COMMENT

A PROPOSED MODIFICATION OF THE PARENTAL IMMUNITY DOCTRINE

> The law is a human institution fashioned not by some superior being, but by the mind of man, and intended to serve human needs. Such being its nature, it can always be changed in order to adapt it to the service of justice. The development of the common law is the story of the constant efforts of the courts to find principles applicable to specific cases, only to discover later that the principle applied yesterday in a case, if applied today in the instant case, will produce injustice.[1]

In a recent New York case, *Badigan v. Badigan*,[2] a mother of a three-year-old child brought an action against the child's father for negligently injuring the infant. The father allegedly left the family automobile unlocked in a parking lot; the child released the brake and was injured in his attempt to escape from the auto. Defendant's motion for summary judgment was sustained by the trial court, and the holding was affirmed by the New York Court of Appeals. The court's decision was based upon the settled rule "that an unemancipated minor child has no right of action against his parents for nonwillful injuries."[3] In the 1957 case of *Parks v. Parks*,[4] the Pennsylvania Supreme Court held that a minor child could not recover damages for injuries sustained because of his mother's negligent operation of the family automobile. The court reached this decision while admitting that the injuries did not result from an exercise of parental discipline or control or in the conduct of the domestic establishment. The injuries caused the child to be confined in a state institution, and it was thought that the confinement would be permanent. It was also acknowledged that liability insurance would have covered the judgment. Nevertheless, the court followed the parental immunity rule and declared that the doctrine is:

> [A] rule based on the sound principle of public policy to promote family unity and avoid family discord and disturbance, it prevents possible collusive action between parent and child in situations where the liability of either parent or child is covered by insurance.[5]

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[1] Rossman, J., concurring in Cowgill v. Boock, 189 Ore. 282, 302, 218 P.2d 445, 453 (1950).

[2] 9 N.Y.2d 472, 174 N.E.2d 718 (1961).

[3] *Id.* at 473, 174 N.E.2d 719.

[4] 390 Pa. 287, 135 A.2d 65 (1957). See also Hastings v. Hastings, 33 N.J. 247, 163 A.2d 147 (1960).

[5] *Id.* at 296, 135 A.2d 71.

Thus, the child in each of these cases was exposed to the danger of not receiving proper medical treatment for his injuries and living the rest of his life with a handicap. The purpose of this comment is to examine this rule of parental immunity and to suggest a different approach in those cases where a minor child is injured because of his parent's negligence in operating an automobile.

ORIGIN OF THE PARENTAL IMMUNITY DOCTRINE

Without citing authority, the Mississippi Supreme Court in *Hewellete v. George*,[6] decided in 1891, held that:

> The peace of society, and of 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.[7]

The court disallowed the claim of a minor daughter, who was separated from her husband, against her mother for falsely imprisoning her in an insane asylum. The court assumed that an infant could not maintain a personal injury action against his parent at common law, but later authorities dispute this premise.[8] There is confusion on this point because there were no English cases deciding this question. Thus, one can argue that there was no such cause of action at common law because there was no case sustaining the child's cause of action.[9] However, by relying on the same fact, one could reach the opposite conclusion, and the English courts did permit a minor child's cause of action against his parents where the suit concerned the child's property rights.[10] Furthermore, "the English text-writers of the nineteenth century appear to have been unanimous in the opinion that a child might have a cause of action for an assault committed by the father."[11] Thus, the Mississippi court based its opinion upon a disputed assumption at best. Of even greater import is the fact that the court failed to take account of the conflicting policies involved. That public policy which guarantees a remedy to every man for a wrong done him squarely collides with the policy of preserving family harmony and discipline. By considering only the latter and ignoring the former, the court failed

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[6] 68 Miss. 703, 9 So. 885 (1891).

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

[8] Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951); Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905 (1930); Prosser, Torts § 101 (2d ed. 1955).

[9] See Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923); Materese v. Materese, 47 R.I. 131,131 Atl. 198 (1925).

[10] Roberts v. Roberts, Hadres 96; Duke of Beaufort v. Berty, 1 P. Wms. 705; Morgan v. Morgan, 1 Atk. 489.

[11] Dunlap v. Dunlap, *supra* note 8, at 357, 150 Atl. 907.

to reach a reasoned decision which would strike a balance between these two important policies. It is apparent that in this case there was no family harmony to preserve, and the problem of parental discipline was not present because the child was married.

Despite the shortcomings of the Mississippi decision, its reasoning was followed in the next two cases on the subject. In *McKelvery v. McKelvery*[12] the Tennessee Supreme Court held that a minor child could not recover civil damages from his father and stepmother for the infliction of cruel and inhuman treatment. The rule reached the height of its application when the Washington Supreme Court in Roller *v. Roller* [13] held that a teen-age daughter could not recover damages from her father who had raped her. The court realized that there was good reason for not applying the rule in this situation, but it asserted that:

> Courts, in determining their jurisdiction or want of jurisdiction, rely upon certain uniform principles of law, and, if it be once established that a child has a right to sue a parent for a tort, there is no practical line of demarkation which can be drawn, for the same principle which would allow the action in the case of a heinous crime, like the one involved in this case, would allow an action to be brought for any other tort.[14]

Thus, the court applied a rule designed to protect domestic harmony in a case where the tranquility of the family home was disrupted beyond repair. Despite the results of these early cases, the rule of parental immunity survives. The rule is followed in all cases where parental negligence results in harm to the minor child whether such negligence results from operation of the family automobile[15] or not.[16] Nevertheless, the courts, having discovered the fallibility of this inflexible rule, have chipped away at the rule's foundation by engrafting various exceptions.

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[12] 11 Tenn. 388, 77 S.W. 664 (1903); see also, Cook v. Cook, 232 Mo. App. 994, 124 S.W.2d 675 (1939).

[13] 37 Wash. 242, 79 Pac. 788 (1905), *overruled by* Borst v. Borst, 41 Wash. 2d 242 251 P.2d 149 (1952).

[14] *Id.* at 244, 79 Pac. 789.

[15] Owens v. Auto. Mut. Indem. Co., 235 Ala. 9, 177 So. 133 (1937); Rambo v. Rambo, 195 Ark. 832, 114 S.W.2d 468 (1938); Mesite v. Kirchstein, 109 Conn. 77, 145 Atl. 753 (1929); Wright v. Wright, 85 Ga. App. 721, 70 S.E.2d 152 (1952); Luster v. Luster, 299 Mass. 480, 13 N.E.2d 438 (1938); Badigan v. Badigan, 9 N.Y.2d 472, 174 N.E.2d 718 (1961); Hastings v. Hastings, 33 N.J. 247, 163 A.2d 147 (1960); Cohen v. Kraft, 41 Ohio App. 120, 180 N.E. 277 (1932); Parks v. Parks, 390 Pa. 287, 135 A.2d 65 (1957); Kelly v. Kelly, 158 S.C. 517, 155 S.E. 888 (1930); Brumfield v. Brumfield, 194 Va. 577, 74 S.E.2d 170 (1953); Securo v. Securo, 110 W. Va. 1, 156 S.E. 750 (1931); Schwenkhoff v. Farmers Mut. Auto. Ins. Co., 6 Wisc.2d 44, 93 N.W.2d 867 (1959).

[16] Lewis v. Farm Bureau Mut. Auto. Ins. Co., 243 N.C. 55, 89 S.E.2d 788 (1955); Ball v. Ball, 73 Wyo. 29, 269 P.2d 302 (1954).

EXCEPTIONS TO THE PARENTAL IMMUNITY DOCTRINE

The first break with the parental immunity doctrine came in 1930 with the New Hampshire case of *Dunlap v. Dunlap*.[17] In that case the injured child was employed by his father, a contractor, and was injured in the course of his employment. The New Hampshire Supreme Court escaped the dogma of the parental immunity rule by holding that the parent had surrendered his parental control by hiring the child and assuming the master-servant relationship. The court felt that the presence of employer's liability insurance removed the danger that family discord would result from the maintenance of the suit. Thus, the court reasoned that the parental privilege exists only when maintenance of the suit would disturb the parent-child relationship.

In the case of *Lusk v. Lusk*,[18] the West Virginia Supreme Court permitted a minor child, injured while riding on her father's school bus, to recover damages from the parent who was required to carry liability insurance by state law. The Virginia Supreme Court, when confronted with a similar situation in *Worrell v. Worrell*,[19] held that the infant could recover from the parent, a common carrier, because the presence of compulsory insurance did away with the reason for the parental immunity rule. The Ohio Supreme Court followed this trend in *Signs v. Signs*[20] by holding that a parent in his business or vocational capacity is not immune from a personal tort action by his unemancipated minor child. In that case the parent was a member of a partnership, and the accident occurred upon partnership property. The court emphasized the fact that a child is permitted to sue his parents if protecting his property rights but not his personal rights under the general rule.[21] It should be noted that the facts upon which the courts base this exception are similar to the situation which occurs when the parent injures his child while operating an automobile.

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[17] *Supra* note 8.

[18] 112 W. Va. 17, 166 S.E. 538 (1932).

[19] 174 Va. 11, 4 S.E.2d 343 (1939). See also Borst v. Borst, *supra* note 13.

[20] 156 Ohio St. 566, 103 N.E.2d 748 (1952); *But see* Caplan v. Caplan, 268 N.Y. 445, 198 N.E. 23 (1935); Aboussie v. Aboussie, 270 S.W.2d 639 (Tex. Civ. App. 1954).

[21] *Id.* at 575, 103 N.E.2d 748, "It seems absurd to say that it is legal and proper for an unemancipated child to bring an action against his parents concerning the child's property rights yet to be utterly without redress with reference to injury to his person. It is difficult to understand by what legerdemain of reason, logic or law such a situation can exist or how it can be said that domestic harmony would be undisturbed in one case and be upset in the other." Nevertheless, the Sign's child did not recover because the parents had previously warned him to stay away from the gasoline pumps on the partnership property; therefore, it was held that he was in the same position as a trespasser. Signs v. Signs, 161 Ohio St. 241, 118 N.E.2d 411 (1954).

A further exception to the rule of parental privilege has been made in cases where the parent has committed tortious conduct so flagrant as to be classified intentional or willful.[22] The courts have reasoned that the parent's acts have either terminated the parent-child relationship or exceeded its bounds,[23] or that the peace of the home has already been disturbed beyond repair.[24] This exception permits the courts to escape such unreasonable results as those reached in the earlier cases.

In the area of vicarious liability, the older cases held that the parent's employer was not liable to the child injured by his parent's negligent conduct while he was within the scope of his employment.[25] These early cases reasoned that it was impossible to hold the master liable for the servant's tort when the servant could not be held liable, and that if recovery were allowed, the master's right of indemnity would shift the loss to the parent and, thus, defeat the purpose of the parental immunity rule. However, the courts came to realize that there is no reason to include the master within the family privilege because such inclusion does not foster the aims of the parental privilege. Also, the employer's right of indemnity against his employee is based upon the employee's duty to care for his employer's interests, and the right of recovery is not a continuation of the original claim against the employer. Therefore, the majority of jurisdictions have made another exception to the immunity rule and hold that the injured child may recover from the master even though the servant may be immune from suit.[26] The courts have also applied this more modern reasoning to hold an automobile owner who allows a parent to use his car liable to the borrower's child for injuries caused by the parent's negligence,[27] and it has been held that a child may maintain an action

[22] Wright v. Wright, *supra* note 15; Nudd v. Matsoukas, 7 Ill.2d 608, 131 N.E.2d 525 (1956); Mahnke v. More, *supra* note 8; Siembab v. Siembab, 112 N.Y.S.2d 82, 202 Misc. 1953 (1952); Cowgill v. Boock, *supra* note 1.

[23] Wright v. Wright, *ibid.* The court said that what particular acts are necessary to divest custody and bring about loss of parental control is a question of fact, and that these are the acts for which the child may sue.

[24] Mahnke v. More, *supra* note 8.

[25] Myers v. Tranquility Irr. Dist., 26 Cal. App.2d 385, 79 P.2d 419 (1938); Maine v. James Maine and Sons Co., 198 Iowa 1278, 201 N.W. 20 (1924); Sacknoff v. Sacknoff, 131 Me. 280, 161 Atl. 669 (1932); Emerson v. Western Seed and Irr. Co., 116 Neb. 180, 216 N.W. 297 (1927).

[26] Mi-Lady Cleaners v. McDaniel, 235 Ala. 469, 179 So. 908 (1938); Wright v. Wright, 229 N.C. 503, 50 S.E.2d 540 (1948); Schubert v. August Schubert Wagon Co., 249 N.Y. 253, 164 N.E. 42 (1928); Hudson v. Gas Consumer's Ass'n, 123 N.J.L. 252, 8 A.2d 337 (1939); Koontz v. Messer, 320 Pa. 487, 181 Atl. 792 (1935); Pittsley v. David, 298 Mass. 552, 11 N.E.2d 461 (1937); Chase v. New Haven Waste Material Corp., 111 Conn. 377, 150 Atl. 107 (1930).

[27] Broaddus v. Wilkinson, 281 Ky. 601, 136 S.W.2d 1052 (1940); Miller v. J. A.

against a corporation in which his parents own one-half of the shares.[28]

A child may maintain an action against his parents for a tort committed after emancipation[29] or after the child has reached majority.[30] The emancipation occurs when the parent has surrendered his right to the child's earnings and services and his parental control. This exception apparently assumes that the goal of domestic tranquility ends when the child becomes emancipated or reaches majority, and that after this time, the child no longer owes a duty of respect to his parent. Thus, it would seem that if the parental immunity rule does in fact promote domestic peace and respect for parents, this distinction between dependent and independent children should not be made. Nevertheless, this distinction was recognized in the early cases.

The majority of jurisdictions permit recovery in those cases where a child brings an action against one who stands in place of the parent, i.e., a relative who has custody of the child.[31] These cases contradict the reasons given for the immunity rule because the person standing in *loco parentis* takes the role of the parent in all respects, and it would appear that the argument of domestic tranquility would apply in these cases. Thus, the courts seem quite willing to circumvent the rule of parental immunity on the basis of an inapplicable distinction in facts. Indeed, it seems true that "outmoded legal doctrines are rarely overturned abruptly for courts seem to prefer to erode them gradually by differentiation, exception and ultimately extinction."[32] It has also been held that a twelve-year-old brother may recover from his sixteen-year-old sister in a personal injury action when the injury resulted from the sister's negligence in driving an automobile covered by liability in-

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Tyrholm and Co., 196 Minn. 438, 265 N.W. 324 (1936); LeSage v. LeSage, 224 Wisc. 57, 271 N.W. 369 (1937). *Contra,* Riser v. Riser, 240 Mich. 402, 215 N.W. 290 (1927); Ownby v. Kleyhammer, 194 Tenn. 109, 250 S.W.2d 37 (1952).

[28] Foy v. Foy Elec. Co., 231 N.C. 161, 56 S.E.2d 418 (1949).

[29] Wood v. Wood, 135 Conn. 280, 63 A.2d 586 (1948); Groh v. W. A. Krahm, 223 Wisc. 662, 271 N.W. 374 (1937).

[30] Farrar v. Farrar, 41 Ga. App. 120, 152 S.E. 278 (1930); Crosby v. Crosby, 230 App. Div. 651, 246 N.Y.S. 384 (1931); Ponder v. Ponder, 157 So. 627 (La. App. 1934). But, when the tort is committed during minority, the child may not maintain an action after reaching majority. Smith v. Smith, 81 Ind. App. 566, 142 N.E. 128 (1924); London Guarantee and Acc. Co. v. Smith, 242 Minn. 211, 64 N.W.2d 78 (1954). Whether the child is emancipated is a question of fact for the jury. Parker v. Parker, 230 S.C. 28, 94 S.E.2d 12 (1956); Glover v. Glover, 319 S.W.2d 238 (Tenn. App. 1958).

[31] Brown v. Cole, 198 Ark. 417, 129 S.W.2d 245 (1939); Treschman v. Treschman, 28 Ind. App. 206, 61 N.E. 961 (1901); Steber v. Norris, 188 Wisc. 266, 206 N.W. 173 (1925); Dix v. Martin, 171 Mo. App. 266, 157 S.W. 133 (1913). *Contra,* Trudell v. Leatherly, 212 Cal. 678, 300 Pac. 7 (1931); Chastain v. Chastain, 50 Ga. App. 241, 177 S.E. 828 (1934); Fertenberry v. Holmes, 89 Miss. 373, 42 So. 799 (1907).

[32] Jacobs, J. dissenting in Hastings v. Hastings, *supra* note 15, at 261, 163 A.2d 155.

surance.[33] Here again, it appears that the arguments of collusion and damage to domestic tranquility would be as appropriate as in the child-parent cases, but the court chose to hold otherwise.

Another strange application of the parental immunity doctrine occurs in those cases where the child brings a personal injury action against his parent's estate. Although the parent-child relationship has been terminated and the domestic tranquility argument is no longer applicable, the child may not maintain his action.[34] However, when the child is deceased, it has been held that the wrongful death acts permit the child's administrator to recover damages for the death of the infant from the parent.[35] Thus, where the parent-child relationship is terminated, recovery may be had in the one instance but not the other. The logic of these decisions is indeed difficult to understand because the usual arguments of family peace and parental discipline are not applicable in either situation

When one leaves the tort area, it becomes apparent that this parental immunity doctrine is indeed an anomaly. The common law has always permitted actions in favor of the minor with respect to the parent's dealings with the infant's property.[36] Indeed, it would appear that child-parent suits are permitted in all areas of the law other than tort.[37] Surely one cannot take the position that property actions between parent and child do not affect the family relationship but that personal injury actions would be harmful to the relationship. Evidently, the law is quite willing to protect the property rights of a child but not his personal right to be free from negligent invasion. It can truly be said of the parental immunity rule that "few topics in the law of torts, in view of modern economic, social and legislative change, display in their treatment greater inconsistency and more unsatisfactory reasoning."[38]

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33 Rozell v. Rozell, 256 App. Div. 61, 22 N.E.2d 254 (1939). See also Munsert v. Farmers Mutual Auto Ins. Co., 229 Wisc. 581, 281 N.W. 671 (1938).

34 Shaker v. Shaker, 129 Conn. 518, 29 A.2d 765 (1942); Harralson v. Thomas, 269 S.W.2d 276 (Ky. Ct. App. 1954); Damiano v. Damiano, 6 N.J. Misc. 849, 143 Atl. 3 (1928), both parent and child were dead.

35 Hale v. Hale, 312 Ky. 867, 230 S.W.2d 610 (1950); Olivera v. Olivera, 305 Mass. 297, 25 N.E.2d 766 (1940); Albrect v. Pothoff, 192 Minn. 557, 257 N.W. 377 (1934); Morgan v. Leuck, 72 S.E.2d 825 (W. Va. Sup. Ct. 1952). See also, Minken v. Minken, 336 Pa. 49, 7 A.2d 461 (1939), an action for the benefit of the child was allowed where the mother as administrator sued herself for the death of the father.

36 Alston v. Alston, 34 Ala. 15 (1859); Preston v. Preston, 102 Conn. 96, 128 Atl. 292 (1925); Lamb v. Lamb, 146 N.Y. 317, 41 N.E. 26 (1895).

37 Musmanno, J. dissenting in Parks v. Parks, *supra* note 15, at 305, 306, 135 A.2d 75, 76, "Countless pages in the law books are devoted to the description of pitched battles between children and parents over wills, inheritances, settlements, partnerships, real estate, personal property and business deals of every character."

38 Prosser, *op. cit. supra* note 9.

REASONS FOR THE PARENTAL IMMUNITY RULE

One reason given for the parental immunity rule is that the parent-child relationship is analagous to the relationship of husband and wife. At common law the wife could not maintain an action for personal injury against her husband. However, the common law while considering the husband and wife to be one person, recognized the parent and child as separate beings.[39] The proceeds which the minor would recover from his cause of action would be his own and not the property of his parent.[40] The modern married women's acts have put an end to the common law's conception of man and wife, but there are no parallel acts in the case of parent and child. Thus, while some jurisdictions permit a personal injury action by the wife against the husband, they do not allow a child's action against his parent.[41] Thus, the common law has always distinguished the parent-child and husband-wife relationships, and this in itself negates the analogy made in support of the parental privilege rule. However, the analogy appears even weaker when one considers that in modern jurisprudence the idea that a wife may not maintain a personal injury action against her spouse is considered an outmoded doctrine. Thus, to preclude the infant's action on the basis of the analogy to husband and wife at common law seems inconsistent.

A make-weight argument sometimes advanced in favor of the immunity rule is that the possibility of the tortfeasor inheriting the proceeds which the minor would receive from his cause of action should be avoided. When balanced against society's interest in compensating those who are wrongfully injured, this argument cannot stand, and the fact that the possibility of such inheritance would undoubtedly be remote in most cases weakens the argument even further. If the infant is permitted to recover, he will be protected against those dangers which confront him when recovery is denied. Thus, the purposes of permitting recovery for the minor child would be fulfilled during his life, and this is the best the law can do for any person who is negligently injured. The possibility of the tortfeasor's inheritance of what is left of the child's damages after they have served their purpose is not a sufficient reason for denying the child's action. To assert otherwise would assume that danger lies in the possibility

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39 McCurdy, "Torts Between Parent and Child," 5 Vill. L. Rev. 521, 523 (1960).

40 Wilton v. Middlesex R.R., 125 Mass. 130 (1878); Donahue v. Richards, 33 Me. 376 (1854).

41 Rambo v. Rambo, *supra* note 16; Mesite v. Kirchstein, *supra* note 16; Redding v. Redding, 235 N.C. 638, 70 S.E.2d 676 (1952); Wick v. Wick, 192 Wisc. 260, 212 N.W. 787 (1927).

that parents will injure their own chlidren in the hope of a future profit.

Another argument is that if the child's action were to be allowed, the family funds could possibly be depleted at the expense of other children in the family. Where, as in the case of automobile accidents, any recovery permitted the child would most likely be covered by liability insurance, this argument cannot stand. The argument can only refer to those families which are not financially capable of meeting the expenses caused by the infant's injuries. Thus, the family is faced with the alternatives of not securing the proper medical services for the injured child and thus not depriving the other children of their share of family wealth, or securing the necessary services and depriving the other children. Permitting the injured child's action would put an end to this dilemma. This would provide sufficient funds to care for the injured infant and yet would not effect the other children.

The reason for the parental immunity rule traditionally relied upon by the courts is that domestic tranquility and parental discipline would be disrupted if the minor child were permitted to bring a personal injury action against his parent. This argument rests upon the doubtful assumption that an uncompensated injury aids to the peace of the home. Nevertheless, it cannot be denied that the argument has weight when the infant's injury results from the exercise of an act of parental discipline or control. The law recognizes that a reasonable act of parental discipline is a defense to an intentional tort action brought by the infant,[42] and the rule seems sound when the child alleges negligence in this situation. The reasoning that if a child could bring an action in these situations, the parent would lose control over the infant, and the youth would come to disrespect the disciplining parent is acceptable. And, unless the parent has a comprehensive liability policy, one cannot take the position that insurance negates the reason for the rule. However, it cannot be logically contended that parental control would be disturbed when the child's action is based upon conduct by the parent which is not carried out in a parental capacity. The courts have recognized this distinction in those cases where the conduct which caused the injury occurred as a part of the parent's vocational activities,[43] but they have failed to carry this distinction to its logical result. The act of driving an automobile is not an act of parental control or discipline; instead, it is a mechanical act which is

[42] Prosser, *op. cit. supra*, at § 27; A parent is permitted to use reasonable force for the correction of a child providing the same is administered in good faith and in a reasonable manner. The rule extends to one who stands *in loco parentis* to the child.

[43] Dunlap v. Dunlap, *supra* note 8, Signs v. Signs, *supra* note 20; Worrell v. Worrell, *supra* note 19; Borst v. Borst, *supra* note 13; Lusk v. Lusk, *supra* note 18.

performed by parent and non-parent alike. Thus, one cannot contend the parent would lose control over the infant if the action were allowed and, as in the vocational tort cases, liability insurance is present.

Thus, on the basis of the reasons just discussed, the parental privilege in automobile negligence cases seems outmoded, and it would appear that the bench recognizes this logic. However, rather than change the rule, the courts retreat to an argument that the danger of collusion is so great in cases where the child sues his insured parent that the action should be prohibited. In *Hastings v. Hastings*[44] the New Jersey Supreme Court stated:

> . . . we all know that realistically such actions are never thought of, let alone commenced, unless there is an insurance policy, automobile or comprehensive personal liability . . . on the basis of which money can be sought to be obtained.[45]

Thus, the sole reason for denying recovery to the minor unemancipated child in automobile negligence cases is the alleged danger of fraud and collusion. But, the action is permitted when the parent is engaged in a vocational activity, and in those cases we found that the presence of liability insurance was a decisive argument for permitting recovery.[46] It cannot honestly be argued that the danger of collusion is greater in one case than the other. Furthermore, there is reason to doubt that the danger of collusion is as great as the courts would have us believe. Collusion is a crime and certainly this fact has a deterrent effect upon any family contemplating a fraud on an insurance company, and

> . . . as parents who seek to instill decent principles of integrity and ethics in their offspring will readily realize, there would be greater restrain and less danger of fraud and collusion between the minor child and his parents than there would be between the parent and his adult friends and relatives who admittedly may maintain actions when injured by the parent's negligent operation of his automobile.[47]

Nevertheless, there is always a certain amount of danger in any case where liability insurance is present, and the courts should be constantly alert to this danger. But, it is another thing to say that there should not be a remedy for an injured child because of the possibility of fraud and collusion. The courts must deal with the possibility of fraud so long as they are kept open and to deny recovery in one

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[44] *Supra* note 15.

[45] *Id.* at 252, 163 A.2d 150.

[46] Dunlap v. Dunlap, *supra* note 8; Worrell v. Worrell, *supra* note 19; Borst v. Borst, *supra* note 13; Lusk v. Lusk, *supra* note 18.

[47] Jacobs, J. dissenting in Hastings v. Hastings, *supra* note 15, at 257, 163 A.2d 153.

singled out situation seems unjust. Certainly, the collusion argument furnishes no just basis for precluding meritorious actions.

Effect of Liability Insurance

It is uniformly held that insurance only covers legal liability and does not create it.[48] The courts have created the parental immunity exception in tort law and have advanced the above reasons. Insurance does eliminate the reasons for the rule in automobile negligence cases. The domestic harmony of the family will not be disturbed because the action is in reality between the infant and his parents insurance company and not the child and his parent. In fact, domestic harmony would seemingly be increased if there are sufficient funds available to provide the necessary medical care which the child will need.[49] The alleged danger of fraud and collusion would certainly be held in check by alert insurance company attorneys who are in fact the defenders of the action. A great flood of litigation would not result if the rule were changed to permit recovery in the automobile negligence cases because the likelihood of settlement in these cases is great.[50] The danger that actions would be brought where the parent is not insured is indeed slight if one accepts the reasoning of the New Jersey Supreme Court in *Hastings*. The emergence of compulsory automobile insurance laws only serves to reenforce this argument, for these laws are evidence of a public policy which favors the compensation of automobile accident victims.

While some courts have recognized that there is a need for a change in the parental immunity rule, they have chosen to wait for legislative action rather than to take the initiative themselves.[51] However,

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48 Owens v. Auto. Mut. Indem. Co., *supra* note 15; Rambo v. Rambo, *supra* note 15; Lund v. Olsen, 183 Minn. 515, 237 N.W. 188 (1931); Baker v. Baker, 364 Mo. 453, 263 S.W.2d 291 (1953); Rines v. Rines, 97 N.H. 55, 80 A.2d 497 (1951); Siembab v. Siembab, *supra* note 22; Parks v. Parks, *supra* note 16; Fidelity Sav. Bank v. Aulik, 252 Wisc. 602, 32 N.W.2d 613 (1948).

49 Musmanno, J. dissenting in Parks v. Parks, *supra* note 15, at 312, 135 A.2d 79, "To say that a family relationship will be severed because an injured child is to receive money to buy medicine, to employ doctors, to hire nurses, to rent a hospital bed, and to do everything that science can do to restore vigor to a helpless frame and light to the lantern of a darkened brain—is to say what is opposed to demonstrated phenomena, contrary to common knowledge, . . . and antagonistic to established reality based upon love, reverence, and loyalty between parent and child. Why would a mother hate her child because, through payment of insurance money, her beloved offspring may have a chance to recover?"

50 James, "Accident Liability Reconsidered: The Impact of Liability Insurance," 57 Yale L.J. 549, 566 (1948).

51 Harralson v. Thomas, 269 S.W.2d 276 (Ky. 1954); Levesque v. Levesque, 99 N.H. 147, 106 A.2d 563 (1954).

> The doctrine of parental immunity . . . was created by the courts. It is especially for them to interpret and modify that doctrine to correspond with prevalent considerations of public policy and social needs.[52]

That insurance has made an important impact upon the law of negligence cannot be denied.[53] Accident litigation is no longer considered as a private contest between the parties but as a means of adjustment between the parties with society being an interested party.[54] Society must be vitally interested in the restoration of a child's health which has been lost because of an unfortunate accident whether or not the person at fault is the infant's parent.

CONCLUSION

In the overwhelming majority of automobile cases, the law acknowledges that the victim of negligence should be compensated. By not extending this logic to those cases where a child is injured by his parent's negligent operation of an automobile, the law exposes the infant to unnecessary dangers. Even if his parents are financially able to do what is necessary for his rehabilitation, there is a possibility that their death will leave him in poor financial condition before he is completely rehabilitated. If his injuries are permanent, he may well become dependent upon society. The parents may be financially unable to care for the child, and he might permanently suffer from injuries which could have been remedied or the family may find it necessary to borrow in order to pay for the child's medical bills. In the latter case, the family harmony which the rule professes to protect may well be disrupted for the family may come to resent the child because of the additional expenses caused by his injuries. The child must be protected if he has the misfortune to have parents who do not care whether or not he is rehabilitated.

The rule of parental privilege does have a reasonable basis in those cases where the parent has injured the child while exercising reasonable parental control. To allow an action by the child in these cases can only lead to a feeling of disrespect for the parent. In the case of household accidents, it seems only fair that all in the family share the common dangers. However, in the case of automobile accidents, the rule cannot be logically applied, and the courts should assume the responsibility of modifying the rule of their own making.

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[52] Nudd v. Matsoukas, *supra* note 22, at 619, 131 N.E.2d 531.

[53] McNiece and Thornton, "Is the Law of Negligence Obsolete," 26 St. Johns L. Rev. 255 (1952); James, *supra* note 50.

[54] McNiece and Thornton, *ibid.*