuries occasioned to the minor as a result of the negligence of the parent. . . . The majority, in the case *sub judice,* opine that it is up "to the Maryland legislature to make this change [in the law] if it perceives it to be in the best interest of the people of this State." I fail to see why that is necessarily true. . . . The promulgation of parental immunity from actions by unemancipated minors and its subsequent nutriment have been solely judicial functions. To me there is no valid reason why the branch of government that gave birth to the doctrine cannot lay it to rest . . . .

Id. at 226-28, 388 A.2d at 572-73 (Gilbert, C.J., concurring) (footnote omitted).

145. *Id.* at 226, 388 A.2d at 571 (Gilbert, C.J., concurring).
146. 68 Miss. 703, 9 So. 885 (1891).
147. Montz v. Mendaloff, 40 Md. App. 220, 226 n.2, 388 A.2d 568, 572 n.2 (Gilbert, C.J., concurring), *cert. denied,* 283 Md. 736 (1978).
148. In examining the basis for the *Hewlett* decision, he also criticized that court's contention that an abused child was adequately protected by the state criminal code. This assumption, he concluded, revealed that the Mississippi court was "unaware of the increasing number of child abuse cases appearing in the courts." *Id.* at 226 n.3, 388 A.2d at 572 n.3 (Gilbert, C.J., concurring).
149. 43 Md. App. 1, 403 A.2d 379 (1979).
150. *Id.* at 2-4, 403 A.2d at 380-81.
151. This exception for tortious injuries which occur on business premises within the scope of the tort-feasor's employment has been established in many other jurisdicitons. *E.g.,* Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930) (first case to establish this exception); Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952); Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952). *See generally Demise, supra* note 19, at 609-10.

did not adopt Shell's allegation that the parent and child's employer-employee relationship when the injury occurred barred application of the immunity.[152] Additionally, Shell asserted that the parent impliedly waived the defense of parent-child tort immunity by agreeing, in an indemnification contract, to compensate Shell for any liability for injury that occurred on the leased premises.[153] The court responded by stating that "any waiver of parental immunity must be expressly indicated. Waiver of that immunity will not be 'presumed' or 'inferred' from broadly written, stock language indemnity provisions."[154] This language indicates that the court would permit a parent or child to waive the immunity by express provision in all contracts.[155]

The *Ryckman* court, by applying the immunity, relieved the father of his contractual obligation to indemnify the company for its monetary settlement with his son.[156] Voicing dissatisfaction with the immunity but deferring abrogation to the legislature, the court stated, "Had we been free to digress from the rigidity of *Schneider,* we would have readily done so in *Montz* as indicated by Chief Judge Gilbert's compelling reasoning."[157]

In summary, the court of special appeals has expressed a willing-

152. The facts of *Ryckman* would not have warranted this exception, even in those jurisdictions which have recognized the business exception, because the child was not on the premises primarily to provide labor. When the parent is the employer, this is a prerequisite of the exception. Dunlap v. Dunlap, 84 N.H. 352, 354-56, 150 A. 905, 906-07 (1930). For the list of the three factors which justify this exception to the immunity, see discussion of *Dunlap* at note 58 *supra.* The injured child in *Ryckman* was on the business premises merely to visit his father. 43 Md. App. 1, 2, 403 A.2d 379, 379 (1979).

153. 43 Md. App. 1, 11, 403 A.2d 379, 387 (1979). As an additional basis for making an exception to the immunity under the facts of the case, Shell suggested that the court extend the *Mahnke* exception to the business activities of a child.

154. *Id.* at 8, 403 A.2d at 383-84. The court stated that Maryland law does not permit a parent to waive the parent-child tort immunity by contract, but modified this holding by stating that no implied waiver of the immunity may be created by contract. *Id.*

155. *Id.* In order to allow recovery between parent and child when insurance exists, the *Ryckman* court indicated that the provisions of the contract must form an express contractual waiver. Although this was never mentioned in any preceding Maryland opinion on parent-child tort immunity, the court of special appeals stated, "We touched upon the question of what is sufficient to indicate a contractual waiver of that immunity in *Montz v. Mendaloff.* In light of *Schneider v. Schneider,* we declined to hold that a parent who contracts to insure against her negligence negated the immunity rule by so doing." *Id.* at 6, 403 A.2d at 383 (citations omitted).

156. The court queried:

> If we cannot infer that when one contracts to protect all the world from his negligence, he did intend to protect his own children, . . . then can we properly infer that a parent who broadly contracts to indemnify a landlord "against all claims . . . on account of injury" contemplated waiving his immunity so he could indemnify a landlord who might settle a claim with his son?

Id. The court answered this question in the negative.

157. *Id.* at 8, 403 A.2d at 384.

ness to consider an exception for gross negligence,[158] for injuries occurring within the scope of employment[159] and for injuries arising from automobile accidents.[160] Maryland has recognized no other exceptions beyond those based upon the termination of the parent-child relationship,[161] as established in *Mahnke,* and the appellate courts of Maryland await action by a legislature which has been silent on this issue since the judicial adoption of the immunity fifty-three years ago.

VI. ABROGATING THE PARENT-CHILD TORT IMMUNITY

A. Reasons Supporting Abrogation

The parent-child tort immunity has been invoked to protect the parent tort-feasor from liability for intentional, grossly negligent, and negligent torts. Different policy reasons support abrogation of the immunity in each instance.

1. Intentional Torts

The application of the immunity to bar intentional tort actions shields the cruel parent and ignores the abused child. Rather than preserve family harmony, the immunity acts to conceal intra-family brutality.[162] The harmonious family that the immunity aims to protect and preserve will not seek the court's assistance to resolve family disputes.[163] In addition, if a family is truly harmonious, such torts would

158. Montz v. Mendaloff, 40 Md. App. 220, 224, 388 A.2d 568, 570-71, *cert. denied,* 283 Md. 736 (1978). The court of special appeals in *Montz* indicated that although gross negligence may form a basis for an exception to the immunity, the court would not address the issue unless that degree of negligence was alleged throughout the pleadings as the sole cause of injury. *Id.* The degree of gross negligence sufficient to form an exception would probably resemble those acts defined as wilful misconduct in other jurisdictions, such as driving while intoxicated. *See* notes 81-86 and accompanying text *supra.*

No exception has yet been formed for intentional torts that are more culpable than negligent injury but less outrageous than the behavior in Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951). Because of the standards established in *Mahnke* and in two earlier cases, Yost v. Yost, 127 Md. 128, 190 A. 753 (1937) and Schneider v. Schneider, 160 Md. 18, 152 A. 498 (1930), the exceptions would probably be drawn only for the commission of intentional torts that do not fall within the scope of parental discretion to discipline. This would align Maryland's standards with those of the common law, which protected parental discretion within the execution of parental duties, including the duty to discipline the child. *See* notes 7-9 and accompanying text *supra.*

159. Shell Oil Co. v. Ryckman, 43 Md. App. 1, 4, 403 A.2d 379, 381 (1979).

160. Montz v. Mendaloff, 40 Md. 220, 226, 388 A.2d 568, 573, *cert. denied,* 283 Md. 736 (1978).

161. Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951). Maryland courts appear to require that the parent threaten the child's welfare, and not merely fail to protect the child, in order to be excepted from the immunity. *See, e.g.,* Latz v. Latz, 10 Md. App. 720, 272 A.2d 435, *cert. denied,* 261 Md. 726 (1971).

162. *Torts, supra* note 19, at 1062.

163. Sorensen v. Sorensen, 369 Mass. 350, 357, 339 N.E.2d 907, 913 (1975); Balts v. Balts, 273 Minn. 419, 430, 142 N.W.2d 66, 80 (1966).

not occur.

When the immunity is raised to bar the claim of a child injured by his parent, the immunity allows the parent to injure tortiously with impunity. The parental privilege, which preceded the *Hewlett v. George*[164] decision, secured the parent's right to punish his child moderately but protected the child's right to be free from brutal treatment. Maryland should adopt the standards applied in common law pursuant to the parental privilege to govern.

The creators of the immunity assumed that the criminal code would adequately protect the child from any serious harm intentionally caused by the parent.[165] As Chief Judge Gilbert noted in *Montz v. Mendaloff*,[166] the widespread incidence of child abuse refutes the assumption that the criminal justice system provides sufficient protection for the victimized child.[167] In addition, when the responsibility to redress the injuries of an abused child is delegated to the criminal courts, a wide range of egregious behavior that does not constitute a criminal offense escapes judicial scrutiny. Likewise, criminal sanctions do not provide the monetary damages available to the child in a civil proceeding.[168]

2. Torts Involving Gross Negligence

When the parent-child tort immunity is applied to acts of gross negligence, it allows the parent to disregard the well-being of the individual most reliant upon his protection. The parent, charged with the duty of protecting the child, is held to a standard of care much lower than that required between total strangers. This result contravenes the legal principle imposing a higher standard of care upon a person owing a special duty to another.[169]

Some courts apply the immunity to bar all claims based on negli-

164. 68 Miss. 703, 9 So. 885 (1891).

165. Hewlett v. George, 68 Miss. 703, 711, 9 So. 885, 891 (1891). This reliance upon criminal sanctions has provoked criticism. Implicit within this reasoning is the belief that the child should endure, for the sake of family harmony, all personal injuries that are caused by conduct that is insufficiently egregious to form a criminal offense. *See* Montz v. Mendaloff, 40 Md. App. 220, 226 n.3, 388 A.2d 568, 572 n.3 (Gilbert, C.J., concurring), *cert. denied,* 283 Md. 736 (1978).

166. 40 Md. App. 220, 388 A.2d 568, *cert. denied,* 283 Md. 736 (1978).

167. *Id.* at 226 n.3, 388 A.2d at 572 n.3 (Gilbert, C.J., concurring).

168. *See* Cooperrider, *Child v. Parent in Tort: A Case for the Jury?,* 43 MINN. L. REV. 73, 85 (1958). Maryland has various procedures for removing a child from a home in which he has been criminally mistreated; however, none of these sanctions require the parent to make restitution to the victimized child. *E.g.,* MD. ANN. CODE art. 72A, §§ 5-8 (1977 & Supp. 1981); *id.* art. 27, § 35A (1977); MD. CTS. & JUD. PROC. CODE ANN. §§ 30-88 (Supp. 1981). For an illustration of the inadequacies of the present sanctions, because they fail to make restitution to the abused child, see McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905). *See generally* Paulsen, *The Legal Framework for Child Protection,* 66 COLUM. L. REV. 679 (1966).

169. *See generally* PROSSER, *supra* note 3, § 122.

gence,[170] including gross negligence,[171] reasoning that some degree of negligence in the family's daily life is inevitable.[172] Currently in Maryland, an act of gross negligence will only be actionable if it reveals that a parent has abandoned his role as the child's protector, pursuant to the guidelines of *Mahnke v. Moore.*[173] Maryland should broaden the current interpretation of the *Mahnke* exception to include all acts of gross negligence. A parent committing a grossly negligent act that injures his child demonstrates a sufficient disregard for a child's life to indicate an abandonment of the parental role. If application of the immunity enables a parent to commit a grossly negligent act with impunity, the danger posed to the family will outweigh the immunity's possible benefits.

3. Negligent Torts

It is difficult to reconcile the application of the immunity to negligent tort actions with Maryland's constitutional guarantee which enables each person to seek a remedy for any injury to person or property.[174] Although the parent-child tort immunity has never been applied to bar an action between parent and child for negligent injury to property,[175] when the negligence results in personal injury, the claim is barred by the immunity.[176] This unreasonable distinction, combined with the legal maxim that negligent conduct should result in the wrong-

170. When a claim involving a grossly negligent act that merits judicial inspection is presented, the court often chooses a synonym that describes the nature of the tort action but does not include the word negligence. Wilful misconduct, wanton misconduct, and wanton recklessness are a few of the many terms that have been used. *See, e.g.,* Hoffman v. Tracy, 67 Wash. 2d 31, 406 P.2d 323 (1965). *See generally Demise, supra* note 19, at 611-12; notes 81-86 and accompanying text *supra.*

171. *See, e.g.,* Oliveria v. Oliveria, 305 Mass. 297, 299, 25 N.E.2d 766, 767 (1940).

172. The English author, Charles Dickens, expressed the ubiquity of negligence: "Accidents will occur in the best regulated families." C. DICKENS, DAVID COPPERFIELD 396 (4th ed. 1925).

173. 197 Md. 61, 77 A.2d 923 (1951). *See* Montz v. Mendaloff, 40 Md. App. 220, 224, 388 A.2d 568, 571, *cert. denied,* 283 Md. 736 (1978).

174. Article 19 of the Maryland Constitution states:

> That every man, for any injury done to him in his person or property, ought to have a remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land.

MD. CONST., DECL. OF RIGHTS art. 19.

175. *Torts, supra* note 19, at 531.

176. This issue was examined by the Supreme Court of Arizona in Streenz v. Streenz, 106 Ariz. 86, 89, 471 P.2d 282, 284 (1970), in which the court queried, "Is it reasonable to say that our law should protect the property and contract rights more zealously than the rights of his person?" *Id.* The court resolved the question in the negative. *Id.* The Supreme Judicial Court of Massachusetts in Sorensen v. Sorensen, 369 Mass. 350, 356, 339 N.E.2d 907, 912 (1975), addressing the same issue, stated, "Children enjoy the same right to protection and to legal redress for wrongs done to them as others enjoy. Only the strongest reasons, grounded in public policy, can justify limitation or abolition of those rights." *Id.*

doer's liability,[177] highlights the appropriateness of abrogating the immunity.

The substitution of a parental defense in the area of negligence, however, may be warranted to protect the parent from two types of claims: the claim of a child injured by parental negligence in which the injurious act is not protected by insurance coverage; and a non-family member's claim that is founded upon a breach of duty owed by a parent to a child. A child receiving the advantage of his parent's care should not be allowed to gain, at his parent's expense, from an incident of parental negligence.[178] Additionally, a modified defense should be retained to protect the parent from the claim of a non-family member seeking indemnification.[179] This type of action arises when the non-family member seeks compensation from the parent and bases his claim on the parental negligence that was a factor in the non-family member's liability for damages awarded the child.[180] When a child would be barred from bringing a negligence claim against the parent that is founded on a breach of a parental duty, the third party should not be allowed to "stand in the child's shoes" to allege that the parent's

177. Presidents & Directors of Georgetown College v. Hughes, 130 F.2d 810, 812 (D.C. Cir. 1942). In *Hughes,* Justice Rutledge stated, "We start with general principles. For negligent or tortious conduct liability is the rule. Immunity is the exception." *Id.* (referring to charitable immunity), *quoted in* Lee v. Comer, 224 S.E.2d 721, 723 (W. Va. 1976).

178. *See* Hastings v. Hastings, 33 N.J. 247, 250, 163 A.2d 147, 150 (1960). *But see* Sorensen v. Sorensen, 369 Mass. 350, 339 N.E.2d 907 (1975). In *Sorensen,* the court stated: "[W]here the action is a true adversary one against a parent who refused to contribute sufficiently to the support of a child . . . , judicial formulation of an obstacle to the suit cannot contribute to family harmony . . . ." *Id.* at 357, 339 N.E.2d at 913.

179. Some jurisdictions that allow a child to bring a negligence claim against a parent for an injury arising from an automobile accident do not allow the child to bring a claim that is based upon the negligent execution of a parental duty. By virtue of this distinction, a third party is precluded from basing a claim upon any aspect of parental negligence that would not, by application of the immunity, be actionable by the child. This tangential benefit of the immunity is most useful in precluding the third party's recovery in a claim alleging negligent supervision. *See* Schneider v. Coe, 405 A.2d 682 (Del. 1979); Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

If the child could sue his parent for a claim of negligent supervision, a third party could also raise such a claim. This would lead to an apportionment of damages and would consequently decrease the child's recovery. In Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), the court allocated the damages from the parent and Dow Chemical Company in proportion to the negligence each displayed. This produced the undesirable result of allowing an outsider the right to claim family funds. If the child received $10,000 and $8,000 was to be paid by the non-family tort-feasor, the family's assets would have been diminished by $2,000. For a discussion of the disadvantages of allowing third party claims for negligent supervision of a child, see Holodook v. Spencer, 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974). *See also* Strahorn v. Sears, Roebuck & Co., 50 Del. 50, 123 A.2d 107 (1956) (immunity barred defendant's joinder of parent in child's tort action).

180. Strahorn v. Sears, Roebuck & Co., 50 Del. 50, 123 A.2d 107 (1956).

duty has not been conscientiously executed.[181] *Shell Oil Co. v. Ryckman*[182] applied the immunity to bar the claim for indemnification because recovery, if allowed, would have indirectly taken funds from the parent to compensate the child, which the child could not have done directly.[183]

4. Negligent Torts in the Presence of Insurance

Injuries arising from automobile accidents are the most frequent basis of intra-family tort claims.[184] The tort-feasor involved in these accidents is generally covered by liability insurance because insurance is often a prerequisite for obtaining a driver's license.[185] In Maryland, all licensed drivers must possess some form of liability insurance as proof of financial ability to compensate any victim of his negligent driving.[186] Maryland's public policy is to provide recovery for those injured by negligent driving within the state.[187] This policy has been furthered by the General Assembly's provision for the establishment of a fund to compensate the victim of a driver who does not possess the requisite insurance, cannot be found, or is otherwise judgment proof.[188]

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181. *Id.; see* Shell Oil Co. v. Ryckman, 43 Md. App. 1, 403 A.2d 379 (1979).
182. 43 Md. App. 1, 403 A.2d 379 (1979).
183. *Id.* at 6-10, 403 A.2d at 383-86.
184. Sorensen v. Sorensen, 369 Mass. 350, 355, 339 N.E.2d 907, 911-12 (1975); Lee v. Comer, 224 S.E.2d 721, 723-25 (W. Va. 1976); *Torts, supra* note 19, at 535. *See generally* Casey, *supra* note 3; Sanford, *supra* note 36. Very few courts, however, have agreed on the role of insurance in a negligence claim which involves the parent-child tort immunity. *Torts, supra* note 19, at 545-50. *See generally* Fleming, *Accident Liability Reconsidered: The Impact of Liability Insurance,* 57 YALE L.J. 549 (1948).

The role of automobile liability insurance in general is to spread the potential loss one driver may incur among all those who engage in the same activity. By this method, no driver is financially ruined by the liability he incurred in negligently injuring another nor is the victim denied compensation. 1 J. JOYCE, INSURANCE 94 (2d ed. 1917).

185. Gelbman v. Gelbman, 23 N.Y.2d 434, 439, 245 N.E.2d 192, 196, 297 N.Y.S.2d 529, 534 (1969); *see, e.g.,* Streenz v. Streenz, 106 Ariz. 86, 88, 471 P.2d 282, 284 (1970); Gibson v. Gibson, 3 Cal. 3d 914, 922, 479 P.2d 648, 655, 92 Cal. Rptr. 288, 297 (1971) (en banc); Sorensen v. Sorensen, 369 Mass. 350, 339 N.E.2d 907 (1975). The court in *Sorensen* stated, "[W]e take judicial notice of the widespread existence of automobile liability insurance . . . . [I]t remains . . . a proper element in a discussion of the public policy supporting abrogation of parental immunity." *Id.* at 356, 339 N.E.2d at 914.

In Smith v. Kaufman, 212 Va. 181, 185, 183 S.E.2d 190, 194 (1971), the court stated, "The very high incidence of liability insurance covering Virginia-based motor vehicles, together with the mandatory uninsured motorist endorsements to insurance policies, has made our rule of parental immunity anachronistic when applied to automobile accident litigation." *Id.*

186. MD. TRANSP. CODE ANN. § 17-103 (1977).
187. Sherby v. Weather Bros. Transfer Co., 421 F.2d 1243, 1247 (4th Cir. 1970) (Butzner, J., dissenting); *see, e.g.,* MD. ANN. CODE art. 48A, § 243H (1979 & Supp. 1981); MD. TRANSP. CODE ANN. § 17-103 (1979 & Supp. 1981).
188. MD. TRANSP. CODE ANN. § 17-103 (1979). Maryland has assured that every driver on a Maryland road may recover up to $20,000. *Id.* This provision requires

Despite the Maryland legislature's efforts to insure adequate recovery for accident victims, the victim who is the parent or child of the negligent driver is denied recovery, due to the application of the parent-child tort immunity.[189] The insurance underwriter providing the defense for the negligent parent or child invokes the immunity and, thus, protects the assets of the insurance company at the expense of a family's resources.

An objection to allowing a child's action against an insured parent has been that this exception to the immunity establishes liability based upon the presence of insurance.[190] This view misinterprets the interplay between the purpose of the immunity, tort liability, and the role of insurance. The presence of insurance, irrelevant to the culpability of the defendant, is fundamentally relevant to the application of the immunity.[191] Specifically, application of the immunity prevents the diversion of family funds to pay a court judgment.[192] Insurance coverage provides an auxiliary source of funds to compensate the injured family member and, therefore, furthers the objectives of the immunity without denying the family member's recovery.[193] In this situation, the immunity's invocation would present unnecessary hardship without providing the family a corresponding benefit.[194]

Independent of forming this exception to the immunity, a method to remove this family penalty in automobile negligence actions was revealed in *Shell Oil Co. v. Ryckman.*[195] The court suggested that a parent may contractually waive his parental immunity if the waiver is express and its terms are precise.[196] If implemented, this guideline would allow a parent, upon including an express provision within his

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each applicant for a Maryland driver's license to possess this minimum amount of security to be paid to victims of his negligence. If the driver is insolvent, the victim can claim directly from the insurance company. MD. ANN. CODE art. 48A, § 481 (1979). If the driver has no insurance, the victim can file a claim with the Maryland Uninsured Motorist Fund. *Id.* § 539.

189. Injured victims who are barred from prosecuting their claims due to an immunity do not appear to be able to recover under the Uninsured Motorist Fund, nor from the insurance company directly. Article 48A of the Maryland Annotated Code provides that claims can only be made against the Uninsured Motorist Fund or directly against the insurer if the injured party (claimant) has a cause of action against the owner or operator of the vehicle. MD. ANN. CODE art. 48A, § 243H(a)(1)(iii) (1979).

190. Luster v. Luster, 299 Mass. 480, 483, 13 N.E.2d 438, 441 (1938).

191. *Torts, supra* note 19, at 545.

192. Streenz v. Streenz, 106 Ariz. 86, 88, 471 P.2d 282, 284 (1970).

193. *Id.*

194. *Id.* at 87, 471 P.2d at 283. An additional basis for allowing recovery in the presence of insurance is that it would be unconscionable to allow the insurer of the one possessing the immunity to receive premium payments from the insured and refuse to pay any claims against the insured by invoking the insured's immunity. *Cf.* Cox v. DeJarnette, 104 Ga. App. 664, 671-75, 123 S.E.2d 16, 21-24 (1964) (referring to charitable immunity).

195. 43 Md. App. 1, 403 A.2d 379 (1979).

196. *Id.* at 9, 403 A.2d at 383-84.

insurance policy, to preclude the insurer's invocation of the parent-child tort immunity to bar the child's recovery. This, however, may prove to be an impractical alternative. The insurance contract is generally an adhesion contract[197] and, therefore, is not customarily subject to wide variance in its terms; each provision is not negotiated.[198] In the normal course of obtaining insurance coverage, the general public does not determine which potential victims the insurer will compensate. The activity, such as operating a motor vehicle, is identified[199] and all victims of the insured party's negligence while engaging in this activity will be compensated by the insurance underwriter.[200]

B. Establishing a Parental Defense

In order to insure that the original objectives of the parent-child tort immunity were not abandoned when the doctrine was removed, some courts abrogating the immunity have established a narrow parental defense to protect the parent who has committed an isolated act of negligence.[201] Three defenses to parent-child tort claims have been established, each barring a claim in one of the following areas: claims based upon negligent exercise of a parental duty;[202] claims in which the injurious behavior involved a family activity;[203] and claims against a parent who acted as a reasonably prudent parent.[204] In addition, some courts have chosen to abrogate the immunity without establishing a defense that may later prove to be too rigid.[205] These courts have decided to consider each claim on a case-by-case basis.[206]

In the 1963 case of *Goller v. White,*[207] Wisconsin became the first state to abrogate the immunity and to establish a limited parental de-

197. Guin v. Ha, 591 P.2d 1281, 1284-85 (Alaska 1979); W. VANCE, VANCE ON INSURANCE 243 (3d ed. 1951). Vance defined the term as follows:

> [T]he terms of the contract do not result from mutual negotiation and concessions of the parties and so do not truly express an agreement at which they have arrived. Rather most of the terms are fixed in accordance with a form prescribed by the insurer, or even by statute, to which the insured may "adhere" if he chooses, but which he cannot change.

Id.

198. W. VANCE, VANCE ON INSURANCE 45, 241 (3d ed. 1951).
199. The practice of insuring a driver for his potential liability to another arose from the maritime practice of insuring all ship captains against loss of their cargo at sea. *Id.* at 8.
200. *Id.* at 53.
201. *E.g.,* Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971) (en banc); Schenk v. Schenk, 100 Ill. App. 2d 199, 241 N.E.2d 12 (1968); Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963).
202. Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963).
203. Schenk v. Schenk, 100 Ill. App. 2d 199, 241 N.E.2d 12 (1968).
204. Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971) (en banc).
205. *E.g.,* Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969); Lee v. Comer, 224 S.E.2d 721 (W. Va. 1976).
206. Gelbman v. Gelbman, 23 N.Y.2d 434, 442, 245 N.E.2d 192, 199, 297 N.Y.S.2d 529, 537 (1969); Lee v. Comer, 224 S.E.2d 721, 733 (W. Va. 1976).
207. 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

fense.[208] The court held that a child's claim alleging the negligent execution of a parental duty could not be pursued.[209] Specifically, a claim founded upon negligence in the parent's provision of clothing, housing, or health care would be barred by this defense.[210]

The *Goller* guideline, however, was criticized as being difficult to apply precisely and consistently because the scope of the duties owed to the child evade exact description.[211] For example, a claim of injury resulting from a broken stair in the home would be barred by the *Goller* defense, although an injury caused by a negligent car repair would not clearly lie within *Goller*'s boundaries. In a later case, this same court, attempting to clarify the scope of the *Goller* defense, ruled that a child's claim founded upon a parent's negligent warnings or instructions is a challenge to parental discretion which, under *Goller,* must be barred.[212]

The Illinois Court of Appeals, in *Schenk v. Schenk,*[213] sought to abrogate the immunity and substitute a parental defense that would protect the lifestyle of the family. The *Schenk* court held that all tort actions between parent and child would be allowed except those in which the injury arose from a family activity.[214] Claims that involved injuries arising from automobile accidents, even if the automobile was being used for a family excursion, were specifically held to be actionable.[215]

To prevent a parent from escaping liability for the negligence he commits within the family context, the Supreme Court of California advanced the "reasonable parent test" in *Gibson v. Gibson.*[216] Although the *Gibson* court effectively eliminated the situation in which a child

208. Noting that contract and property actions between parent and child were unqualifiedly allowed without ill effect upon the family and that the widespread use of liability insurance removed the threat of financial hardship, the court held that each of the policy reasons for invoking the immunity was inapplicable. *Id.* at 411-15, 122 N.W.2d at 200-04.

209. *Goller* established that parental liability would be the rule and an immunity, in the form of a narrow parental privilege, would be the exception. *See* 1964 WIS. L. REV. 714.

210. 20 Wis. 2d 402, 408-10, 122 N.W.2d 193, 198-99 (1963).

211. For a criticism of the *Goller* guideline, see Gibson v. Gibson, 3 Cal. 3d 914, 922-23, 479 P.2d 648, 652-53, 92 Cal. Rptr. 288, 292-93 (1971) (en banc). *See also Demise, supra* note 19, at 615-17.

212. Lemmen v. Servais, 39 Wis. 2d 75, 81-83, 158 N.W.2d 341, 345-47 (1968).

213. 100 Ill. App. 2d 199, 241 N.E.2d 12 (1968).

214. *Id.* at 202, 241 N.E.2d at 15. The court allowed the father to pursue a cause of action based on negligence because no family relationship or purpose resulted in the father's injury. *Id.*

215. *Id.* at 204, 241 N.E.2d at 16.

216. 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971) (en banc). *Gibson* stated that "although a parent has the prerogative and the duty to exercise authority over his minor child, this prerogative must be exercised within reasonable limits." *Id.* at 917, 479 P.2d at 651, 92 Cal. Rptr. at 293. This guideline is very similar to the common law parental privilege to govern. *See* notes 7-9 and accompanying text *supra.*

suffered tort injury without having legal recourse against the parent, this approach is of dubious value.[217] In effect, the *Gibson* approach would subject each negligence claim to a preliminary judicial determination of whether a parent's behavior is that of a reasonable, prudent parent.[218] It is not clear from the *Gibson* opinion whether the reasonably prudent parent is more or less responsible than the reasonably prudent person.

C. Effect of Abrogation on the Insurance Underwriters

In those jurisdictions that have removed the immunity, some insurance companies have responded by including clauses within their policies that exclude recovery by any family member living in the same household as the insured.[219] Because this clause could bar the recovery of the spouse, siblings, and other relatives, as well as the parent and child, its effect upon the family member's recovery is much broader than the scope of the parent-child tort immunity. If the immunity in Maryland is modified to allow tortious injury claims between parent and child, the policy reasons supporting recovery should be invoked to prohibit this type of exclusionary clause.[220]

Upon removing the parent-child tort immunity, it is inevitable that the cost of automobile liability insurance will increase to some extent to absorb the additional recovery of the parent or child plaintiff. If, due to the inability of the insurer to defend against an intra-family claim, these suits become the source of frequent inordinately large awards, then liability premiums for all members of the insured public will greatly increase.[221] The interests of persons purchasing insurance therefore coincide with the interests of the insurance underwriter in seeking a fair trial and preventing the unjust enrichment of the family plaintiff.[222]

An insurance underwriter may experience three problems in de-

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217. *Demise, supra* note 19, at 615-17.

218. If the reasonable parent is held to a more lenient standard than the reasonable person, the parent may act negligently and with impunity to the extent of the difference in the two standards. This result, however, would frustrate the *Gibson* court's stated intent. If the reasonable parent is viewed to be more responsible than the reasonable person, then the preliminary determination that the child may bring this cause of action would be dispositive of the parent's culpability at trial. For a discussion of some additional ramifications of the *Gibson* standard, see *Demise, supra* note 19, at 617-18.

219. A sample clause reads, "This policy does not apply to bodily injury to any person who is related by blood, marriage or adoption to an insured against whom claim is made if such person resides in the same household as such insured." Casey, *supra* note 3, at 331.

220. The Insurance Commissioner of Maryland has the final authority to approve or disapprove the provisions within each insurance policy of all insurance underwriters operating in Maryland and may allow or prohibit exclusionary clauses. MD. ANN. CODE art. 48A, § 376 (1979).

221. Casey, *supra* note 3, at 329.

222. Lee v. Comer, 224 S.E.2d 721, 725-26 (W. Va. 1976), Casey, *supra* note 3, at 329.

fending an intra-family tort claim. First, the insurer may not receive the necessary cooperation from a family defendant in providing adequate information for the insured's defense.[223] Second, a defendant family member in a jury trial may be too helpful to the plaintiff family member and may prejudice the jury by his statements.[224] Third, if aware that the insurer and not the defendant family member will furnish the funds, a jury may be unduly influenced to award an unjustifiably large recovery.[225] Several solutions to each of these problems have been proposed.[226] In response to the first problem the insured's cooperation in the defense of a claim against him is often a contractual prerequisite of the underwriter's duty to indemnify the defendant.[227] When the family member's failure to cooperate has materially prejudiced the insured's defense, the insurer is not obligated to indemnify the defendant for any damages awarded to the plaintiff.[228]

If it becomes apparent that the defendant may offer statements that will unfavorably influence the jury, the insurer should be allowed to inform the jury that due to the relationship between the parties, plaintiff and defendant may both be in favor of the plaintiff's recovery.[229] Upon the insurer's request, the jury should be instructed that the testimony of the defendant concerning the circumstances of the accident must be received with great caution. A jury instruction similar to the cautionary instruction administered in a criminal trial when the uncorroborated testimony of a co-conspirator is in evidence may prove helpful.[230] As another alternative, the insurer should also be allowed to elicit testimony from the family member defendant in the manner reserved for hostile witnesses.[231] These procedures may mitigate the possibility of collusion.[232]

In addition, the insurer should be allowed to defend the suit in its

223. Comment, *Intrafamily Tort Immunity in Virginia: A Doctrine in Decline,* 21 WM. & MARY L. REV. 273, 302 (1979).

224. *Id.*

225. Casey, *supra* note 3, at 330.

226. *Id.* at 329-36.

227. *Id.* at 332.

228. Cabrera v. Atlantic Nat'l Ins. Co., 44 Misc. 2d 598, 603, 254 N.Y.S.2d 496, 500 (1964) (when lack of cooperation is prejudicial to the outcome of the trial, the insurance company is relieved of its obligation to defend or indemnify the insured). The insurer can thus avoid relying upon an insured who may offer unfavorable testimony. *See also* Goldberg v. Preferred Accident Ins. Co., 279 Mass. 393, 188 N.E. 235 (1933) (insured defendant's repeated disappearances from courtroom in the midst of his trial relieved insurance company of its obligation to defend him).

229. Comment, *Intrafamily Tort Immunity in Virginia: A Doctrine in Decline,* 21 WM. & MARY L. REV. 273, 303 (1979).

230. *Id.*

231. This would allow the insurer to cross-examine the insured. Cross-examination is reserved for an adverse witness or a hostile party. C. MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 25, at 52 (E. Cleary ed. 1972).

232. Casey, *supra* note 3, at 332.

own name when the cooperation between plaintiff and defendant family members jeopardizes the adversarial nature of the trial. The jury's knowledge that the underwriter, not the individual defendant, will be responsible for paying the damages awarded to the plaintiff may result in larger verdicts against the insurer. In automobile accident claims, however, the jury may already have assumed that the insurer is providing the recovery.[233] Nevertheless, a jury should be reminded that an unjustly high award will result in higher insurance premiums for all insured drivers.

VII. CONCLUSION

The Court of Appeals of Maryland should act to align Maryland with the growing number of jurisdictions that have abrogated the parent-child tort immunity. The court of appeals is the preferable forum for several reasons. First, it is appropriate for the judiciary to extinguish the doctrine it created. The Court of Appeals of Maryland, which incorporated the immunity into state law, should assume the responsibility for removing this defense which produces results that are antagonistic to its stated purposes. Second, sufficient basis for legislative abrogation of the doctrine has existed for the past fifty-three years, without fruition.[234] In response to the General Assembly's reluctance to nullify other anachronistic laws, the Maryland judiciary has recently taken an active role and has abolished or modified the outdated laws.[235] The court of appeals should continue its pragmatic re-evaluation of state law and abrogate the parent-child tort immunity.

If the court deems a limited parental defense to be beneficial after abrogation, it should adopt a guideline that protects the parent in his execution of parental duties while safeguarding the rights of parent and child to pursue recovery for those injuries that are extrinsic to their relationship as parent and child. The selected standard should be modeled after the common law parental privilege to govern, which succeeded in protecting the integrity of the family without destroying the legal rights of the family members.

Rhonda Ilene Framm

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233. The jury is frequently aware that the plaintiff and defendant are friendly and that the suit is not truly adverse between the parties. "When the parent and child are seen leaving the courtoom hand-in-hand, there is little uncertainty left as to who is going to pay any judgment." Comment, *Intrafamily Tort Immunity in Virginia: A Doctrine in Decline,* 21 WM. & MARY L. REV. 273, 304 n.195 (1979).

234. The inequities resulting from application of the immunity have been apparent since the court first adopted the doctrine in the 1930 case of Schneider v. Schneider, 160 Md. 18, 152 A. 498 (1930).

235. *See* Kline v. Ansell, 287 Md. 585, 414 A.2d 929 (1980) (tort of criminal conversation); Lewis v. State, 285 Md. 705, 404 A.2d 1073 (1979) (doctrine of accessoryship); Lusby v. Lusby, 283 Md. 334, 390 A.2d 77 (1978) (interspousal tort immunity). For a discussion of *Kline,* see 10 U. BALT. L. REV. 205 (1980). For a discussion of *Lusby,* see 8 U. BALT. L. REV. 584 (1979).