

The Vestiges of Child-Parent Tort Immunity

For most of this century it was established law in virtually all jurisdictions that a parent could not be sued by his unemancipated minor offspring for negligence. Almost from the moment of its adoption, numerous exceptions were developed to this rule, and in many states these exceptions eroded much of the substance of the original doctrine. Although often criticized, not until 1963 was parental immunity rejected by any court. In the subsequent 10 years, parental immunity has been abrogated to some degree in about one-third of the states, including California in 1969. And, while it was once fashionable in these states to speak of the exceptions to the doctrine of parental immunity, it now seems appropriate to consider the exceptions to what has become in many of these states a general rule of parental liability. This is particularly true in California, which has deviated from other states in its adoption of a so-called "reasonable and prudent parent" standard to determine when a parent should remain immune from suit.¹

I. HISTORICAL DEVELOPMENT OF PARENTAL IMMUNITY

A. RATIONALE FOR ESTABLISHMENT OF THE RULE

Although it might be presumed that parental immunity would have its roots in the common law, it is a doctrine of relatively recent birth, having been enunciated judicially for the first time in Mississippi in 1891.² The case involved an attempted suit by a daughter against her mother, the daughter claiming that she had been wrongfully committed to an insane asylum. The Mississippi court cited no authority for its decision, concluding simply that to permit a child to

¹Although this discussion will be confined to a consideration of the issues involved in litigation in which the child is suing the parent, it should be noted that many cases have arisen in which the parent was attempting to sue his minor child. In fact, one of the leading cases in which parental immunity was abrogated involved a suit by a parent against his unemancipated son, *Gelbman v. Gelbman*, 23 N.Y. 2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969). The California court did not indicate whether it intended its rejection of parental immunity to also permit suits by parent against child, but no court abolishing parental immunity has suggested that such actions should not be permitted.

²*Hewlett v. George*, 68 Miss. 703, 9 So. 885 (1891).

maintain a suit against his parent would be contrary to the "peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society . . ." ³

The Mississippi case was followed by similar decisions in Tennessee 12 years later and in Washington in 1905.⁴ Both cases involved an alleged intentional infliction of harm: assault and battery by a father and stepmother in Tennessee; and a father's rape of his 15-year-old daughter in Washington. As in Mississippi, both courts used the somewhat ironic rationale that maintenance of civil suits of this nature would be violative of intra-family harmony. In any event, virtually every court to consider the question in the next 50 years, including California in 1931,⁵ followed the lead of Mississippi and adopted some form of parental immunity.

In addition to citing the need for preservation of intra-family harmony,⁶ courts also warned of the danger of intra-family fraud or collusion if such suits were to be permitted.⁷ Another frequently expressed fear was that allowing sons and daughters to maintain civil actions would threaten the parents' right to control and discipline their children.⁸ Finally, a number of courts concluded that to permit a child to recover from his parents would permit the child, in effect, to deprive all other members of the family of their fair share of the familial assets.⁹

B. EXCEPTIONS TO PARENTAL IMMUNITY

Almost from the moment of the rule's adoption, a number of qualifications and exceptions began to be introduced which greatly undermined its effect.¹⁰ Among the more widely recognized situa-

³*Id.* at 711, 9 So. at 887.

⁴*McKelvey v. McKelvey*, 111 Tenn. 388, 77 S.W. 664 (1903); *Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905).

⁵*Trudell v. Leatherby*, 212 Cal. 678, 300 P. 7 (1931).

⁶An extensive analysis of justifications for parental immunity may be found in Annot., 41 A.L.R. 3rd 904, 927-40 (1972). A recent summary of the historical reasons is contained in Winchester, *Streenz v. Streenz: The End of an Era of Parental Tort Immunity*, 13 ARIZ. L. REV. 720, 727n. 52 (1971).

⁷See e.g., *Hastings v. Hastings*, 33 N.J. 247, 163 A.2d 147 (1960), *overruled by* *France v. A.P.A. Transport Corp.*, 56 N.J. 500, 267 A.2d 490 (1970); *Dennis v. Walker*, 284 F.Supp. 413 (D.C., Dist. Col., 1968); and the dissenting opinion of McFarland, J., in *Streenz v. Streenz*, 106 Ariz. 86, 471 P.2d 282, 285 (1970).

⁸See, e.g., *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12 (1923); *Wick v. Wick*, 192 Wis. 260, 212 N.W.787 (1927), *overruled by* *Goller v. White*, 20 Wis. 2d 402, 122 N.W.2d 193 (1963); and *Rodebaugh v. Grand Trunk Western Railroad Co.*, 4 Mich. App. 559, 145 N.W.2d 401 (1966).

⁹See, e.g., *Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905); and *Bulloch v. Bulloch*, 45 Ga. App. 1, 163 S.E. 708 (1932).

¹⁰Summaries of the exceptions may be found in Hinkle, *Intrafamily Litigation — Parent and Child*, 1968 INS. L. J. 133 (1968); and Belzer, *Child v. Parent: Erosion of the Immunity Rule*, 19 HAST L. J. 201, 206-218 (1967).

tions in which the child has been permitted to maintain a tort action include: (1) when the child has been emancipated,¹¹ (2) when the child's injuries were intentionally inflicted or were the result of reckless misconduct,¹² (3) when the harm was inflicted by a step-parent rather than a natural parent,¹³ (4) when either the parent or child had died, terminating the familial relationship,¹⁴ and (5) where the child was injured by the parent acting in a business, rather than a personal, capacity.¹⁵

II. REJECTION OF PARENTAL IMMUNITY

A. ABROGATION IN WISCONSIN: *GOLLER V. WHITE*

As the exceptions were being developed, commentators were subjecting the doctrine to harsh criticism.¹⁶ In his third edition, Prosser observed: "Few topics in the law of torts, in view of modern economic, social and legislative changes, display in their treatment greater inconsistency and more unsatisfactory reasoning."¹⁷ Despite the criticism, it was not until 1963 that parental immunity was first abrogated. In *Goller v. White*¹⁸ the Supreme Court of Wisconsin rejected the argument that child-parent suits would threaten family harmony, observing that the same objection had been raised to interspousal suits, but that there was no evidence of increased disharmony in those states which had been permitting husband-wife suits for up to 35 years.¹⁹ By its own admission, the court was swayed by the

¹¹Martinez v. Southern Pacific Co., 45 Cal. 2d 244, 288 P.2d 868 (1955).

¹²Badigian v. Badigian, 9 N.Y.2d 472, 215 N.Y.S.2d 35, 174 N.E.2d 718 (1961); Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Gillett v. Gillett, 168 Cal. App. 2d 102, 335 P.2d 736 (1959); People v. Stewart, 188 Cal. App. 2d 88, 10 Cal. Rptr. 217 (1961). In Emery v. Emery the California court not only recognized the right of an injured minor to sue her father for a willful or malicious tort, but also the minor's right to sue a sibling for ordinary negligence.

¹³Brown v. Cole, 198 Ark. 417, 129 S.W.2d 245 (1939). In California, however, a step parent or any other person standing in relation of *loco parentis* to the child was immune from suit. Trudell v. Leatherby, 212 Cal. 678, 300 P. 7 (1931); Perkins v. Robertson, 140 Cal. App. 2d 536, 295 P.2d 972 (1956).

¹⁴Palcsey v. Tepper, 71 N.J. Super. 294, 176 A.2d 818 (1962); Parks v. Parks, 390 Pa. 287, 135 A.2d 65 (1957); Oliveria v. Oliveria, 305 Mass. 297, 25 N.E.2d 766 (1940).

¹⁵Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930); Lusk v. Lusk, 113 W.Va. 17, 166 S.E. 538 (1932); Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952); Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952).

¹⁶McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030 (1930) was one of the earliest. A lengthy list of critical articles is included in the dissenting opinion in Hastings v. Hastings, 33 N.J. 247, 254-55, 163 A.2d 147, 151 (1960). Criticism of the rule in California prior to its abrogation may be found at Belzer, *Child v. Parent: Erosion of the Immunity Rule*, 19 HAST. L. J. 201 (1967) and Pate, *Parent-Child Immunity: The Case for Abolition*, 6 SAN DIEGO L. REV. 286 (1969).

¹⁷PROSSER, LAW OF TORTS, 879, (3rd ed., 1964).

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

¹⁹Wisconsin had also been one of the pioneers in abrogating interspousal im-

increased availability of liability insurance which meant that recovery would likely be from an insurance company rather than the parent.²⁰ And the court also recognized that suits between parent and child had been maintainable even at common law in conflicts over property and contract rights.²¹

The abrogation was not without limitations, however. In a test which has been expressly adopted in several jurisdictions²² and alluded to in others,²³ the court declared that parental immunity would be retained in two situations: (1) where the alleged negligent act involves an exercise of parental authority over the child; and (2) where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care.²⁴ These exceptions, of course, represent a concession to the objection that permitting child-parent litigation undermines the parent's ability to control and discipline his children. The exceptions are extremely broad, however, and courts construing the language of the *Goller* court liberally could easily fit many clearly negligent parental acts within one of the two exceptions.

With *Goller v. White* leading the way, numerous courts have used the same rationale to eliminate or greatly restrict parental immunity in the past decade. As noted, Minnesota, Kentucky and Michigan have adopted the Wisconsin test.²⁵ Illinois has established similar exceptions to parental liability,²⁶ and New Hampshire, New York

munity, eliminating the doctrine in 1926 in *Wait v. Pierce*, 191 Wis. 202, 209 N.W. 475. A review of the justifications for abrogating parental immunity may be found at Annot., 41 A.L.R. 3rd 904, 970-75 (1972).

²⁰*Goller v. White*, 122 N.W.2d at 197. Despite the emphasis on the availability of insurance, the *Goller* court also decided that, in that particular case, the insurance policy did not cover the plaintiff's injuries; thus, the parent himself was forced to pay the judgment.

²¹*Id.*

²²*Silesky v. Kelman*, 281 Minn. 431, 161 N.W.2d 631 (1968); *Rigdon v. Rigdon*, 465 S.W.2d 921 (Ky. App., 1970); and *Plumley v. Klein*, 388 Mich. 1, 199 N.W.2d 169 (1972). All these states require that the exercise of any parental authority be "reasonable."

²³*Felderhoff v. Felderhoff*, 473 S.W.2d 928 (Tex. Sup., 1971); *Streenz v. Streenz*, 106 Ariz. 86, 471 P.2d 282 (1970).

²⁴*Goller v. White*, 122 N.W.2d at 198. The extent to which these exceptions have continued to shield parents from suit and their utility under the California test is explored below.

²⁵*See supra*, note 22.

²⁶*Schenk v. Schenk*, 100 Ill. App. 2d 199, 241 N.E.2d 12 (1968). The Illinois court declared that parental immunity was abrogated except where the conduct arises "out of the family relationship and (is) directly connected with the family purposes and objectives in those cases where it may be said that the carelessness, inadvertence or negligence is but the product of the hazards incident to inter-family (sic) living and common to every family." 241 N.E.2d at 15. Two other appellate courts have employed this test, applying it in a narrow fashion. In *Cosmopolitan National Bank of Chicago v. Heap*, 128 Ill. App. 2d 165, 262

and Pennsylvania are regarded as having abrogated parental immunity entirely.²⁷ Hawaii, North Dakota, New Jersey, Louisiana and Vermont have rejected the doctrine but have yet to specify the precise limitations on its application.²⁸ Alaska, Arizona and Virginia have specifically limited the abrogation of parental immunity to automobile accidents.²⁹ The Supreme Court of Texas claimed that it was retaining the doctrine in *Felderhoff v. Felderhoff*,³⁰ but the language of its decision indicates that it is receptive to limiting immunity to the types of situations delineated in the *Goller* test.³¹

B. ABROGATION IN CALIFORNIA: *GIBSON V. GIBSON*

Perhaps the most novel test devised to date is that established by California in 1971 in *Gibson v. Gibson*.³² While towing a jeep on a highway, a father pulled off the road and directed his son to step out of the car and ensure that the wheels on the jeep were properly

N.E.2d 826 (1970), the court refused to permit a child to sue his parent for negligently maintaining a rug which caused his fall down a stairway. And in *Johnson v. Myers*, 2 Ill. App. 3d 844, 277 N.E.2d 778 (1972), the court suggested in dicta that a child riding in an auto might be barred from suing his driver parent if the trip was to accomplish some family purpose.

²⁷*Briere v. Briere*, 107 N.H. 432, 224 A.2d 588 (1966); *Gelbman v. Gelbman*, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969); *Falco v. Pados*, 444 Pa. 372, 282 A.2d 351 (1971).

²⁸*Petersen v. City and County of Honolulu*, 51 Hawaii 484, 462 P.2d 1007 (1969); *Nuelle v. Wells*, 154 N.W.2d 364 (N.D., 1967); *France v. A.P.A. Transport Corp.*, 56 N.J. 500, 267 A.2d 490 (1970); *Jagers v. Royal Indemnity Co.*, 257 So.2d 806 (La. App., 1972). The situation is particularly uncertain in Vermont. In that state, parental immunity is said to have been abrogated by a Federal District Court decision, *Xaphes v. Mossey*, 224 F.Supp. 578 (D.C., Vt., 1963).

²⁹*Hebel v. Hebel*, 435 P.2d 8 (Alaska, 1967); *Streenz v. Streenz*, 106 Ariz. 86, 471 P.2d 282 (1970); and *Smith v. Kauffman*, 212 Va. 181, 183 S.E.2d 190 (1971). In these states it may seem more accurate to say that parental immunity has been retained, subject to an additional exception in the case of automobile accident litigation. In fact, in a recent case, the Virginia Supreme Court said of *Smith v. Kauffman*: "(In that case) we carved out another exception to the (parental immunity) doctrine." The court dismissed the plaintiff-child's claim against her father who negligently left metal awnings with sharp, jagged edges in the child's play area, concluding that "the allegations . . . do not fall within any exceptions to the parental immunity doctrine which we have previously recognized." *Wright v. Wright*, 213 Va. 177, 191 S.E.2d 223, 225 (1972). The principal argument in favor of regarding the elimination of immunity in the area of automobile accidents as abrogation of the doctrine itself is that cases of this type make up such a large percentage of total child-parent litigation. See *supra* note 76 and accompanying text.

³⁰473 S.W.2d 928 (Tex. Sup., 1971).

³¹*Id.* at 933. The court rejected a suggestion that parental immunity be completely abrogated in Texas, but said: "We believe a better course was followed by the Supreme Courts of Kentucky, Minnesota and Wisconsin in retaining the immunity rule with respect to alleged acts of ordinary negligence which involve a reasonable exercise of parental authority or the exercise of ordinary parental discretion with respect to provisions for the care and necessities of the child."

³²3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971).

aligned. The son was injured by a passing car, and he charged that his father was negligent in requiring him to leave the car in such hazardous circumstances. The trial court, applying *Trudell v. Leatherby*,³³ the case in which California adopted parental immunity, sustained the father's demurrer to the complaint. The Supreme Court, expressly overruling *Trudell*, declared an end to parental immunity in the state and remanded the case for trial.

1. RATIONALE FOR REJECTION

The California court used the same reasoning expressed in *Goller* and subsequent cases in rejecting parental immunity. A focal point of the California decision was a trilogy of relatively recent cases which had done much to erode intra-family immunity in California. These were *Emery v. Emery*,³⁴ in which a minor was permitted to sue her father for willful infliction of harm and allowed to sue her brother for ordinary negligence; *Self v. Self*,³⁵ in which interspousal immunity was abrogated for intentional torts; and *Klein v. Klein*,³⁶ in which interspousal immunity was abolished for negligent torts.³⁷ The court declared that the reasoning of the two decisions on interspousal torts had "totally destroyed two of the three grounds traditionally advanced in support of parental immunity: (1) disruption of family harmony and (2) fraud or collusion between family 'adversaries.'"³⁸

In the case of intra-family harmony, the court recognized that the risk of family discord was no greater in negligence actions than in litigation over rights in property which had long been permitted in California.³⁹ And it also recalled its language in *Emery v. Emery* when the court was considering the propriety of a suit between an unemancipated brother and sister: "An uncompensated tort is no more apt to promote or preserve peace in the family than is an action between minor brother and sister to recover damages for that tort."⁴⁰

Although it was not given primary emphasis in the opinion, a

³³ 212 Cal. 678, 300 P. 7 (1931).

³⁴ 45 Cal. 2d 421, 289 P.2d 218 (1955).

³⁵ 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962).

³⁶ 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962).

³⁷ The court noted that a scholar in the field of family law had suggested two years earlier that *Emery*, *Self* and *Klein* "spelled doom for the parental immunity doctrine." See Bodenheimer, *Justice Peters' Contribution to Family and Community Property Law*, 57 CAL. L. REV. 577, 593 (1969), cited in *Gibson*, 3 Cal. 3d at 919n, 479 P.2d at 651n, 92 Cal. Rptr. at 291n.

³⁸ *Gibson v. Gibson*, 3 Cal. 3d at 919, 479 P.2d at 651, 92 Cal. Rptr. at 291.

³⁹ *Id.* at 919, 479 P.2d at 651, 92 Cal. Rptr. at 291, citing *Self v. Self*, 58 Cal. 2d 683, 690, 376 P.2d 65, 67, 26 Cal. Rptr. 97, 101.

⁴⁰ *Id.* at 919, 479 P.2d at 651, 92 Cal. Rptr. at 291, citing *Emery v. Emery*, 45 Cal. 2d 421, 430-31, 289 P.2d 218, 224 (1955).

principal reason for concluding that familial harmony will not be threatened by child-parent suits is the increased prevalence of liability insurance.⁴¹ Said the court: "We can no longer consider child-parent actions on the outmoded assumption that parents may be required to pay damages to their children. As Professor James has observed: '... in truth, virtually no such suits are brought except where there is insurance. And where there is, none of the threats to the family exists at all.'"⁴²

Rejecting the second argument, that of the danger of collusion and fraud,⁴³ the court concluded that the threat of fraud is "no greater when a minor child sues his parent than in actions between husbands and wives, brothers and sisters, or adult children and parents, all of which are permitted in California."⁴⁴ The justices recalled the court's language in *Klein*:

... It would be a sad commentary on the law if we were to admit that the judicial processes are so ineffective that we must deny relief to a person otherwise entitled because in some future case a litigant may be guilty of fraud or collusion. Once that concept were accepted, then all causes of action should be abolished. Our legal system is not that ineffectual.⁴⁵

It was in respect to the third argument supporting immunity, that it was essential for the preservation of parental authority and discipline,⁴⁶ that the court devised its unique test to determine the circumstances under which a parent may still claim immunity from suit. In establishing its so-called "reasonable and prudent parent" standard, the court expressly rejected the *Goller* test which retained

⁴¹The New York court has provided the most candid analysis: "The parties recognize, as we must, that there is compulsory automobile insurance in New York. Such insurance effectively removes the argument favoring continued family harmony as a basis for prohibiting this suit. The present litigation is, in reality, between the parent passenger and her insurance carrier. Viewing the case in this light, we are unable to comprehend how the family harmony will be enhanced by prohibiting this suit." *Gelbman v. Gelbman*, 23 N.Y.2d 434, 438, 245 N.E.2d 192, 193-4, 297 N.Y.S.2d 529, 531-32, (1969). These facts have resulted in several proposals for the enactment of direct action statutes which would allow the injured passenger to recover directly from the insurance company. See Whitten, *Gibson v. Gibson: A Further Limitation on California's Parent-Child Immunity Rule*, 23 HAST L. J. 588, 602 (1972). See also dissenting opinion of Abe, J., in *Petersen v. City and County of Honolulu*, 51 Hawaii 484, 462 P.2d 1007, 1011 (1969); and dissenting opinion of Rogosheske, J., in *Silesky v. Kelman*, 281 Minn. 431, 161 N.W.2d 631, 639 (1968).

⁴²*Gibson v. Gibson*, 3 Cal. 3d at 922, 479 P.2d at 653, 92 Cal. Rptr. at 293, quoting James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L. J. 549, 553 (1948).

⁴³*Id.* at 919-20, 479 P.2d at 651-52, 92 Cal. Rptr. at 291-92.

⁴⁴*Id.* at 920, 479 P.2d at 651, 92 Cal. Rptr. at 291.

⁴⁵*Id.* at 920, 479 P.2d at 652, 92 Cal. Rptr. at 292, citing *Klein v. Klein*, 58 Cal. 2d at 695-96, 376 P.2d at 72-73, 26 Cal. Rptr. at 104-105.

⁴⁶*Id.* at 920-21, 479 P.2d at 652, 92 Cal. Rptr. at 292.

immunity where the parent was exerting authority or imposing discipline, declaring:

First, we think that the *Goller* view will inevitably result in the drawing of arbitrary distinctions about when particular parental conduct falls within or without the immunity guidelines. Second, we find intolerable the notion that if a parent can succeed in bringing himself within the 'safety' of parental immunity, he may act negligently with impunity.⁴⁷

2. THE 'REASONABLE AND PRUDENT PARENT' STANDARD

By instituting its 'reasonable and prudent parent' test, the court, in effect, instructed the lower courts to ask in each case: What would an ordinarily reasonable and prudent *parent* have done in similar circumstances?⁴⁸ The court makes it clear that total abrogation is inappropriate, recognizing "the undeniable fact that the parent-child relationship is unique in some aspects, and that traditional concepts of negligence cannot be blindly applied to it."⁴⁹ The court illustrated its desire to retain immunity in some areas by explaining that a parent obviously may spank his child without being liable for battery or may order the child to remain in his room without being sued for false imprisonment.⁵⁰

One commentator⁵¹ has suggested that courts may encounter some procedural complexities in applying the *Gibson* test. This suggestion was based on the premise that a two-step process is to be followed once parental immunity is pleaded by a defendant parent. Stated the comment: "... it appears that the parent's lack of 'reasonableness' must be determined by the trial judge at the outset in determining whether there is a proper basis for the child's suit."⁵² If the trial judge concludes that the defendant's action is reasonable and consistent with his parental role, the plaintiff child's action would be foreclosed. Only if the court concluded that the parent acted unreasonably, it was suggested, would the case proceed to trial for the jury to determine the usual issues in an action for tortious injury.⁵³

Although this is not an illogical proposition, it seems more likely that the issue of the 'reasonableness' of the parent's action is a question to be decided in all cases by the jury, unless the court can find as a matter of law that no reasonable man could conclude that the

⁴⁷*Id.* at 922, 479 P.2d at 653, 92 Cal. Rptr. at 293.

⁴⁸*Id.* at 921, 479 P.2d at 653, 92 Cal. Rptr. at 293.

⁴⁹*Id.* at 921, 479 P.2d at 652, 92 Cal. Rptr. at 292.

⁵⁰*Id.*

⁵¹Whitten, *Gibson v. Gibson: A Further Limitation on California's Parent-Child Immunity Rule*, 23 HAST. L. J. 588, 593-94 (1972).

⁵²*Id.* at 593.

⁵³*Id.* at 593-4.

defendant's actions, considering his parental role, were unreasonable.

The rationale for employment of a two-step process would be the desire to minimize parent-child litigation and avoid trials which would be potentially disruptive to familial relations unless they were truly justified.⁵⁴ Although this is a valid concern, it is essentially the same argument which was originally made in *Hewlett v. George* in 1891, which was repeated for the next 70 years, and which was decisively rejected in *Gibson*. Indeed, the entire tenor of the *Gibson* opinion is to subject the parent to liability in all cases except those in which he has acted no differently than the ordinarily reasonable and prudent parent in the same situation. It would seem unlikely that the court would all but totally abolish immunity and, at the same time, condone a procedure which would have the inevitable effect of encouraging trial judges to provide continuing protection whenever they could conclude that the defendant parent's actions were 'reasonable.'

At the same time, it seems apparent that the *Gibson* test will allow trial judges a shade more leeway in deciding as a matter of law that a given defendant should not be exposed to liability. Most cases which have reached the appellate level have been on appeal from demurrers or motions for dismissal on the grounds of the claimed immunity.⁵⁵ In post-*Gibson* litigation, the trial court judge will be faced with essentially the same question as in any negligence action: Was this defendant so clearly not negligent that no reasonable man could find him guilty of the alleged tortious act? But even if a judge might answer in the negative with respect to an ordinary defendant, he must take into consideration that the defendant in the case before him is the parent of the plaintiff. This should have a significant effect on his thinking, and it is inevitable that a parent, because of the complexity of his parental obligation, will occasionally receive the benefit of a non-suit, summary judgment, or directed verdict while an ordinary defendant accused of the same actions, but standing in no special relation to the plaintiff, would be forced to prove his lack of negligence to the jury.

An interesting subject for speculation is the degree of negligence which a jury will require to find a parent liable when they are using the *Gibson* test to measure the quality of a given parental act. The jury's deliberations will necessarily involve many of the same considerations weighed by the trial judge, of course. It seems clear that in most cases it will not be enough to find merely that the parent has been guilty of the ordinary negligence that would be sufficient to

⁵⁴*Id.* at 593, note 26.

⁵⁵*See, e.g.,* *Silesky v. Kelman*, 281 Minn. 431, 161 N.W.2d 631 (1968); *Petersen v. City and County of Honolulu*, 51 Hawaii 484, 462 P.2d 1007 (1969); *Gibson v. Gibson*, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971).

impose liability on a defendant unrelated to the plaintiff. Indeed, the defendant parent would seem justified in seeking a jury instruction which would state that, even if he should be found guilty of the degree of negligence for which an ordinary defendant could be held liable, the jury must then take into consideration the fact that his actions are to be evaluated in light of his parental role. Particularly when one considers the large number of jurors who are parents themselves and who will presumably empathize with the defendant, it may well be that it will require something equivalent to gross negligence to find a parent guilty of a tortious act toward his child. Mitigating against such a phenomenon will be the realization on the part of most juries that the real parties in interest in virtually all cases are the parents and their liability insurer. Even if erroneous, such a conclusion by the jury may enhance its willingness to find liability even if the parent's behavior has been within the bounds of the *Gibson* standard.

C. REAFFIRMATION OF PARENTAL IMMUNITY

Although Prosser claimed in his fourth edition that *Goller* "set off something of a long-overdue landslide" and predicted that "the number of such jurisdictions will henceforth be rapidly on the increase,"⁵⁶ it should be noted that the doctrine of parental immunity is by no means doomed to extinction. Indeed, in the ten years since *Goller*, almost as many jurisdictions have upheld immunity as have abolished it. In recent years, for example, courts for the District of Columbia,⁵⁷ Iowa,⁵⁸ Maine,⁵⁹ Maryland,⁶⁰ Missouri,⁶¹ New Mexico,⁶² North Carolina,⁶³ Oklahoma,⁶⁴ and Tennessee⁶⁵ have all been presented the rationale of *Goller* or subsequent decisions, yet have concluded, at best, that if a change is desirable it is for the Legislature to make.⁶⁶ And many of the courts have concluded that

⁵⁶PROSSER, LAW OF TORTS, 867-68, 4th ed. (1971).

⁵⁷*Dennis v. Walker*, 284 F.Supp. 413 (D.C., Dist. Col., 1968). Dicta in *Emmert v. United States*, 300 F.Supp. 45 (D.C., Dist. Col., 1969) suggested, however, that parental immunity may no longer be the law in the District of Columbia.

⁵⁸*Barlow v. Iblings*, 156 N.W.2d 105 (Iowa, 1968). The commitment of the Iowa court to intrafamily immunity was even more strongly reinforced in *Wright v. Daniels*, 164 N.W.2d 180 (Iowa, 1969), where the administratrix of a wife was prohibited from suing the husband even though he had willfully and maliciously caused his wife's death.

⁵⁹*Downs v. Poulin*, 216 A.2d 29 (Maine, 1966).

⁶⁰*Latz v. Latz*, 10 Md. App. 720, 272 A.2d 435 (1971).

⁶¹*Bahr v. Bahr*, 478 S.W.2d 400 (Mo., 1972).

⁶²*Nahas v. Noble*, 77 N.M. 139, 420 P.2d 127 (1966).

⁶³*Skinner v. Whitley*, 281 N.C. 476, 189 S.E.2d 230 (1972).

⁶⁴*Workman v. Workman*, 498 P.2d 1384 (Okla., 1972).

⁶⁵*Campbell v. Gruttemeyer*, 222 Tenn. 133, 432 S.W.2d 894 (1968).

⁶⁶*Downs v. Poulin*, 216 A.2d 29 (Maine, 1966); *Latz v. Latz*, 10 Md. App. 720, 272 A.2d 435 (1971); *Nahas v. Noble*, 77 N.M. 139, 420 P.2d 127 (1966);

the policy reasons for creating parental immunity initially still outweigh the arguments for abolishing it.⁶⁷

III. THE EXCEPTIONS TO PARENTAL LIABILITY

Despite California's express rejection of the *Goller* test and the adoption of its own 'reasonable and prudent parent' standard, it seems inevitable that some indication of what parental actions are 'reasonable' and will, therefore, render the actor immune may be found in the statements of other courts which have been more explicit in identifying the areas of lingering immunity. Although the language of the court in *Gibson* might suggest otherwise,⁶⁸ it would seem that courts which have adopted the *Goller* test, or perhaps no test at all, are likely in most cases to be in agreement with California as to the type of parental conduct which is deserving of continued protection. A typical example was provided by the Wisconsin court in 1968 when it quoted with approval this paragraph from a pre-abrogation case: "Parents are, of course, not required to do the impossible in caring for their children. As a rule, however, they are bound to provide such reasonable care and protection as an ordinary prudent person, solicitous for the welfare of his child would deem necessary."⁶⁹ Clearly expressed in the *Gibson* opinion is the court's concern for retaining the parent's right to control the development of his child and to discipline him when necessary. This is the identical concern which governed the *Goller* court in its enunciation of the two areas where immunity should remain, as well as subsequent courts which have limited or abolished immunity.⁷⁰ Ignoring its express rejection of the *Goller* test, the only truly distinguishing characteristic of the *Gibson* opinion is its fear that the establishment of a *Goller*-like standard would permit a court to stay within the letter of the law while classifying a blatantly negligent and unreasonable action as "an exercise of parental authority" or as "an exercise of ordinary parental discretion."⁷¹ A trial judge so inclined, of course, will in many cases be no more inhibited from making the same

Skinner v. Whitley, 281 N.C. 476, 189 S.E.2d 230 (1972); *Campbell v. Gruttemeyer*, 222 Tenn. 133, 432 S.W.2d 894 (1968).

⁶⁷*Dennis v. Walker*, 284 F.Supp. 413 (D.C., Dist. Col., 1968); *Barlow v. Iblings*, 156 N.W.2d 105 (Iowa, 1968); *Nahas v. Noble*, 77 N.M. 139, 420 P.2d 127 (1966).

⁶⁸As, for example, where the court declared in *Gibson*: "... we reject the implication of *Goller* that within certain aspects of the parent-child relationship, the parent has carte blanche to act negligently toward his child." 3 Cal. 3d at 921, 479 P.2d at 652-53, 92 Cal. Rptr. at 292-93.

⁶⁹*Lemmen v. Servais*, 39 Wis. 2d 75, 158 N.W.2d 341, 343, (1968), citing *Reber v. Hanson*, 260 Wis. 632, 635-36, 51 N.W.2d 505, 507 (1952); which was quoting 39 AM. JUR. *Parent and Child*, § 46.

⁷⁰See text at note 24, *supra*.

⁷¹See text at notes 116-118, *infra*.

judgment as to immunity while applying the 'reasonable parent' standard. Indeed, as will be suggested below, the danger may be greater that, by an improvident decision, he will subject the family to a jury trial in a situation in which the parent is clearly free of actionable negligence.

Although it may be reasonable to look to the decisions of other courts to determine the types of parental actions which may be granted immunity in California, for a variety of reasons a survey of this nature is not exceptionally productive. In the first place, most courts abrogating parental immunity have said little in their opinions concerning the circumstances in which immunity should be retained. The *Goller* test contains the most explicit criteria, but even it provides a basis for a wide range of interpretations.

A second obstacle to predicting the limits of parental liability is the scarcity of opinions in most jurisdictions. As noted, parental immunity was first abolished only 10 years ago, and most of the 17 states rejecting parental immunity have done so since 1969.⁷² Given the lengthy periods between tortious injury, initiation of suit, trial and appellate review, it is not surprising that few states have had the opportunity to interpret their new rules of parental liability. Even in Wisconsin, only a handful of cases have risen to the appellate level which help refine the test provided in *Goller*.⁷³

Despite the absence of case law on the subject, it is possible to provide some general guidelines as to the situations in which parental immunity remains. After considering two special problems involving the existence of other immunities and the relevance of the availability of liability insurance to satisfy judgments, the areas of continuing immunity will be analyzed within the framework of the two-pronged *Goller* test: (1) those actions related to acts of parental authority and (2) those concerned with acts of parental discretion.

A. EXISTENCE OF OTHER IMMUNITIES

Although the elimination of parental immunity would seem to be an occasion for a proverbial 'opening of the flood gates of litigation,' the effect of *Gibson* standing alone was greatly mitigated in California by the existence at that time of the automobile guest

⁷²Dates of abrogation for each state: Wisconsin and Vermont, 1963; New Hampshire, 1966; Alaska and North Dakota, 1967; Minnesota and Illinois, 1968; New York and Hawaii, 1969; Arizona, Kentucky and New Jersey, 1970; California, Virginia and Pennsylvania, 1971; and Michigan and Louisiana, 1972. See notes 22, 25-32, *supra*.

⁷³Five decisions have interpreted the test enunciated in *Goller v. White*: *Lemmen v. Servais*, 39 Wis. 2d 75, 158 N.W.2d 341 (1968); *Cole v. Sears Roebuck & Co.*, 47 Wis. 2d 629, 177 N.W.2d 866 (1970); *Thomas v. Kells*, 53 Wis. 2d 141, 191 N.W.2d 872 (1971); *Thoreson v. Milwaukee & Suburban Transport Co.*, 56 Wis. 2d 231, 201 N.W.2d 745 (1972); and *Howes v. Hansen*, 56 Wis. 2d 247, 201 N.W.2d 825 (1972).

statute.⁷⁴ The *Gibson* opinion had no effect on the operation of the guest statute in California and the court conceded in *Gibson* that the statute "may eliminate some potential child-parent suits, which frequently involve injuries received by the child while a 'guest' in an automobile driven by his parent."⁷⁵ The extent to which automobile accidents serve as the basis for child-parent suits can best be appreciated by surveying the cases in which parental immunity has been challenged. With only two exceptions,⁷⁶ each of the cases in which parental immunity was abrogated involved a passenger suing a negligent driver.

The recent decision⁷⁷ of the California Supreme Court to strike down the guest statute has greatly enhanced the impact of *Gibson*. With the guest statute in effect, there would have been few occasions on which a child could have qualified under one of the three principal exceptions to the guest statute: (1) where the parent driver was intoxicated, (2) where the parent driver was found guilty of willful misconduct, or (3) where the child had given compensation for the ride. Even if some type of immunity for the driver should eventually be reinstated, there are other claims which at least certain minors may make to avoid disqualification by a statute. In the first place, most statutes require that a guest "accept" a ride, and there is a clear connotation of voluntariness in the acceptance. It may be argued that a child under legal age is, for practical purposes, deprived of the ability to accept or reject his parent's "invitation" to enter the family automobile. Under these circumstances, it seems inappropriate to view any unemancipated minor under 18 as having "accepted" a ride with his parent in the sense inherent in the guest statutes.⁷⁸ Even if this argument proves to be without merit, it has

⁷⁴CAL. VEH. CODE § 17158 (West 1971).

No person riding in or occupying a vehicle owned by him and driven by another person with his permission and no person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of the vehicle or against any other person legally liable for the conduct of the driver on account of personal injury to or the death of the owner or guest during the ride, unless the plaintiff in any such action establishes that the injury or death proximately resulted from the intoxication or willful misconduct of the driver.

⁷⁵*Gibson v. Gibson*, 3 Cal. 3d 920n, 479 P.2d at 651n, 92 Cal. Rptr. at 291n. The child plaintiff in *Gibson* was able to avoid the application of the guest statute because he was not "in" the car at the time of the accident. See *Boyd v. Cress*, 46 Cal. 2d 164, 293 P.2d 37 (1956).

⁷⁶*Gibson v. Gibson*, *id.*, and *Petersen v. City and County of Honolulu*, 51 Hawaii 484, 462 P.2d 1007 (1969).

⁷⁷*Brown v. Merlo*, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

⁷⁸A similar argument is suggested in Whitten, *Gibson v. Gibson: A Further Limitation on California's Parent-Child Immunity Rule*, 23 HAST. L. J. 588, 599 (1972).

been successfully contended that a child under seven should not be disqualified by the guest statute since he clearly lacks the maturity and mental capacity to "accept" a ride.⁷⁹

In the only case to date involving a conflict between a guest statute and parental liability, the Virginia Supreme Court of Appeals ruled that a child under 14 was "incapable of knowingly and voluntarily accepting an invitation to become a guest in an automobile so as to subject himself to the (guest statute)."⁸⁰ Without this judicially created exception to the guest statute, the abrogation of parental immunity would have been virtually meaningless in Virginia which limited its restriction on parental immunity to automobile accident cases.

Presuming that the decision declaring the guest statute unconstitutional is not subject to appeal or is otherwise permitted to stand, it is evident that parent-child litigation will proliferate. As is suggested below, the probable result will be an attempt by insurance companies to limit their liability in such circumstances.

B. EXISTENCE OF LIABILITY INSURANCE

It should be recognized that the existence or absence of liability insurance apparently has no bearing on whether a parent will be granted immunity. Although one of the bases for the *Gibson* decision was that intra-family suits are seldom maintained except where there is insurance,⁸¹ the Court in no way implied that a parent might be granted immunity merely because he would have to pay a judgment from his personal assets.

As noted previously,⁸² in the leading case of *Goller v. White*, the fact that the defendant's insurance policy was insufficient to cover the judgment was held to be immaterial. One of the first questions litigated following the abolition of parental immunity in New York was whether the insufficiency of the parent's insurance would serve as a basis for limiting his liability. In two 1969 cases,⁸³ courts rejected parents' claims that permitting actions in such circumstances would be disruptive of family unity and could subject the family to hardship and deprivation.

⁷⁹*Rocha v. Hulen*, 6 Cal. App. 2d 245, 44 P.2d 478 (1935). The Michigan decision abrogating parental immunity, *Plumley v. Klein*, 388 Mich. 1, 199 N.W.2d 169 (1972), also uses this rationale to avoid that state's guest statute. But see *Buckner v. Vetterick*, 124 Cal. App. 2d 417, 269 P.2d 67 (1954) which stated that the parent may provide the requisite acceptance on behalf of his underage child.

⁸⁰*Smith v. Kauffman*, 212 Va. 181, 183 S.E.2d 190, 195 (1971).

⁸¹See text at notes 41 and 42, *supra*.

⁸²See *supra*, note 20.

⁸³*D'Ambrosio v. D'Ambrosio*, 60 Misc. 2d 886, 304 N.Y.S. 2d 156 (1969) and *Howell v. Perri*, 60 Misc. 2d 871, 304 N.Y.S. 2d 156 (1969).

Although it seems unlikely that suits will be maintained unless insurance is available to pay a judgment, there is no guarantee, of course, that this will always be the case. Particularly when one contemplates the 'liberated spirit' of many of today's older minors, it is not difficult to imagine such an individual retaining counsel independently to initiate an action against his parents for some harm, whether genuine or otherwise. A number of factors could contribute to litigation of this type, including the not infrequent alienation between parents and children in modern society, the increased emphasis on children's rights in recent years, the availability of the contingent fee arrangement, and the increased availability of attorneys ready and willing to become involved in, or even initiate, causes of action of an unconventional nature.

The court's dependence on liability insurance as a basis for abolishing parental immunity could be severely undermined if insurance companies respond by increasing the use of clauses in their policies disclaiming liability for intra-family torts. Legislative intervention in this area would also not be without precedent. In 1937, the New York legislature passed a law abolishing inter-spousal immunity, but then enacted Insurance Law 167 (3) which provides that an insurance company cannot be held under a liability policy in an inter-spousal suit unless express provision is made for such coverage in the policy.⁸⁴

Particularly in view of the striking down of the automobile guest statute, it seems inevitable that insurance companies will attempt to limit their coverage for intra-family torts, either by contract with individual insureds or by seeking legislative relief.

C. EXERCISE OF PARENTAL AUTHORITY

The first of the two exceptions to parental liability established in *Goller* include situations "where the alleged negligent act involves an exercise of parental authority over the child."⁸⁵ As explained in a recent decision by the Wisconsin court, this exception is concerned with the parent's freedom to discipline his child.⁸⁶ All three states which have adopted the *Goller* test have modified it to provide for immunity only "where the alleged negligent act involves an exercise

⁸⁴N.Y. INS. LAW § 167 (3) reads in full: No policy or contract shall be deemed to insure against any liability of an insured because of death of or injuries to his or her spouse or because of injury to, or destruction of property of his or her spouse unless express provision relating specifically thereto is included in the policy."

⁸⁵*Goller v. White*, 122 N.W.2d at 198.

⁸⁶*Thoreson v. Milwaukee & Suburban Transport Co.*, 56 Wis. 2d 231, 201 N.W.2d 745, 753 (1972).

of *reasonable* parental authority over the child (emphasis added)."⁸⁷ For practical purposes, this would seem to be indistinguishable from the position taken by the California court in *Gibson*.

The language in *Gibson* suggests that the prevention of abuses of discipline was the court's primary concern when it attempted to circumscribe parental immunity by the 'reasonable and prudent parent' test. This concern may be found in its rejection of "the implication of *Goller* that within certain aspects of the parent-child relationship, the parent has carte blanche to act negligently toward his child"⁸⁸ and its assertion 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."⁸⁹

In so far as the exercise of authority is concerned, the *Gibson* test would seem to pose few problems. Historically, there have always been special relationships in which a wide latitude was allowed for discipline, including parent-child, teacher-student, military officer-subordinate, and ship captain-crewman.⁹⁰ In most cases, the person exercising the discipline has been required to impose it in a reasonable fashion, but in the case of the parent-child relationship in a jurisdiction with complete immunity, the only penalties to which the parent was subject were criminal. However, civil liability could be imposed for excesses of discipline in those states which adopted the exception to parental immunity for torts involving willful or intentional injury to the child, as California did in *Emery v. Emery*.⁹¹ The net result is that *Gibson v. Gibson* would not seem to alter the general rule of parental liability in the case of intentional infliction of harm, except to make more explicit the requirement for reasonableness.

Situations in which negligent injury will occur in the exercise of discipline should be uncommon. In such cases, the *Gibson* test should prove to be identical to the standard used to measure negligence in general. Thus, if the parent inadvertently grabs a stick with a protruding nail to paddle his child, it would seem that he would remain immune from suit unless it could be concluded that a reasonable and prudent individual should have been able to foresee the

⁸⁷*Silesky v. Kelman*, 281 Minn. 431, 161 N.W.2d 631 (1968); *Rigdon v. Rigdon*, 465 S.W.2d 921 (Ky. App., 1970); *Plumley v. Klein*, 388 Mich. 1, 199 N.W.2d 169 (1972).

⁸⁸*Gibson v. Gibson*, 3 Cal. 3d at 921, 479 P.2d at 652-53, 92 Cal. Rptr. at 292-93.

⁸⁹*Id.* at 921, 479 P.2d at 653, 92 Cal. Rptr. at 293.

⁹⁰See discussion in PROSSER, LAW OF TORTS, 136-138, 4th ed. (1971).

⁹¹*Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 219 (1955). "... the parent has a wide discretion in the performance of his parental functions, but that discretion does not include the right wilfully to inflict personal injuries beyond the limits of reasonable parental discipline." 45 Cal. 2d at 430, 289 P.2d at 224.

possible injury and would have done otherwise in the same circumstances.

In the ten years since *Goller* was decided, no jurisdiction abrogating parental immunity has been presented with a case at the appellate level involving negligence in the exercise of parental authority, and it seems unlikely that many such cases will arise.

D. EXERCISE OF PARENTAL DISCRETION

Without question most of the difficult problems which have arisen — and will likely continue to arise both in California and elsewhere — involve the second *Goller* area of immunity: "Where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care."⁹² It is these situations which have provoked the most heated dissents from judges opposed to the abrogation of parental immunity,⁹³ which have been most discussed by commentators,⁹⁴ and which have been the subject for all of the decisions interpreting the exceptions to parental liability.⁹⁵

With one exception, the decisions to date would at least seem to agree that driving a motor vehicle is not conduct for which the parent can claim immunity.⁹⁶ Even if the parent and child were en route to the child's dentist, it would seem to represent a rather severe interpretation of the second *Goller* exception to permit the parent to escape liability for an accident caused by his negligence by resort to a plea that the trip was an exercise of ordinary parental discretion with respect to medical and dental services. In any event, an Illinois court of appeal refused to concede that "the operation of a motor vehicle with minor children as passengers must necessarily be outside the family relationship. In a modern society," concluded the court, "the motor vehicle plays an intimate and necessary part in the accomplishment of many family purposes."⁹⁷ The decision was the outgrowth of the rather restrictive rule stated in *Schenk v. Schenk* which pro-

⁹²Both Minnesota and Michigan adopted the exact language of the *Goller* court. *Silesky v. Kelman*, 161 N.W.2d at 638; *Plumley v. Klein*, 199 N.W.2d at 173. The Kentucky test provides for immunity "where the alleged negligent act involves the exercise of ordinary parental discretion with respect to provisions for the care and necessities of the child." *Rigdon v. Rigdon*, 465 S.W.2d at 923.

⁹³See, e.g., dissenting opinion of McFarland, J., in *Streenz v. Streenz*, 106 Ariz. 86, 471 P.2d 282, 285-90 (1970).

⁹⁴Galligan, *The Balance Between Individual Rights and Family Preservation: The Future of the Parent-Child Immunity Doctrine in Texas*, 4 ST. MARY'S L.J. 48, 54-57 (1972); Conklin, *Parent and Child — Negligence — Abrogation of the Parental-Immunity Rule*, 1964 WISC. L. REV. 714, 718-22 (1964)

⁹⁵See cases cited *supra*, notes 26, 73 and 112.

⁹⁶*Hebel v. Hebel*, 435 P.2d 8 (Alaska, 1967); *Silesky v. Kelman*, 281 Minn. 431, 161 N.W.2d 631 (1968); *Rigdon v. Rigdon*, 465 S.W.2d 921 (Ky. App., 1970).

⁹⁷*Johnson v. Myers*, 2 Ill. App. 3d 844, 277 N.E.2d 778, 779-780 (1972).

vides for continued parental immunity in Illinois for any conduct "arising out of the family relationship and directly connected with the family purposes and objectives."⁹⁸ This is perhaps the type of arbitrary distinction which the California court was attempting to avoid when it established its 'reasonable and prudent parent' standard rather than a more carefully defined test such as those in Illinois and states following *Goller*.

The most relevant guidance concerning the second *Goller* exception may be found in a series of five decisions by the Supreme Court of Wisconsin.⁹⁹ In *Lemmen v. Servais* the court was faced with the question of whether parents' failure to instruct their child about safety procedures for leaving a school bus represented an exercise of ordinary parental discretion with respect to "other care" of their child. The court concluded that the parents would be immune from suit on the ground that instructions of this nature were within a protected area of parental discretion as to the child's care.¹⁰⁰

Although the court used a number of justifications, including the disfavored argument that maintenance of such suits might disrupt family harmony and unity, the real basis for the decision seems to be the recognition that it would be an unfair and impossible burden on parents to expose them to liability for each of the thousands of parental acts and omissions which occur during the two decades of a child's development.¹⁰¹ The court attempted to distinguish between those obligations peculiar to the parental relationship and those which are owed to mankind in general. The substance of the decision was that children should be permitted to recover damages for injuries resulting from negligent acts outside the parental relationship, but that the parents should not be subject to legal action for commonplace failures in performance of their parental duties.¹⁰²

Three of the other four Wisconsin cases involved alleged parental negligence in the failure to supervise a child outside the home. In each case, the court rejected the argument that supervision of a child's play constituted an exercise of parental discretion with respect to "other care".

In *Cole v. Sears Roebuck & Co.*,¹⁰³ the question was whether a parent was negligent in failing to supervise her child at play in a

⁹⁸ 241 N.E.2d 12, 15.

⁹⁹ See *supra*, note 73.

¹⁰⁰ *Lemmen v. Servais*, 39 Wis.2d 75, 158 N.W.2d 341, 343.

¹⁰¹ Said the court: "A new and heavy burden would be added to the responsibility and privilege of parenthood, if within the wide scope of daily experiences common to the upbringing of children a parent could be subjected to a suit for damages for each failure to exercise care and judgment commensurate with the risk." *Id.* at 344.

¹⁰² *Id.*

¹⁰³ 47 Wis. 2d 629, 177 N.W.2d 866 (1970).

neighbor's back yard and partially responsible for the child's injury on a swing set. The court declared that parental immunity would not be automatically conferred simply because "the negligence arises out of an 'essentially parental' act." To do so, said the court, "would give immunity the same breadth and scope as in those jurisdictions which carved out another exception to the rule of immunity premised on whether the negligent act was an activity intimately associated with the parent-child relationship."¹⁰⁴

The Wisconsin court again distinguished two types of parental obligations: (1) those legal duties which society imposes on a parent such as providing a child with food, housing, medical and dental services and (2) those which are not essentially concerned with providing a child with such similar necessities.¹⁰⁵ Thus, in *Lemmen v. Servais*, the parent was immune from suit because his negligence was related to his legal obligation to ensure the child's basic education. With respect to supervision of a child's play, however, no analogous legal obligation peculiar to parenthood is imposed, and, in *Cole v. Sears Roebuck*, the parent could claim no immunity for his negligence.

The same logic prevailed in *Thoreson v. Milwaukee & Suburban Transport Co.*,¹⁰⁶ where the parent negligently left her three-year-old son alone in the living room, and the child wandered into the street where he was hit by a car. The court rejected the mother's attempt to bring herself under *Lemmen v. Servais* by claiming that her negligence consisted not in supervision of the child but in "failing to educate her child not to go out of the house and onto a busy street."¹⁰⁷ Regarding the second *Goller* exception, the court said:

... the exception does not extend to the ordinary acts of upbringing, whether in the nature of supervision or education, which are not of the same legal nature as providing food, clothing, housing, and medical and dental services. The care sought in the exclusion is not the broad care one gives to a child in day-to-day affairs. If this were meant, the exclusion would be as broad as the old immunity was. The exclusion is limited to legal obligations, and a parent who is negligent in other matters cannot claim immunity simply because he is a parent.¹⁰⁸

In both *Thoreson* and the other recent Wisconsin case, *Howes v. Hansen*,¹⁰⁹ the court indicated that it would interpret the language of

¹⁰⁴ *Id.* at 868.

¹⁰⁵ *Id.* at 869.

¹⁰⁶ 56 Wis. 2d 231, 201 N.W.2d 745 (1972).

¹⁰⁷ *Id.* at 753.

¹⁰⁸ *Id.*

¹⁰⁹ 56 Wis. 2d 247, 201 N.W.2d 825 (1972). A mother was held to be liable for negligence in failing to properly supervise her child, permitting him to wander into the front yard where he was seriously injured by a power mower.

the second *Goller* exception strictly. If the parent can show that his acts "involve the discharge of a parent's duty to provide food, clothing, housing, medical and dental services (or) other care," then he is entitled to immunity, apparently without regard to the degree of his culpability. The Wisconsin court's willingness to engage in fine line-drawing was revealed most clearly in *Thomas v. Kells*¹¹⁰ where the issue was reduced to whether a child could maintain an action against his parent for failure to properly supervise the child and prevent him from falling down a stairway. The crucial question, unresolved by the court because of a lack of essential facts before it, was whether the stairway at the rear of the building was part of the family's home. Apparently if the stairway was found to be within the family domicile, the parents would be permitted to claim immunity since supervision of the child would become "an exercise of ordinary parental discretion" with respect to the provision of "housing." The complications which might arise in such a consideration were indicated in a lengthy set of hypothetical questions posed by the Wisconsin court:

Does such reference under all circumstances include a basement to attic stairway used in common with other tenants and not under the parents' control? Is it material whether or not the stairway is an only or an alternative method of ingress and egress to the parental premises? Is a rear stairway part of the parental home only as to that portion that leads to the outside door of the duplex? Or, is the portion of the stairway leading to the apartments of other tenants or to the attic also to be included in the definition of parental home or housing? If so, what are the limits, if any, to the 'exercise of ordinary parental discretion' in parental permission allowing a three-year-old to proceed down a defective stairway?¹¹¹

The exception involving an exercise of ordinary parental discretion with respect to the provision of housing has also been considered by the Supreme Court of Minnesota, which adopted the *Goller* test in 1968. In *Cherry v. Cherry*,¹¹² a nine-month-old child received severe burns when she placed an electrical extension cord in her mouth. There was nothing defective about the lamp, cord, or the socket, and the only conceivable act of negligence was leaving the child unattended in the living room for about two minutes. The Minnesota court declared that the act of using an extension cord for a lamp in the living room is an act of ordinary parental discretion with respect to housing and other care, and concluded that "public policy demands that the parent be immune from (such) claims of negligence."¹¹³

¹¹⁰ 53 Wis. 2d 141, 191 N.W.2d 872 (1971).

¹¹¹ *Id.* at 875.

¹¹² *Cherry v. Cherry*, ___ Minn. ___, 203 N.W.2d 352 (1972).

¹¹³ *Id.* at 353.

IV. CONCLUSION

Perhaps the most enlightening aspect of the Wisconsin cases is the extent to which they endorse the validity of the California court's concern in *Gibson* that adoption of a *Goller*-type formula "will inevitably result in the drawing of arbitrary distinctions about when particular parental conduct falls within or without the immunity guidelines."¹¹⁴ Of even greater concern is the fact that if a parent is able to bring himself under the protective cloak of one of the parental immunity exceptions, he may escape liability regardless of the degree of his negligence.¹¹⁵ A logical extension of *Lemmen v. Servais*, for example, is that the parent's discretion to educate might provide him with immunity even if he instructs his child that "it is perfectly proper to cross a street in the middle of the block as long as you are sure that you can outrun any oncoming cars." And from *Thomas v. Kells*, one is left with the impression that a parent might claim immunity from liability for a child's injury on a defective interior stairway, regardless of the parent's gross negligence in knowingly allowing it to remain in a dilapidated condition for an extended period. When faced with such possibilities, one is tempted to conclude that the California court has provided a highly preferable alternative to a *Goller*-type test.

The *Gibson* test is not without its own potential abuses, however. Just as the *Goller* test may overly protect the parent, so may ill-considered applications of the *Gibson* test expose him to liability where he should be immune. Particularly with respect to matters of parental discretion, the family may be exposed to a lengthy and unpleasant trial over any one of the thousands of judgments, acts or omissions which a parent is called on to make in a child's minority. There is much wisdom in the warning of the dissenting opinion to the Arizona case abrogating immunity:

A vacuum cleaner forgetfully kept near an entrance; an open, live toaster wire carelessly ignored by the do-it-yourself father; a tea-kettle or pot of boiling water unthinkingly left within the reach of a toddler, all become the elements of a suit by the infant child against his parents. It takes but little imagination to conceive of almost unlimited examples. Liability lurks in every corner of the household.¹¹⁶

The weakness of the *Gibson* test is that trial judges may habitually err on the side of caution, preferring to let all matters go to trial

¹¹⁴ *Gibson v. Gibson*, 3 Cal. 3d at 922, 479 P.2d at 653, 92 Cal. Rptr. at 293.

¹¹⁵ The second objection in *Gibson* to the *Goller* test voices a similar concern: the "intolerable . . . notion that if a parent can succeed in bringing himself within the 'safety' of parental immunity, he may act negligent with impunity." *Id.*

¹¹⁶ Dissenting opinion of McFarland, J., in *Streenz v. Streenz*, 106 Ariz. 86, 471 P.2d 282, 286 (1970).

rather than ruling as a matter of law that the defendant simply has done nothing more than any reasonable and prudent parent would have done in the same circumstances. Without a judicious exercise of discretion, California may find itself in the same position as those states which are claimed to have abrogated parental immunity entirely.¹¹⁷ Of these states rejecting all immunity, one commentator has suggested that a child might properly sue his parent "for damage caused by the parent's negligent failure to have a cavity filled in the child's tooth."¹¹⁸

Although the California test has been recognized by subsequent courts abrogating immunity,¹¹⁹ and praised by some commentators,¹²⁰ it is noteworthy that none of the five states to abolish parental immunity since California did so has shown any interest in adopting it. In view of the shortcomings of the *Goller* test and the possible uncertainties of the *Gibson* standard, it may well be that the wisest course has been charted by those jurisdictions which have abolished parental immunity but have refused, for the present, to establish any guidelines at all for situations in which immunity should be retained.¹²¹

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¹¹⁷ See *supra*, note 27.

¹¹⁸ Belzer, *Child v. Parent: Erosion of the Immunity Rule*, 19 HAST L. J. 201, 219 (1967).

¹¹⁹ Rigdon v. Rigdon, 465 S.W.2d 921 (Ky. App., 1970); Falco v. Pados, 444 Pa. 372, 282 A.2d 351 (1971); Plumley v. Klein, 388 Mich. 1, 199 N.W.2d 169 (1972).

¹²⁰ Winchester, *Streenz v. Streenz: The End of an Era of Parental Tort Immunity*, 13 ARIZ. L. REV. 720, 742-43 (1971); MacCartee, *Gibson v. Gibson: California Abrogates Parental Tort Immunity*, 7 CALIF. WEST. L. REV. 466, 476-79 (1971); Stone, *Parental Immunity: California's Answer*, 8 IDAHO L. REV. 179, 187 (1971).

¹²¹ See *supra*, note 28.