Parent-Child Tort Immunity: A Rule in Need of Change

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A RULE IN NEED OF CHANGE

SUSAN G. CHOPIN*

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"[A]ccidents will occur in the best regulated families." 

The area of torts in domestic relations is permeated with inconsistencies and a lack of logic. What would ordinarily render one person liable to another is not usually the case among members of the family. While civil liability between husband and wife presents problems, this article will concentrate on the action for negligence brought by an unemancipated child against his parent and will also discuss the lack of immunity when an intentional tort is involved.

The purpose of this article is to suggest a need for change in Florida law which would permit a cause of action by the unemancipated child against his parent for negligence. In presenting the argument for

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2. It should be noted at the outset that there is a difference between the concept of civil liability between spouses and that between a parent and his minor child. The legal difference is usually attributed to the fact that the husband-wife relationship, although severable and artificial, is permanent in status. The parent-child relation, for purposes of liability, exists only as long as the child is under the control of his parent, i.e., unemancipated. In addition, the consensual nature of marriage, as well as the "one entity" concept, are lacking in the parent-child relation.
3. Suits brought by parents against their unemancipated children will be discussed only insofar as they are relevant to the legal theories applied to suits brought by children against their parents. For a discussion of intrafamily suits in general, see Comment, Torts Between Persons in Domestic Relation, 43 HARV. L. REV. 1030 (1929-30).
change, the history of the rule immunizing a parent from liability to his child for negligence, as well as the various applications and exceptions that have been carved out of the rule, will be traced. The Florida position will be analyzed in terms of its reasons for adopting the immunity rule. Finally, the factors necessitating alteration of the rule in Florida will be discussed, with examples of recent developments in other jurisdictions relating to parental immunity.

I. HISTORY OF THE IMMUNITY RULE

Although prior to 1891 there were no cases involving parental tort liability, certain cases seemed to suggest that the parent would be liable for torts against the child. In 1891, however, in Hewlett v. George, the Supreme Court of Mississippi established the rule of immunity which laid the foundation for innumerable decisions forbidding any cause of action by an unemancipated child against his parent for negligence.

In Hewlett, a daughter instituted an action against the estate of her mother for false imprisonment by the mother for ten days in an asylum. The plaintiff was a minor who, although married at the time of the confinement, was separated from her husband and was living in the mother's house. The trial court found for the daughter. On appeal to the state supreme court, however, the judgment was reversed. The court stated that as long as there was an obligation by the parent to support the child, the child, in return, must aid and comfort his parent. The court stated:

The peace of society, and of the families composing society, and a sound public policy . . . forbid 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 hands of the parent.

The court justified its result by noting that the child had criminal recourse against the mother, thereby eliminating any need for a civil remedy.

Interestingly enough, the Hewlett court cited no authority for its holding. Apparently, this was due to the fact that, in addition to the lack of American precedent, no English decision reported before 1891 involved a personal tort action based on negligence. Even more inter-

4. Several cases supported the liability of a person standing in loco parentis for gross neglect or abusive treatment towards the child. E.g., Fitzgerald v. Northcote, 4 F.&F. 656, 142 Rev. R. 703 (Q.B. 1865) (suit by child against schoolmaster for assault and battery); Gould v. Christianson, 10 F. Cas. 857 (No. 5636) (S.D.N.Y. 1836) (suit by child-servant against shipmaster for assault and battery); Nelson v. Johansen, 18 Neb. 180, 24 N.W. 730 (1885) (recovery by child for negligence of his guardian); Lander v. Seaver, 32 Vt. 114 (1859) (suit by child against schoolteacher for assault and battery).

5. 68 Miss. 703, 9 So. 885 (1891). While the SOUTHERN REPORTER spelling of the plaintiff's name is "Hewellette," reference herein to the case will be to "Hewlett," as it appears in the official report.

6. Id. at 711, 9 So. at 887.
7. Id.
8. However, at early common law in both England and America, suits for contract
testing is the large following that Hewlett received. Despite a lack of direct authority, the courts following Hewlett justified the immunity rule on various grounds. For example, a North Carolina 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.

While such Biblical precedent went unquestioned by the North Carolina court, it is of questioned validity today. At present, thirty-four jurisdictions continue to cling to the immunity rule. While they no longer attempt to supply historic precedent for the rule, all attempt to provide various rationales for the rule.

II. VARIOUS RATIONALES

Three principal grounds have traditionally been relied upon in support of the parent-child immunity doctrine. They are: (1) fundamental policy; (2) disruption of family harmony; and (3) danger of fraud and collusion. There are, in addition, several grounds which do not warrant individual treatment but which will be mentioned briefly.

A. General Social Policy

A long line of cases refuses recovery to the child for torts committed by his parents on broad grounds of public policy. The older cases rely on the fundamental concept of our society which regards the family as the primary unit of government. The head of the family, much like a sovereign, is clothed with an immunity from suit.


10. Small v. Morrison, 185 N.C. 577, 585-86, 118 S.E. 12, 16 (1923) (emphasis supplied). The case involved a suit brought by a minor child against his parent and an insurance company to recover, under an insurance policy, for injuries received from the parent's negligent operation of a car. Early support for the immunity rule may be found in J. Schouler, Domestic Relations § 275 (3d ed. 1882). Early criticism for the rule is presented in Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927), and in the dissent in Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923).


Perhaps cognizant of changing attitudes toward the concept of the father as "lord and master" and the child as his servant, the newer cases avoid using the sovereignty argument by name. Rather, the modern decisions apply a general policy approach. For example, in a recent New York case, a mother, on behalf of her three-year-old son, brought suit against the father for negligence toward the child. The father had left his car unlocked in a parking lot with the child inside. The child released the brakes and was injured when he tried to jump from the car. The court, in dismissing the complaint, stated:

[The no-liability rule] is a direct application of a concept that cannot be rejected without changing the whole fabric of our society, a fundamental idea that is at the bottom of all community life. The basic principle is that children and parents form a unique kind of social unit different from all other groups.

B. Disruption of Family Harmony

The family harmony argument is the most commonly used argument of the courts which follow the immunity rule. A fortiori, the concept of domestic tranquility is important only insofar as the family unit exists. Thus, once the child has reached majority or is emancipated, he is technically no longer a member of the family and may then bring an action against his parent for negligence.

The family harmony argument is bottomed on general public policy considerations. A suit by a child against his parent for negligence has been said to injure not only the family's welfare, but the public's as well. Many parental acts could provide the basis for a suit for negligence by the child; if a suit were allowed, the parent's authority will be subverted and the family will be torn apart. In effect, the family harmony argument maintains that it is preferable that the wrong committed against the child go uncompensated rather than risk disrupting family harmony.

The soundness of the family harmony argument has been attacked on the ground that suits relating to property and contract rights were maintainable at common law between parent and child. It is doubtful whether a negligence suit could uproot family harmony more than could

16. This, too, begs the question. If the reason for denying a negligence action to the child during his minority is domestic tranquility, the same argument should be applicable to actions brought after majority. In addition, after personal injuries have been received by one member of the family through the negligence of another, it is doubtful that family harmony will continue to exist anyway.
one for property or contract. In fact, an action in contract or to enforce property rights, where the parent would usually have to pay the verdict from his own resources, has been said to be more threatening to family peace than a tort action, where the parent usually has insurance coverage.19

C. Danger of Fraud and Collusion

The existence of automobile liability insurance has supplied the courts with an additional ground to deny a child's negligence action. If such actions were allowed, some courts have stated, domestic fraud and collusion may be worked upon the parent's insurance company.20

Illustrative of the many cases rebutting the fraud-collusion argument is Hebel v. Hebel.21 In Hebel, the Supreme Court of Alaska recognized a right of action by an unemancipated minor against her mother for injuries received as a result of the mother's negligent driving. In dealing with the defendant's contention that fraud would be perpetrated upon insurance companies if such suits were allowed, the court noted that the danger of fraud and collusion exists in all liability insurance cases.22 The danger, however, should not serve to sever any and all causes of action. Rather, it should only mean greater caution by the court in hearing the case.23

The judicial approach to justifying the immunity rule under the fraud-collusion argument, when contrasted with the family harmony argument, presents a paradox. Under the fraud-collusion argument, the immunity rule is justified because the suit might be so friendly it could be collusive. Under the domestic tranquility argument, however, immunity is justified because the suit would be likely to uproot family harmony.

D. Additional Grounds

Many cases have barred actions by children for their parent's negligence on the basis that recovery would deplete the "family exchequer"24 to the detriment of other family members. Where there are other dependents in the family, it is reasoned, recovery by one child reduces the

22. The Hebel court quoted Judge Fuld's dissent in Badigian, supra note 13: "'The danger is precisely the same when the injury is to a child who has attained 21 or to a brother or sister or, to a less degree, to a friend.'" Hebel v. Hebel, 435 P.2d 8, 12 (Alas. 1967).
funds available to the rest of the family. This argument overlooks the fact that the child recovering has been injured by his parent while the other family members have not. In addition, recovery by a stranger against a parent would likewise deplete the family exchequer; these suits, however, have long been allowed. Lastly, where there is liability insurance, no depletion in family funds occurs.\(^2\)

Another ground for the immunity rule is that if the parent pays damages to his child, there is a possibility that the parent could eventually obtain the funds from the child. If the child dies intestate during minority, the parent, as next of kin, would inherit the money that he paid as damages. This would, in effect, permit the negligent parent to profit from his wrong.\(^2\) Not only does such a contingency appear remote, but the argument is equally applicable to interfamily suits which are allowed by the courts, \textit{i.e.}, contract and property suits.\(^2\)

Another ground often advanced against parental liability is the need for parental discipline and control. The parent, having the responsibility of raising his child, "may lawfully correct his child, being under age, in a reasonable manner."\(^2\) Advocates of the immunity rule argue that a suit by an unemancipated minor would necessarily impair the parental discipline privilege. The courts which reject this ground note that the negligent act of the parent is really outside of the scope of parental discipline, which therefore should not be a factor in denying a cause of action to the child.\(^2\)

### III. Exceptions to the Rule

Because reasonable parental actions in the rearing of children are privileged, suits arising out of the parents' actions in the familial relation have generally been denied.\(^2\) However, "[i]f the parental relationship is abandoned, the reason for the immunity ceases to exist."\(^2\) The most frequently encountered situations where the courts consider the parental relationship to have been abandoned are the cases where the child is emancipated or where the parent is guilty of a wilful or malicious tort. Other exceptions to the rule have evolved from the recognition that the particular acts of the parent giving rise to a suit do not arise out of the family relation, or that the parent has abandoned his role of parent in committing the tort.


\(^{26}\) See Agustin v. Ortiz, 187 F.2d 496 (1st Cir. 1951), affirming as not patently erroneous the holding of the Supreme Court of Puerto Rico that a child under the guardianship and custody of his father is precluded from suing his father for negligence since any damages recovered would be subject to the control and administration of the father.

\(^{27}\) Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930).

\(^{28}\) 1 W. Blackstone, Commentaries *452.


\(^{30}\) Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952).

\(^{31}\) Teramano v. Teramano, 6 Ohio St. 2d 117, 119, 216 N.E.2d 375, 377 (1966).
A. Emancipation

Even Hewlett v. George recognized that a child emancipated at the
time the cause of action accrued against his parent could bring the ac-
tion.22 Once emancipated, the child is his own master, so to speak, and
there is no longer the strong policy justification for family harmony.
Florida follows the emancipation exception to the immunity rule and
has considered what facts will constitute emancipation.23

In Meehan v. Meehan,24 a decision rendered by the District Court
of Appeal, Second District, a father sued his minor son for the wrong-
ful death of another minor son. The defendant son had failed to inform
his brother of the defect in an electric buffing machine which subse-
quently resulted in the brother's death by electrocution. While the case
involved a suit by a parent against his child, and is thus without the
scope of this article, Meehan is noteworthy because it dealt with the
question of whether the defendant son was emancipated so that the father
could maintain an action in negligence against him.

The Meehan court first noted that the common law rule in Florida
was that a child is emancipated only upon reaching the age of twenty-
one years.25 If emancipation by age or by the statutory procedure26 is not
shown, then emancipation may still be shown by "a complete severance
of the filial tie."27 The burden of proving emancipation, the court held,
is upon the plaintiff.28

Because most of these parent-child negligence suits arise before the
child has reached statutory majority, whether emancipation has occurred
is usually a question of fact.29 Generally, the standard for emancipation
appears to be the Meehan concept of "complete severance" of the child
from the control of his parent. This idea of relinquishment of control
illustrates that emancipation is more concerned with the extinguishment
of parental rights and obligations than with the removing of the dis-
abilities of childhood.30 "There must be a surrender by the parent of the

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32. 68 Miss. 703, 711, 9 So. 885, 887 (1891).
33. Meehan v. Meehan, 133 So.2d 776 (Fla. 2d Dist. 1961).
34. Id.
35. Id., citing Beekman v. Beekman, 53 Fla. 858, 43 So. 923 (1907). But see Fla. Laws
1973, ch. 73-21, § 2, creating Fla. Stat. § 1.01(14), which removes the age disability at 18
years of age.
to remove disabilities of all minors who are between the ages of 18 and 21. This provision
has apparently been mooted by Chapter 73-21 of the Laws of Florida, which removes the
73-21, §§ 2, 4.
37. Meehan v. Meehan, 133 So.2d 776, 779 (Fla. 2d Dist. 1961); accord, Owen v.
Owen, 234 So.2d 165 (Fla. 1st Dist. 1970).
38. Meehan v. Meehan, 133 So.2d 776 (Fla. 2d Dist. 1961).
39. Vaupel v. Bellach, 261 Iowa 376, 154 N.W.2d 149 (1967). This question of fact
may be clouded by the provision of Fla. Laws 1973, ch. 73-21, § 1, creating Fla. Stat. §
1.01(14), which reduces the age of majority to 18 but allows court-ordered support to age
21.
right to the services of his minor child, and also the right to the custody and control of his person.  

Emancipation usually occurs where the parent has terminated actual control over his child, i.e., the child earns his own money, the parent is no longer under a legal obligation to support the child, and the child has no legal obligation to remain in the parent's home. However, one court has held that even where the minor child quit school and took employment, there was no emancipation where the parent had not given his consent to it.

Emancipation can also be terminated. For example, in a recent Iowa case, a mother sued the driver of a car which collided with the car driven by her son and in which she was riding. After the driver of the other car was found liable for the father's injuries, he brought suit against the son for contribution. The minor son, prior to the accident, had lived in an apartment in another town where he was employed. However, before the accident, the son had returned home and was receiving room and board without any payment to his mother. The Supreme Court of Iowa affirmed the trial court's finding that the son, while possibly emancipated at one time, was not emancipated at the time of the accident, and therefore disallowed the suit for contribution. The court stated that "[e]mancipation is not necessarily a continuing status, even if once established, it may be terminated at any time during the child's minority."

B. Intentional and Willful Torts

The parent-child relationship is abandoned when a parent maliciously injures his child. Courts divide malicious acts by parents which will terminate the relationship, with its consequent immunity, into two categories: intentional torts and those torts consisting of gross negligence by the parent.

1. INTENTIONAL TORTS

[The abandonment of the parental relationship] should be implied in the case of malicious injuries. Such acts are in no way

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41. Taubert v. Taubert, 103 Minn. 247, 249, 114 N.W. 763, 764 (1908).
42. Niesen v. Niesen, 38 Wis. 2d 599, 157 N.W.2d 660 (1968). See Gillikin v. Burbage, 263 N.C. 317, 139 S.E.2d 753 (1965), involving a suit by a mother against her 19 year-old daughter for personal injuries. The girl alleged she was not emancipated because, even though she supported herself, she still obeyed every wish and command of her parents. The court held the girl to be emancipated and, thus, amenable to suit. The court quoted Vergil to the effect that emancipation is not lacking merely because "emotional privity" remains. The court stated: "For complete emancipation, the law does not require the severing of all parental ties; the parent may continue to receive by grace that which he could formerly command." Id. at 323-24, 139 S.E.2d at 759. Cf. Weinberg v. Underwood, 101 N.J. Super. 448, 244 A.2d 538 (Essex Cty. Ct. 1968) (30-year-old self-supporting daughter living with parents held emancipated in suit brought against parents for contribution).
44. Id. at 380, 154 N.W.2d at 151.
45. While the scope of this paper is confined to the action for negligence, the exception
COMMENTS

referable to the parental status, and they indicate its abandon-
ment more clearly than words.46

Recovery against a parent by an unemancipated child has been
allowed for assault and battery,47 false imprisonment,48 and wrongful
death.49 In the only reported case dealing with rape, however, the court
held that a civil action for damages could not be maintained.50 The court
based its decision on the family harmony rationale, notwithstanding the
obvious fact that domestic tranquility had been already irreparably de-
stroyed. The case has often been criticized.51

2. WILFUL OR GROSS TORTS

Most courts refuse to recognize an exception to the immunity rule
where the parent has acted with only gross negligence.52 However, where
the parent's negligence is so great as to have been termed wilful or mali-
cious, some courts have held the immunity rule inapplicable.53

This exception to the rule for wilful torts is most commonly seen in
the "driving while intoxicated" cases. For example, in Cowgill v. Boock54
the executor of a seventeen-year-old decedent instituted a suit against the
estate of the deceased father for the boy's death in an automobile driven
by the father while intoxicated. Evidence showed that the father had
forced the son to ride with him. The court held that the immunity rule
was not applicable to bar the suit against the estate of the father since
the case involved

more than ordinary or gross negligence. It [was] one of wilful
misconduct of the father whose wrongful act resulted in the

to the immunity rule for intentional torts is nevertheless relevant as an area of the law
where the courts have found the need for family harmony to be lacking. It is suggested
that the reasoning used by the courts in imposing liability upon the parent for intentional
torts, i.e., that the acts are outside the bounds of the parent-child relationship, could be
applied to actions for negligence.

47. Treschman v. Treschman, 28 Ind. App. 206, 61 N.E. 961 (1901) (assault by step-
mother).
48. Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891) (wrongful confinement in an
insane asylum).
(4-year-old sued father for damages for murdering boy's mother); Meyer v. Ritterbush,
196 Misc. 551, 92 N.Y.S.2d 595 (Spec. T. 1949) (mother murdered son and then com-
mitted suicide).
52. The courts differ, however, as to what degree of culpability is necessary to con-
stitute a wilful or malicious tort. See Strong v. Strong, 70 Nev. 290, 267 P.2d 240, rehearing
denied, 70 Nev. 296, 269 P.2d 265 (1954) (act must be malicious); Decker v. Decker, 20
Misc. 2d 438, 193 N.Y.S.2d 431 (Sup. Ct. 1959) (act need only be wilful and wanton).
53. 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); Cowgill v. Boock, 189 Ore. 282, 218 P.2d 445
(1950).
untimely death of his young son. . . [I]n this case there was a clear abandonment of the parental duty.\textsuperscript{55}

However, in collision cases where the parent is not intoxicated, courts usually refuse to allow the suit by the child.\textsuperscript{56}

\section*{C. In Loco Parentis}

The term "in loco parentis" refers to a person who has made himself a lawful parent by assuming the obligations of being a parent without a formal adoption.\textsuperscript{57} Several courts take the position that if a stepparent assumes the obligations of parenthood, he should be afforded the parental immunities, on the ground that the preservation of family harmony is fully as important where there has been a voluntary assumption of parental obligations as in the natural home.\textsuperscript{58} The courts following this position take note of the fact that immunity is afforded the natural parent not because he is the natural parent, but because of the public policy of preserving domestic tranquility.\textsuperscript{59}

Whether a person stands in loco parentis to a minor is generally a question of intent under the circumstances.\textsuperscript{60} In \textit{Miller v. Davis},\textsuperscript{61} a two-year-old, through his parent and natural guardian, sued for personal injuries sustained while riding in a car owned and operated by the foster parent. The child had been placed with the foster parents by a local welfare agency. While the defendants had trained and educated the child, they were compensated for their efforts by the social welfare department. The defendants were held not to be immune from suit. The court stated that to establish an in loco parentis relationship, there must be an assumption of responsibility for the support of the child in addition to providing for the child's general welfare.\textsuperscript{62}

Even where it is shown that the stepparent supports and provides for the welfare of the child, some courts have refused to grant immunity to the stepparent. In a Mississippi case,\textsuperscript{63} the supreme court recognized that the stepfather stood in loco parentis to the child to the extent that he supported her and treated her as his natural child. However, since he

\begin{itemize}
\item \textsuperscript{55} Id. at 293, 218 P.2d at 450.
\item \textsuperscript{56} Chaffin v. Chaffin, 239 Ore. 374, 397 P.2d 771 (1964).
\item \textsuperscript{57} Black's Law Dictionary 896 (rev. 4th ed. 1968).
\item \textsuperscript{58} Trudell v. Leatherby, 212 Cal. 678, 300 P.7 (1931), overruled on other grounds by Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); Bricault v. Deveau, 21 Conn. Super. 486, 157 A.2d 604 (1960); Wooden v. Hale, 426 P.2d 679 (Okla. 1967).
\item \textsuperscript{59} See Trudell v. Leatherby, 212 Cal. 648, 300 P. 7 (1931), overruled on other grounds by Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971).
\item \textsuperscript{60} Bricault v. Deveau, 21 Conn. Super. 486, 157 A.2d 604 (1960).
\item \textsuperscript{62} Miller v. Davis, 49 Misc. 2d 764, 268 N.Y.S.2d 490 (Spec. T. 1966).
\item \textsuperscript{63} Rayburn v. Moore, 241 So.2d 675 (Miss. 1970).
\end{itemize}
was never under any legal obligation to support her, for lack of formal adoption, the stepfather was not immune from a suit by the child for negligence.

D. Where Parties Are Dead at Time of Suit

Many courts hold that where either the parent or the child, or both, is dead at the time of suit, the action by the child or his estate may be maintained. The reason for allowing the suit after the death of one of the parties is that death terminates the family relationship and, consequently, the need for family harmony. Thus, it has been held that immunity ends with the parent's death and does not accrue to the parent's estate. Some courts, however, have held that parental immunity does extend to the estate of the deceased parent. These courts reason that if an unemancipated child has no cause of action before a parent's death, he should not have one if the parent dies, since this would discriminate in favor of the child whose parent dies and against the child whose parent lives.

Where the child is dead, and a wrongful death action has been brought by a survivor or the administrator of the deceased's estate, a number of courts allow the child's representatives to maintain suit. The basis for these decisions is that while a living minor may not sue his parent, the wrongful death statute creates a new cause of action. Florida, however, refuses to recognize this exception and holds that the estate or survivor of the deceased child may not sue the negligent parent.

Lastly, where both parent and child are dead at the time of suit, most courts hold that the doctrine of parental immunity is inapplicable.

E. Liability Insurance

In Dunlap v. Dunlap, a minor was allowed to sue his father for negligence because the father carried liability insurance. The court said that the suit did not offend the traditional arguments advanced for immunity since the finances of the family were undisturbed and, in essence, the suit was between the minor and the insurance company, not the father. Other courts, however, have found the factor of insurance coverage to be irrelevant in determining parental immunity "since liability

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69. 84 N.H. 352, 150 A. 905 (1930).
must exist before such insurance would be applicable, and a policy of insurance could not establish that fact.\hfill\footnote{70}

\section*{F. Business Exception}

In some jurisdictions, an unemancipated child may sue his parent if, at the time of the accident, they stand in the relation of master and servant.\footnote{71} Where the injury arises out of the parent's business, the parent is not performing parental duties and the immunity, therefore, is inapplicable.\footnote{72}

Other jurisdictions, however, have taken the view that the situs of the accident should not determine the applicability of the immunity rule. In Barlow v. Iblings,\footnote{73} a six-year-old was injured when he put his hand into a meat grinder at his father's cafe. Merely because the accident occurred at the father's business premises did not mean, the court reasoned, that the parent-child relationship had ended. Their personal relationship still existed and suit could not be maintained.

Whether an unemancipated minor may sue a partnership for negligence when his parent is one of the partners appears to depend upon whether the forum state recognizes a partnership as a legal entity or as an aggregate. If it is viewed as merely an aggregate, a suit against the partnership would really be against the father as an individual and therefore would be barred.\footnote{74} However, where state law considers partnerships to be legal entities, a minor may sue the partnership for negligence.\footnote{75}

\section*{IV. Analysis of Florida Decisions}

Only four reported cases in Florida have directly passed on the question of whether a child or his estate may sue his parent for negligence.\footnote{76} Two cases have dealt with an action by a parent against his unemancipated child for the child's negligence.\footnote{77} In these six decisions, the Florida courts applied the immunity rule to prohibit the suits. However, in each case, the holding was accompanied by little or no discussion of the necessity for imposition of the immunity rule.

\begin{itemize}
\item[71.] Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930).
\item[73.] 261 Iowa 713, 155 N.W.2d 105 (1968).
\item[74.] Aboussie v. Aboussie, 270 S.W.2d 636 (Tex. Civ. App. 1954). Aboussie was overruled to the extent that it prevented suits by children injured while employed in their parent's business outside the sphere of parental duties. Felderhoff v. Felderhoff, 473 S.W.2d 928 (Tex. 1971).
\item[75.] Cody v. J.A. Dodds & Sons, 252 Iowa 1394, 110 N.W.2d 225 (1961).
\item[76.] Orefice v. Albert, 237 So.2d 142 (Fla. 1970); Webb v. Allstate Ins. Co., 258 So.2d 840 (Fla. 3d Dist. 1972); Denault v. Denault, 220 So.2d 27 (Fla. 4th Dist. 1969) (per curiam); Rickard v. Rickard, 203 So.2d 7 (Fla. 2d Dist. 1967).
\item[77.] Russell v. Meehan, 141 So.2d 332 (Fla. 2d Dist. 1962), was the companion case to Meehan v. Meehan, 133 So.2d 776 (Fla. 2d Dist. 1961).
\end{itemize}
For example, in *Rickard v. Rickard*, a 7-year-old boy was playing with lighter fluid at his parents' home. One of the boy's playmates lit a match and the boy's clothing caught fire, causing severe burns. The boy, through his next friend and father, sued his parents for failing to provide him a safe place to play. The parents filed a motion to dismiss and the trial judge granted the motion. On appeal, the District Court of Appeal, Second District, affirmed, stating that no prior case in Florida had considered whether an unemancipated child could sue his parent for injury. However, the court in reaching its decision relied upon *Meehan v. Meehan*, a suit brought by a father against his unemancipated child. The *Rickard* court, quoting the decision in *Meehan*, stated:

"[T]he question involved here is one of public policy and should be decided on that ground. The view of the majority of states is that a parent or his representative cannot maintain an action in tort against an unemancipated minor child and the reason advanced for such rule is the necessity for the encouragement of family unity and the maintenance of family discipline."

Relying on the above reasoning in *Meehan*, the court in *Rickard* held:

We see no reason why the rule should not be the same where a minor child, acting through his natural parent, seeks to sue his parents for damages for their alleged negligence in not properly protecting the person of the minor child.

Recently, the Supreme Court of Florida, in *Orefice v. Albert*, affirmed the doctrine of family immunity. In *Orefice*, a boy was killed in an airplane crash through the negligence of his father, both pilot and co-owner of the plane. While the supreme court noted that an action by the estate and survivor of the boy could be maintained against the other owner of the airplane, a non-family member, the immunity doctrine precluded suit by the son's estate against the father. In so holding, the supreme court stated:

It is established policy, evidenced by many decisions, that suits will not be allowed in this state among members of a family unit for tort. Spouses may not sue each other, nor children their parents. The purpose of this policy is to protect family harmony and resources.

Subsequent to the supreme court's decision in *Orefice*, the District Court of Appeal, Third District, held that even where the father was intoxicated and was operating an automobile owned by his employer, the

78. 203 So.2d 7 (Fla. 2d Dist. 1967).
79. 133 So.2d 776 (Fla. 2d Dist. 1961).
80. Rickard v. Rickard, 203 So.2d 7, 8 (Fla. 2d Dist. 1967).
81. Id.
82. 237 So.2d 142 (Fla. 1970).
83. Id.
84. Id. at 145.
son could not maintain a suit against the father for injuries received in a collision. The court in this case, Webb v. Allstate Insurance Co.,\textsuperscript{86} summarily refused to recognize the son's cause of action on the basis of Orefice and Rickard. There was no discussion of the possibility that the intoxicated father might have been guilty of wilful or gross negligence,\textsuperscript{86} or that the father's drunk driving was not an action arising out of the parent-child relationship necessitating, or justifying, application of the immunity rule.

Florida's professed reason for following the immunity rule, as evidenced by the quotations from Rickard, Meehan, and Orefice, is the protection of family harmony and general social policy. The Florida courts, however, should view the social policy underlying immunity to determine if immunity is of continued validity today.

V. ABROGATION OF THE RULE

A. Community Attitudes Toward Family Immunity

If the law is, as Mr. Justice Holmes stated, "the witness and external deposit of our moral life,"\textsuperscript{87} then contemporary morals should be looked to as the standard for rules of liability and nonliability.

Fourteen years ago, a study was undertaken by a group composed of sociologists, anthropologists, and lawyers to ascertain the moral sense of the community as an ingredient for law-making.\textsuperscript{88} A cross-state random sample of 860 people was gathered. Each person was interviewed and asked questions relating to the parent-child relationship.

In one set of questions, the hypothetical situation of a child injured by his parent's carelessness was presented. The parent was not covered by insurance but could afford to pay for the damages. Faced with a fact pattern somewhat favorable to parental immunity, one half of the group nevertheless answered that the parent should be liable to the child.\textsuperscript{89} In giving the reasons for their answers, 25 percent of the group desired to recognize the child's claim against his parent on the basis of tautologies. Sixteen percent, wishing to impose liability, thought that to do so would mean greater protection for the child and added deterrence to the parent. Twenty-three percent, against such recognition of suits by children against their parents, responded with tautologies. The remaining persons rejecting liability offered various nonlegal reasons. None, however, based nonrecognition on the furtherance of family harmony.\textsuperscript{90}

While this article deals solely with a child's action for injuries caused

\begin{itemize}
\item \textsuperscript{85} 258 So.2d 840 (Fla. 3d Dist. 1972).
\item \textsuperscript{86} See section III(B) (2) supra.
\item \textsuperscript{87} O.W. HOLMES, The Path of the Law, in COLLECTED LEGAL PAPERS 170 (1920).
\item \textsuperscript{88} J. COHEN, R. ROBSON, & A. BATES, PARENTAL AUTHORITY: THE COMMUNITY AND THE LAW (1958).
\item \textsuperscript{89} Id. at 80.
\item \textsuperscript{90} Id. at 180-81.
\end{itemize}
by his parent's negligence, the views of the group regarding other actions should be noted to demonstrate the overall variance between the community and the courts as to parent-child immunity. Confronted with the question of whether a child should be allowed to sue his parent for the parent's negligent loss of the child's money or property, over 72 percent of the sample answered in the affirmative. As for theft of the child's money, 89.5 percent said the child should have a claim against the parent.\footnote{Id. at 80.}

Advocates of parental liability would suggest that, had the factual situation in the question relating to a parent's liability for negligent injuries provided for liability insurance, the figure in favor of liability would have been even larger than 50 percent. Regardless of the numerical figures involved, the important element in the study is the proof that the community, comprised of family members for whom the immunity doctrine was developed, is itself questioning the need for parental immunity. Some jurisdictions have recognized the views of today's society and, in so doing, have abrogated their positions toward parent-child immunity.

\section*{B. Abrogation by Other Jurisdictions}

The various applications and exceptions to the doctrine of parental immunity generate the impression that courts, perhaps out of a feeling of injustice, avoid a broad and complete application of the doctrine. Today, business and social life have altered the strict conceptions of family life as it existed at the time of the \textit{Hewlett} decision. As a result, sixteen states have abolished the doctrine of parental immunity in some form or another.\footnote{See note 11 \textit{supra}.}

Wisconsin, in 1963, was the first state to recognize a child's cause of action for bodily injury caused by the negligence of his parent, where both parties were living at the time of suit. In \textit{Goller v. White},\footnote{20 Wis. 2d 402, 122 N.W.2d 193 (1963).} a child fell from the drawbox of a tractor in which he was riding with the permission of the defendant, the child's foster parent.\footnote{The foster father's insurer was also named as a defendant, but it was held that the boy did not fall within the terms of the policy.} At trial, the defendant contended that because he stood in loco parentis to the child, he was immune from suit. The court refused to accept the defendant's contention and held him liable to the child. While the \textit{Goller} court abrogated the rule to some extent, it recognized two situations in which immunity would still apply: 1) where the negligent act arises out of an exercise of parental authority; and 2) where the negligence involves an exercise of ordinary parental discretion such as in providing food, clothing, and housing.\footnote{Goller v. White, 20 Wis. 2d 402, 413, 122 N.W.2d 193, 198 (1963).}
Subsequent to *Goller*, fifteen other jurisdictions eliminated the rule on the basis of various arguments. One common argument for abolition is that property and contract suits between minors and their parents have long been allowed. There is no reasonable distinction impelling a court to protect property rights more than personal rights. Additionally, family harmony is no less threatened by contract and property suits than by tort actions. This distinction between tort and property actions is meaningless in terms of the reason for the immunity rule.

Other courts have abrogated the immunity rule on the basis of the existence of liability insurance. These courts reason that while insurance does not create liability, it nevertheless is an important factor in determining whether family harmony will be affected by maintenance of such a suit. It is unrealistic to assume that family harmony will be undermined where there is liability insurance. In truth, none of these suits are brought unless there is insurance.

Some states have completely abrogated the rule and others have partially done so. While partial or total abolition of the rule creates inflexibility, a third approach does not. This approach, adopted by the Supreme Court of California in *Gibson v. Gibson*, completely abolishes parental immunity and substitutes a standard of reasonableness based upon the ordinarily reasonable and prudent parent. The *Gibson* approach refuses to delineate where immunity should remain. In rejecting the twofold exception of *Goller*, the *Gibson* court stated that these exceptions serve only to give the parent carte blanche to act negligently toward his child. When the test is one of reasonableness viewed in light of the parental role, however, the court may impose or reject immunity as the situation demands. In this manner, *Gibson* circumvents the time-worn obstacles to any recovery for negligence in suits brought by children against their parents. While the test of "reasonableness under the circumstances" is not a new one, the court in *Gibson* was the first to apply the test to a suit dealing with intrafamily immunity. It is suggested that other courts, including those of Florida, should follow *Gibson*.

96. See note 11 *supra*.
100. Id.
103. 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971), overruling *Trudell v. Leatherby*, 212 Cal. 678, 300 P. 7 (1931).
104. See text at note 96 *supra*. The most recent case abrogating immunity, *Plumley v. Klein*, 388 Mich. 1, 199 N.W.2d 169 (1972), reaches much the same result by excepting only *reasonable* exercise of parental authority or discretion.
son's lead. If so, then intrafamily litigation could be handled with proper regard for the substance of the suit rather than the single fact that the suit is one brought by a child against his parent.

VI. CONCLUSION

Cessante ratione legis cessant lex.105

Merely because the parental immunity doctrine was not a creature of the common law does not mean that the doctrine was without merit.106 It came into existence in our country at a time when the family, in theory and, more importantly, in actuality, was the primary unit of society. People grew up in rural communities and small towns, surrounded by relatives and family friends. Not only was family harmony essential, but if the parent were found liable, he and other family members would have felt financial hardship. Today, however, as the world has become smaller through modern technology, personal relationships have expanded to include many persons outside the family. At the same time, the presence of liability insurance limits the adverse economic effects of intrafamily litigation. That the rule of immunity has been entrenched in both Florida and American jurisprudence for over a hundred years is poor reason for continued adherence. Modern conditions demand a change. Parental immunity is a judicial rule—court created, it can and should be court destroyed.

105. When the reason for the rule ceases, the rule itself ceases.
106. "I find it inconceivable that so many courts have walked in error for so many years, even up to the present." Streenz v. Streenz, 106 Ariz. 86, 94, 471 P.2d 282, 290 (1970) (dissenting opinion).