

# Negligent Parental Supervision as Grounds for Contribution in Tort: The Case for Minimal Parental Liability

*Parents have traditionally enjoyed a broad immunity from injury suits brought by their children. The recent erosion of this immunity rule has led to a rise in the standard of care which parents owe to their children. This often allows defendants to partly absolve themselves from liability for negligently injuring a child by claiming contribution from parents based on their alleged negligent supervision of the child as a contributing cause of the injury. This, however, leads to excessive intrusion into parental child-rearing decisions. This article suggests a standard of care for parental supervision which reconciles society's interest in preserving parental discretion with the right of co-defendants to an apportionment of liability.*

"[A]ccidents will occur in the best regulated families. . . ."<sup>1</sup>

The manager of an apartment complex leaves a container of sulphuric acid in a trash receptacle. While playing, two children who live in the complex retrieve the container from the trash. One of them, a ten-year-old boy, is burned when his playmate throws the container to him. The boy's parents file a negligence suit against the manager. In response, the manager files a claim for contribution alleging that the parents' negligent failure to supervise, instruct, and control their son was a contributory cause of the injury.<sup>2</sup>

Two decades ago the manager probably would not have filed a claim for contribution. If he had, the court would have dismissed it based on parents' traditional immunity from injury suits brought by their children. The absence of the child's primary cause of action against the parents precluded the claim for contribution because the right to contribution depends on the parents'

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<sup>1</sup> C. DICKENS, *DAVID COPPERFIELD* 396 (Wash. Square Press ed. 1961).

<sup>2</sup> *Bell v. Schwartz*, 422 F. Supp. 275 (D. Minn. 1976).

failure to perform a legal duty owing to the child.<sup>3</sup> Thus, the parents' immunity also prevented non-family member defendants from bringing contribution claims based on negligent parental supervision.

Recently, however, several courts have abandoned this broad immunity rule in favor of a more restrictive one,<sup>4</sup> recognizing only certain types of parental conduct as deserving of legal protection when it results in injury to the child.<sup>5</sup> As a consequence of the erosion of the parental immunity doctrine, courts are beginning to permit contribution claims based on negligent parental supervision—such as that described in the opening hypothetical. Recognition of such claims, however, forces judges and juries to intrude into the family relationship and second-guess routine parental decisions concerning the rearing of children.<sup>6</sup> This intrusion conflicts with the general legal and social notion that the parent-child relationship should be free from the law's directives and sanctions.<sup>7</sup> The law needs a standard of care for parental supervision that will reconcile the societal interest in freedom of child-raising decisions with the right of co-defendants to an apportionment of liability.

This article critically examines the ramifications of allowing negligent parental supervision as grounds for contribution. The article first explores the legal basis for parents' traditional immunity from personal injury lawsuits brought by their children. It then shows how the recent erosion of that immunity, and the correlative rise in the standard of care that parents owe to their children, has often permitted tort defendants to partially exculpate themselves from liability for negligently injuring a child. The article discusses the tension between standard tort theories of recovery and the strong public policy against intrusion into the parenting process. This article concludes by suggesting a standard which permits a balancing of these conflicting interests in specific cases.

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<sup>3</sup> *Holodook v. Spencer*, 36 N.Y.2d 35, 51, 324 N.E.2d 338, 346, 364 N.Y.S.2d 859, 872 (1974).

<sup>4</sup> See, e.g., *Gibson v. Gibson*, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); *Goller v. White*, 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

<sup>5</sup> See, e.g., *Streenz v. Streenz*, 106 Ariz. 86, 471 P.2d 282 (1970); *France v. APA Transp. Corp.*, 56 N.J. 500, 267 A.2d 490 (1970).

<sup>6</sup> See notes 49-50 & 65-68 and accompanying text *infra*.

<sup>7</sup> See *Holodook v. Spencer*, 36 N.Y.2d 35, 50, 324 N.E.2d 338, 346, 364 N.Y.S.2d 859, 871 (1974); *Feshbach & Feshbach, Child Advocacy and Family Privacy*, 34 J. Soc. ISSUES 168, 168 (1978).

## I. THE PARENTAL IMMUNITY DOCTRINE

Prior to 1891, no English or American Court considered a cause of action for personal injuries between a parent and a minor child.<sup>8</sup> When American courts did address the issue, they ruled that children could not sue for injuries inflicted by their parents, thus creating the doctrine of parental immunity.<sup>9</sup> The rule eventually gained acceptance in nearly every American jurisdiction.<sup>10</sup>

The parental immunity doctrine is premised on the assumption that allowing children to maintain injury suits against their parents will disrupt and weaken the basic family relationship.<sup>11</sup> Courts recognized the parents' obligation to care for, discipline, and control their minor children<sup>12</sup> and were reluctant to impose a rule of liability which they felt would discourage parental fulfill-

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<sup>8</sup> McCurdy, *Torts Between Parent and Child*, 5 VILL. L. REV. 521, 527 (1960).

<sup>9</sup> The case which originally stated the doctrine was *Hewellette v. George*, 68 Miss. 703, 9 So. 885 (1891). The minor plaintiff in *Hewellette*, although married, was separated from her husband and lived with her mother. The mother maliciously confined the plaintiff to an insane asylum in order to obtain her property. In denying the daughter the right to maintain a false imprisonment action against her mother, the Mississippi Supreme Court stated that

so long as the parent is under obligation to care for, guide, and control, and the child is under a reciprocal obligation to aid and comfort and obey, no such action as this can be maintained. The peace of society, and of the families composing society and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress at the hands of the parent.

*Id.* at 711, 9 So. at 887. The court cited no precedent to support this new rule of parental immunity. Apparently no precedent then existed. See text accompanying note 8 *supra*.

<sup>10</sup> The courts in Idaho, Kansas, South Dakota, and Utah have never determined the availability of parental immunity. Alaska, Hawaii, and North Dakota recognized a cause of action in their first cases involving parent-child tort suits. *Hebel v. Hebel*, 435 P.2d 8 (Alas. Sup. Ct. 1967); *Peterson v. City and County of Honolulu*, 51 Haw. 484, 462 P.2d 1007 (1970); *Nuelle v. Wells*, 154 N.W.2d 364 (N.D. Sup. Ct. 1967). There are no state court decisions in Vermont on this issue. The federal district court, however, has held that Vermont courts would allow an action when the child's injury occurred in an auto accident and the parent was covered by insurance. *Xaphes v. Mossey*, 224 F. Supp. 578 (D. Vt. 1963). See Comment, *The Vestiges of Child-Parent Tort Immunity*, 6 U.C. DAVIS L. REV. 195, 196 (1973); Comment, *The Demise of Parent-Child Tort Immunity*, 12 WILLAMETTE L.J. 605, 606 (1975-76).

<sup>11</sup> See, e.g., *Falco v. Pados*, 444 Pa. 372, 375, 282 A.2d 351, 353 (1971).

<sup>12</sup> *Rodebaugh v. Grand Trunk W.R.R. Co.*, 4 Mich. App. 559, 562, 145 N.W.2d 401, 403 (1966); *Hewellette v. George*, 68 Miss. 703, 711, 9 So. 885, 887 (1891).

ment of these duties.<sup>13</sup> Courts also feared that allowing children to sue their parents for injuries would create tension and discord within the family.<sup>14</sup> Yet courts extended the immunity to *all* parental conduct<sup>15</sup> without regard to whether family disharmony or interference with basic parental child-rearing decisions was likely to result.<sup>16</sup>

Recently, however, many courts have discarded the parental immunity doctrine in those cases where its underlying rationale is invalid.<sup>17</sup> These courts have carved out several exceptions to the doctrine of parental immunity.<sup>18</sup> First, courts will often withhold immunity where the parent's act is not uniquely related to the parent-child relationship. For example, when a child is injured in an automobile accident as a result of the parent's negligent driving, courts often permit the action because negligent operation of an automobile does not involve parental discretion.<sup>19</sup> Similarly,

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<sup>13</sup> *Rodebaugh v. Grand Trunk W.R.R.*, 4 Mich. App. 559, 562, 145 N.W.2d 401, 403 (1966); *Matarese v. Matarese*, 47 R.I. 131, 132-33, 131 A. 198, 199 (1925).

<sup>14</sup> *Begley v. Kohl & Madden Printing Ink Co.*, 157 Conn. 445, 449-50, 254 A.2d 907, 910 (1969); *Orefice v. Albert*, 237 So. 2d 142, 145 (Fla. 1970).

Courts also feared that allowing child-parent suits would deplete the family's financial resources. *See, e.g., Orefice v. Albert*, 237 So. 2d 142, 145 (Fla. 1970). Courts reasoned that the family's money should be available for the support of the whole family, especially other children. *See, e.g., Small v. Morrison*, 185 N.C. 577, 582, 118 S.E. 12, 14 (1923). A tort recovery by one child would diminish the funds available to the rest of the family. With the advent of widespread liability insurance, however, this rationale for the parental immunity doctrine has lost much of its strength. *See, e.g., Hebel v. Hebel*, 435 P.2d 8, 12 (Alas. Sup. Ct. 1967). Where insurance is present the family is not impoverished because the insurance proceeds provide a fund to cover the costs of the child's injuries. Moreover, an absence of liability insurance is not a valid reason for denying recovery to the child when the parent is guilty of truly tortious conduct.

<sup>15</sup> *See, e.g., McKelvey v. McKelvey*, 111 Tenn. 388, 77 S.W. 664 (1903) (15-year-old daughter was not allowed to sue father for rape); *Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905) (minor daughter not allowed to sue parents for cruel and inhuman punishment).

<sup>16</sup> *See, e.g., Small v. Morrison*, 185 N.C. 577, 118 S.E. 12 (1923).

<sup>17</sup> *See, e.g., Dunlap v. Dunlap*, 84 N.H. 352, 150 A. 905 (1930).

<sup>18</sup> *See, e.g., Brown v. Cole*, 198 Ark. 417, 129 S.W.2d 245 (1939); *Borst v. Borst*, 41 Wash. 2d 642, 251 P.2d 149 (1952).

<sup>19</sup> *Hebel v. Hebel*, 432 P.2d 8 (Alas. Sup. Ct. 1967); *Streenz v. Streenz*, 106 Ariz. 86, 471 P.2d 282 (1970); *Williams v. Williams*, 369 A.2d 669 (Del. Sup. Ct. 1976); *Sorenson v. Sorenson*, 339 N.E.2d 907 (Mass. Sup. Jud. Ct. 1975); *France v. APA Transp. Corp.*, 56 N.J. 500, 267 A.2d 490 (1970); *Smith v. Kaufman*, 212 Va. 181, 183 S.E.2d 190 (1971); *Lee v. Comer*, 224 S.E.2d 721 (W. Va. Sup. Ct. App. 1976). Because most suits between parent and child arise out of automobile accidents it is likely that an increasing number of courts will recognize this exception in the future.

courts generally allow suit when a child is injured while employed by a parent<sup>20</sup> or while the parent is engaged in a business activity.<sup>21</sup> Courts may also refuse to accord parents immunity where the child is emancipated.<sup>22</sup> In these circumstances, courts need not examine the defendant's "parenting" skills to establish liability.

Courts have also created exceptions where the family harmony rationale for the doctrine does not apply. When parents intentionally<sup>23</sup> or wantonly and willfully<sup>24</sup> inflict an injury on their child, courts will allow suits because there is then little, if any, family harmony left to preserve.<sup>25</sup> Similarly, when one party to the suit is the estate of a deceased parent or child, the family relationship has been dissolved by death and there is no remaining, protectable family harmony.<sup>26</sup>

The exceptions to the parental immunity doctrine demonstrate a judicial awareness of the increased difficulty in supporting a broad application of the doctrine on the basis of the family harmony and parental care, discipline, and control rationales. This is especially so in the light of the recent erosion of all other tort immunities.<sup>27</sup> Still, while courts have little difficulty limiting parental immunity where there is little family harmony, they have continued to struggle with the question of defining which conduct is so unique to the parent-child relationship that it should be free from judicial intrusion.<sup>28</sup>

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<sup>20</sup> See, e.g., *Borst v. Borst*, 41 Wash. 2d 642, 251 P.2d 149 (1952).

<sup>21</sup> See, e.g., *Chase v. New Haven Waste Material Corp.*, 111 Conn. 377, 156 A. 107 (1930).

<sup>22</sup> See, e.g., *Dunlap v. Dunlap*, 84 N.H. 352, 150 A. 905 (1930).

<sup>23</sup> See, e.g., *Brown v. Cole*, 198 Ark. 417, 129 S.W.2d 245 (1939); *Mahnke v. Moore*, 197 Md. 61, 77 A.2d 923 (1951).

<sup>24</sup> See, e.g., *Nudd v. Matsoukas*, 7 Ill. 2d 608, 181 N.E.2d 525 (1956); *Cowgill v. Boock*, 189 Ore. 282, 218 P.2d 445 (1950).

<sup>25</sup> Prosser felt that courts based this exception on the greater culpability involved. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 122, at 866 (4th ed. 1971).

<sup>26</sup> See, e.g., *Brennecke v. Kilpatrick*, 336 S.W.2d 68 (Mo. Sup. Ct. 1960); *Parks v. Parks*, 390 Pa. 287, 135 A.2d 65 (1957). There is also a special need to provide benefits for the child when the parent is no longer alive and, thus, unable to provide for the child's care and support.

<sup>27</sup> See generally W. PROSSER, *supra* note 25, at §§ 131-133.

<sup>28</sup> See, e.g., *Hebel v. Hebel*, 435 P.2d 8, 14-15 (Alas. Sup. Ct. 1967). Compare *Johnson v. Myers*, 2 Ill. App. 3d 844, 277 N.E.2d 778 (1972) (unwilling to concede that operation of an automobile with minor children as passengers is outside the family relationship) with *Sorenson v. Sorenson*, 339 N.E.2d 907 (Mass. Sup. Jud. Ct. 1975) (neither parental authority and discipline nor parental discretion is called into question by an automobile accident case).

Beginning with *Goller v. White*,<sup>29</sup> a 1963 decision of the Wisconsin Supreme Court, several courts<sup>30</sup> have carried these various exceptions to the parental immunity doctrine to their logical conclusion. Recognizing that the exceptions had grown so expansive as to nearly swallow the rule, these courts reduced the scope of the doctrine to its essence: protecting parents from having their "parenting" made subject to judicial review. They achieved this reduction by eliminating the immunity rule and formulating two exceptions. The *Goller* rule allows parent-child tort suits unless the alleged negligent act involves (1) the exercise of *reasonable* parental authority over the child or (2) the exercise of *ordinary* parental discretion with respect to provisions for the child's care and necessities.<sup>31</sup> Although the exceptions are broad,<sup>32</sup> the under-

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<sup>29</sup> 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

<sup>30</sup> *Rigdon v. Rigdon*, 465 S.W.2d 921 (Ky. Ct. App. 1971); *Plumley v. Klein*, 388 Mich. 1, 199 N.W.2d 169 (1972); *Silesky v. Kelman*, 281 Minn. 421, 161 N.W.2d 631 (1968); *Small v. Rockfeld*, 66 N.J. 231, 330 A.2d 335 (1974); *Felderhoff v. Felderhoff*, 473 S.W.2d 928 (Tex. Sup. Ct. 1971).

<sup>31</sup> *Rigdon v. Rigdon*, 465 S.W.2d 921, 923 (Ky. Ct. App. 1971); *Plumley v. Klein*, 388 Mich. 1, 8, 199 N.W.2d 169, 172-73 (1972); *Silesky v. Kelman*, 281 Minn. 431, 442, 161 N.W.2d 631, 638 (1968); *Small v. Rockfeld*, 66 N.J. 231, 241, 330 A.2d 335, 343 (1974); *Felderhoff v. Felderhoff*, 472 S.W.2d 928, 933 (Tex. Sup. Ct. 1971); *Goller v. White*, 20 Wis. 2d 402, 409, 122 N.W.2d 193, 198 (1963). One court refers to these two exceptions as a "'parental functions' immunity rule." *Rodebaugh v. Grand Trunk W.R.R.*, 4 Mich. App. 559, 566, 145 N.W.2d 401, 405 (1966).

<sup>32</sup> Wisconsin has interpreted the exceptions less broadly than have other states following the *Goller* rule. The Wisconsin Supreme Court has ruled that parental supervision does not fit within the scope of either *Goller* exception. The court ignored the first exception and ruled that in order to fall under the second exception "the act must not only be parental in nature but it must also constitute an exercise of discretion with 'respect to the provision of food, clothing, housing, medical and dental services, and other care.'" *Cole v. Sears Roebuck & Co.*, 47 Wis. 2d 629, 634, 177 N.W.2d 866, 869 (1970). The term "other care" does not extend to supervision because it is not of the same legal nature as providing food, clothing, housing, and medical and dental services. *Thoreson v. Milwaukee & Suburban Transp. Co.*, 56 Wis. 2d 231, 242, 201 N.W.2d 745, 753 (1972). Two other states that have adopted the *Goller* rule, however, disagree with this position. They find it logically impossible to distinguish between parental "authority" and parental "supervision." Thus, they hold that parental supervision is covered under the *Goller* exception applicable to exercises of reasonable parental authority. *Bell v. Schwartz*, 422 F. Supp. 257, 259 (D. Minn. 1976); *Paige v. Bing Constr. Co.*, 61 Mich. App. 480, 484, 233 N.W.2d 46, 48-49 (1975). The *Paige* court stated that

[a] parent's exercise of authority over his or her child involves more than discipline. It includes the providing of instruction and education so that a child may be aware of dangers to his or her well being. We find it impossible to separate such general phenomena as au-

lying rule of *Goller* is that most parental conduct is to be judged by an ordinary negligence standard.<sup>33</sup>

The California Supreme Court has subjected parental care to even greater examination than courts applying the *Goller* standard. In the 1971 case of *Gibson v. Gibson*,<sup>34</sup> the court ruled that the negligence standard applies to all parental conduct.<sup>35</sup> Despite citing reasons almost identical to those advanced in *Goller* in support of restricting the scope of the parental immunity doctrine, the *Gibson* court was dissatisfied with the artificiality of the *Goller* approach. It felt that the *Goller* rule would necessarily require arbitrary distinctions as to when particular parental conduct would fall within one of the exceptions.<sup>36</sup> The court also refused to tolerate the notion that parents could act negligently with impunity as long as their conduct came within one of the two

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thority and supervision. In order to adequately supervise a child, every parent knows that some amount of discipline is inextricably involved. The right to exercise authority over a child certainly includes the responsibility to supervise that child's behavior.

*Id.* at 484, 233 N.W.2d at 48-49. The other states that have adopted the *Goller* rule have not yet considered whether a cause of action can be based on negligent parental supervision.

<sup>33</sup> The *Goller* rule has several shortcomings. In some cases it is unclear whether either of the two exceptions applies to the parental conduct in question. In such cases there must be an initial inquiry to determine whether the conduct falls under one of the exceptions, apart from the subsequent question of negligence. See, e.g., *Thomas v. Kells*, 53 Wis. 2d 141, 191 N.W.2d 872 (1971). Another problem with the *Goller* rule is its monolithic nature. If the court finds that one of the exceptions applies then the parent's protection is absolute. If one of the exceptions does not apply then the parental conduct is judged by the negligence standard.

The *Goller* rule may be nothing more than a tautology. Under the *Goller* rule, the first exception is limited to "reasonable" exercises of parental authority. As so limited it provides no real immunity at all. If the parents' conduct is reasonable then it is obvious that they have breached no legal duty owing to their child. It is interesting to note that the *Goller* court, unlike those courts which have adopted its rule, did not limit the first exception to "reasonable" exercises of parental authority. This qualification was probably an oversight by the court, for it is hard to believe that it meant to sanction all exercises of parental authority, no matter how brutal or severe.

The second exception applies only to exercises of "ordinary" parental discretion. Courts may interpret "ordinary" as meaning the same as "reasonable." If they do, the second exception will also not provide any real immunity.

<sup>34</sup> 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971).

<sup>35</sup> *Id.* at 922, 479 P.2d at 653, 92 Cal. Rptr. at 293.

<sup>36</sup> *Id.* This concern is probably a valid one. See note 33 *supra*. Compare *Lemmen v. Servais*, 39 Wis. 2d 75, 158 N.W.2d 341 (1968) with *Thoreson v. Milwaukee & Suburban Transp. Co.*, 56 Wis. 2d 231, 201 N.W.2d 745 (1972).

*Goller* exceptions.<sup>37</sup> California's approach, however, like the *Goller* approach which the *Gibson* court criticized, fails to directly address the difficult and important problem of defining which conduct is so unique to the parent-child relationship that it should be free from judicial intrusion.<sup>38</sup>

It now seems inevitable that more courts will restrict the scope of the parental immunity doctrine.<sup>39</sup> Those courts which have attempted to refine the definition of parents' duty in child-raising care, however, have plagued themselves with arbitrary and ill-considered policy-making. In *Goller* and its progeny, courts have accorded little weight to the family's interest in freedom from legal intrusion, except where the parents' conduct falls into one of the *Goller* exceptions.

## II. NEGLIGENCE PARENTAL SUPERVISION

Courts have traditionally been reluctant to interfere with parents' supervision of their children.<sup>40</sup> The intangible aspects of parental care, such as affection, guidance, and discipline, distinguish the parent-child relationship from other intimate social relationships. Parental supervision of the child's daily activities is

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<sup>37</sup> *Gibson v. Gibson*, 3 Cal. 3d 914, 922, 479 P.2d 648, 653, 92 Cal. Rptr. 288, 293 (1971). The validity of this concern is an open question. See note 33 *supra*.

<sup>38</sup> As yet, no jurisdiction has followed the course charted in *Gibson*. One possible reason for this is the uncertainty as to the consequences of applying this test. One writer suggests that the practical effect of the *Gibson* test may be a complete abrogation of the parental immunity doctrine. This would be the result if trial judges continuously err on the side of caution, permitting all actions to proceed to trial rather than ruling as a matter of law that the parent's acts were those of a reasonable and prudent parent under similar circumstances. Comment, *supra* note 10, at 215-16.

<sup>39</sup> W. PROSSER, *supra* note 25, § 122, at 867-68.

<sup>40</sup> The majority of the courts that have been faced with the question have ruled that "negligent" parental supervision is not an actionable tort. *Paige v. Bing Constr. Co.*, 61 Mich. App. 480, 233 N.W.2d 46 (1975); *Bell v. Schwartz*, 422 F. Supp. 257 (D. Minn. 1976); *Holodook v. Spencer*, 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974); *Fritz v. Anderson*, 148 N.J. Super. 68, 371 A.2d 833 (1977); *Gross v. Sears, Roebuck & Co.*, 158 N.J. Super. 442, 386 A.2d 442 (1978); *Wright v. Wright*, 213 Va. 177, 191 S.E.2d 223 (1972).

There are four states which allow negligent parental supervision claims. California—*Am. Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978); Hawaii—*Peterson v. City and County of Honolulu*, 51 Haw. 484, 462 P.2d 1007 (1970); North Dakota—*Perleberg v. General Tire and Rubber Co.*, 221 N.W.2d 729 (N.D. Sup. Ct. 1974); and Wisconsin—*Cole v. Sears Roebuck & Co.*, 47 Wis. 2d 629, 177 N.W.2d 745 (1970); *Thoreson v. Milwaukee & Suburban Transp. Co.*, 56 Wis.2d 2d 231, 201 N.W.2d 745 (1972); *Howes v. Hansen*, 56 Wis. 2d 247, 201 N.W.2d 825 (1972).

at the heart of the parent-child relationship.<sup>41</sup>

On the other hand, in a contribution action against parents for negligent supervision, courts must respect the right of co-defendants to an apportionment of liability.<sup>42</sup> The policy behind contribution is that those whose negligence causes injury should bear liability in direct proportion to their relative fault.<sup>43</sup> In those states where the action is recognized, parents, when guilty of negligent supervision, must share the financial responsibility for their child's injuries with the non-parent defendant.<sup>44</sup>

The claim that parents have been negligent in supervising their child is brought most often by defendants who have injured the child.<sup>45</sup> Typically, an action is brought on behalf of a child injured at play, and the defendant seeks contribution from the child's parents based on their alleged failure to properly supervise the child.<sup>46</sup> The child remains the plaintiff and the parents are impleaded as co-defendants. Direct actions between parent and child are rare<sup>47</sup> because in such circumstances the parents must

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<sup>41</sup> *Holodook v. Spencer*, 36 N.Y.2d 35, 51, 324 N.E.2d 338, 346, 364 N.Y.S.2d 859, 871 (1974); *Lampman v. Cairo Cent. School Dist.*, 81 Misc. 2d 395, 397, 366 N.Y.S.2d 579, 581 (1975).

<sup>42</sup> See generally *W. PROSSER*, *supra* note 25, § 50.

<sup>43</sup> See *Am. Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 591, 578 P.2d 899, 907, 146 Cal. Rptr. 182, 190 (1978), *citing* *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 813, 532 P.2d 1226, 1232, 119 Cal. Rptr. 858, 864 (1975).

<sup>44</sup> See, e.g., *Thoreson v. Milwaukee & Suburban Transp. Co.*, 56 Wis. 2d 231, 201 N.W.2d 745 (1972). In *Thoreson*, the child plaintiff sustained severe brain damage when he ran in front of a parked car into the path of a bus owned by the defendant. At trial, the jury awarded the child \$35,000 for pain and suffering and \$70,000 for impairment of earning capacity. The boy's mother was awarded \$72,000—\$28,000 for past medical expenses and \$58,000 for future medical expenses. The jury apportioned causal negligence 40% to the mother and 60% to the defendant's driver. Judgment was entered in favor of the boy for \$105,000 and for the mother for 60% of her damages, or \$51,600. The transport company then recovered a judgment against the mother for contribution in the sum of \$42,000—40% of the judgment recovered by the child.

<sup>45</sup> See, e.g., *Am. Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978); *Howes v. Hansen*, 56 Wis. 2d 247, 201 N.W.2d 825 (1972).

The notion of a tort based on negligent parental supervision is a new development in American jurisprudence. Courts, following the parental immunity doctrine, refused to entertain negligence suits between parent and child. Thus, the courts had neither opportunity nor reason to consider whether a parent owed its child a legal duty of reasonable supervision. Only after cases such as *Goller* did it become necessary for courts to consider the extent and effect, if any, of this duty.

<sup>46</sup> See, e.g., *Bell v. Schwartz*, 422 F. Supp. 257 (D. Minn. 1976).

<sup>47</sup> Very few direct actions based on negligent parental supervision have ever

pay for treatment of the child's injuries regardless of liability, and few parents are insured against such claims.<sup>48</sup> This article, therefore, will focus on parents' legal duty to supervise their children only as applied to a contribution action.

Before allowing merely negligent parental supervision to support a contribution claim, courts should note the problems inherent in such a decision. This article will discuss four interrelated areas of concern when applying an ordinary negligence standard to parental supervision claims. The first consideration is judicial intrusion into the parent-child relationship. The second consideration is the importance of allowing a variety of child supervision theories. The third consideration involves the problem of jury bias. The final consideration is the danger that using the ordinary negligence standard could restrict parental discretion and lead to disciplinary constraints harmful to the child's development.

The first danger presented by permitting negligent parental supervision as a ground for contribution is judicial intrusion, a second-guessing of parents' actions. In such a situation, the defendant can draw the parent into the litigation.<sup>49</sup> This intrudes into the family relationship by interjecting a legal dispute over

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been brought. *See* *Reaves v. Horton*, 526 P.2d 304 (Colo. Sup. Ct. 1974); *Graney v. Graney and Ryan v. Fahey consolidated with Holodook v. Spencer* for decision in *Holodook v. Spencer*, 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974). Absent interfamily strife, injured children plaintiffs probably will not bring direct actions unless their parents are insured. Direct action suits are open to possible abuse, however, if brought as a retaliatory lawsuit between estranged parents in which one sues the other on the child's behalf, or by children estranged from their parents who sue upon reaching majority. *Id.* at 49, 324 N.E.2d at 344, 364 N.Y.S.2d at 868.

<sup>48</sup> *Holodook v. Spencer*, 36 N.Y.2d 35, 46-47, 324 N.E.2d 338, 344, 364 N.Y.S.2d 859, 869 (1974). *See also* *Ashdown, Intrafamily Immunity, Pure Compensation, and the Family Exclusion Clause*, 60 IOWA L. REV. 239, 254-55 (1974-75); *Casey, The Trend of Interspousal and Parental Immunity—Cakewalk Liability*, 45 INS. COUNSEL J. 321, 331 (1978). These two articles discuss the widespread and effective use of household or family exclusion clauses in liability insurance policies.

<sup>49</sup> The court in *Kiernan v. Jones*, 73 Misc. 2d 829, 342 N.Y.S.2d 873 (1973) recognized that

[t]his is not the usual case where the court is merely being asked as to whether a defendant should be able to plead a counterclaim against the plaintiff. Thus, . . . the Dole doctrine is being applied to allow a defendant, who is a stranger to the family relationship, the right at his option to initiate litigation between a parent and child even where the family members chose not to exercise their sole option and right to initiate litigation. . . .

*Id.* at 830, 342 N.Y.S.2d at 874.

the propriety of the parents' supervision.<sup>50</sup> Courts, however, are reluctant to examine parents' attempts to raise and discipline their minor children.<sup>51</sup> The law, therefore, has traditionally granted parents wide discretion in making basic supervision decisions. Allowing claims for contribution based on negligent parental supervision, with the resulting judicial intrusion, runs counter to this established legal policy.<sup>52</sup>

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<sup>50</sup> This intrusion presents the additional problem of "nuisance" contribution claims. "[F]ew, if any, accidental injuries to children . . . could not have been prevented, or substantially mitigated, by keener parental guidance, broader foresight, closer protection and better example." *Holodook v. Spencer*, 36 N.Y.2d 35, 44, 324 N.E.2d 338, 343, 364 N.Y.S.2d 859, 867 (1974). Consequently, when the parents bring suit on the child's behalf the defendant will almost always claim contribution based on negligent parental supervision. By threatening to make the contribution claim, defendants, or their insurance companies, may cause the parents to forego bringing suit on behalf of their injured child. *Lastowski v. Norge Coin-O-Matic, Inc.*, 44 App. Div. 2d 127, 133, 355 N.Y.S.2d 432, 439 (1974); *Holodook v. Spencer*, 36 N.Y.2d 35, 46, 324 N.E.2d 338, 344, 364 N.Y.S.2d 859, 868 (1974); *Siegal, Dole v. Dow Chemical Co. and its Ramifications*, in 7B MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED at 231, 251 (1974).

There is also a danger that the parents will only prosecute the child's claim halfheartedly. Realizing that the lower probable award doesn't justify greater effort, parents might secure less effective counsel than would otherwise be the case.

There is also a danger that the parents, fearing the burden of paying a large share of the award would fall on them, might enter into a settlement that is not in the best interests of their child. *Lastowski v. Norge Coin-O-Matic, Inc.*, 44 App. Div. 2d 127, 134, 355 N.Y.S.2d 432, 439 (1974); *Holodook v. Spencer*, 36 N.Y.2d 35, 46, 324 N.E.2d 338, 344, 364, N.Y.S.2d 859, 868 (1974); *Siegal, supra* at 246.

<sup>51</sup> See *Hebel v. Hebel*, 432 P.2d 8, 14 (Alas. Sup. Ct. 1967); *Streenz v. Streenz*, 106 Ariz. 86, 89, 471 P.2d 282, 285 (1970); *Cosmopolitan Nat'l Bank of Chicago v. Heap*, 128 Ill. App. 2d 165, 169-70, 262 N.E.2d 826, 828-29 (1970); *Rigdon v. Rigdon*, 465 S.W.2d 921, 923 (Ky. Ct. App. 1971); *Sorenson v. Sorenson*, 339 N.E.2d 907, 916 (Mass. Sup. Jud. Ct. 1975); *Plumey v. Klein*, 388 Mich. 1, 8, 199 N.W.2d 169, 172-73 (1972); *Silesky v. Kelman*, 281 Minn. 431, 442-43, 161 N.W.2d 631, 638 (1968); *France v. APA Transp. Corp.*, 56 N.J. 500, 507, 267 A.2d 490, 494 (1970); *Lastowski v. Norge Coin-O-Matic, Inc.*, 44 App. Div. 2d 127, 129-30, 355 N.Y.S.2d 432, 434-35 (1974); *Holodook v. Spencer*, 36 N.Y.2d 35, 44-45, 324 N.E.2d 338, 343, 364 N.Y.S.2d 859, 867 (1974); *Falco v. Pados*, 444 Pa. 372, 387, 282 A.2d 351, 357-58 (1971) (Pomeroy, J., concurring); *Felderhoff v. Felderhoff*, 473 S.W.2d 928, 933 (Tex. Sup. Ct. 1971).

<sup>52</sup> Courts retain a rule of limited immunity as a means of enabling parents to effectively discharge their parental duties without fear that a jury will arbitrarily find that a minor error resulting from inexperience constitutes negligence. See, e.g., *Cherry v. Cherry*, 295 Minn. 93, 95, 203 N.W.2d 352, 353-54 (1972); *Lemmen v. Servais*, 39 Wis. 2d 75, 79-80, 158 N.W.2d 341, 344 (1968).

A major difficulty with the negligence standard, which jurisdictions following the *Goller* or *Gibson* rules apply, is that no *objective* child-rearing standard exists. In most areas of tort law, the reasonableness standard serves its purpose "of structuring human activity in accordance with the community's understanding and expectations of proper conduct."<sup>53</sup> Subjecting parental supervision claims to this standard, however, is ill-advised. Vast differences in economic,<sup>54</sup> educational, cultural,<sup>55</sup> ethnic, and religious backgrounds, as well as physical ability, will necessarily result in varying supervising practices among parents.<sup>56</sup> These differences will also result in a multitude of combinations and permutations of parent-child relationships.<sup>57</sup> Such variables will make it especially difficult to determine when parents have acted in a reasonable and proper manner in supervising their children.<sup>58</sup> Thus, the law can offer juries little guidance in judging the reasonableness of parental supervision.

A more significant drawback of the negligence standard is that it requires a jury to intensely scrutinize conduct which courts have traditionally insulated from public examination. The United States Supreme Court has ruled that the parent-child relationship is constitutionally protected from intensive government in-

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<sup>53</sup> *Holodook v. Spencer*, 36 N.Y.2d 35, 49-50, 324 N.E.2d 338, 346, 364 N.Y.S.2d 859, 870 (1974).

<sup>54</sup> See S. AMBRON, *CHILD DEVELOPMENT* 195-96 (1975).

<sup>55</sup> See *Id.* at 196-98.

<sup>56</sup> *Paige v. Bing Constr. Co.*, 61 Mich. App. 480, 485, 233 N.W.2d 46, 49 (1975); *Holodook v. Spencer*, 36 N.Y.2d 35, 50, 324 N.E.2d 338, 346, 364 N.Y.S.2d 859, 870 (1974) *citing* *Holodook v. Spencer*, 43 App. Div. 2d 129, 135, 350 N.Y.S.2d 199, 204-05 (1973).

<sup>57</sup> *Holodook v. Spencer*, 36 N.Y.2d 35, 50, 324 N.E.2d 338, 346, 364 N.Y.S.2d 859, 870 (1974) *citing* *Holodook v. Spencer*, 43 App. Div. 2d 129, 135, 350 N.Y.S.2d 199, 204-05 (1973).

<sup>58</sup> *Id.* Even in this day of specialization and unlimited knowledge, there is no true expert on the subject of raising children. W. HOMAN, *CHILD SENSE* 6 (1969). The parents themselves become the closest things to experts. *Id.* at 9. This compounds the difficulty in a judicial determination of what is reasonable and proper parental supervision.

One writer has gone so far as to suggest that if parents, with adequate financial resources, fail to provide dental services to correct their child's protruding teeth, they would be liable to the child under a reasonableness standard. Comment, *Parent-Child Immunity in Oklahoma: Some Considerations for Abandoning the Total Immunity Shield*, 12 *TULSA L.J.* 545, 555 (1976-77). This suggestion illustrates the difficulty and danger presented by the use of a reasonableness test. While one might agree that such action on the part of the parents is desirable, it is absurd to suggest that the parents could be made to respond to the child in money damages for not having taken such action.

terference.<sup>59</sup> Freedom of personal choice in matters of family life, the court has held, is one of the liberties protected by the due process clause of the fourteenth amendment.<sup>60</sup> Thus, courts recognize the importance of according parents the freedom to supervise children as they see fit,<sup>61</sup> rather than to try to force families into a single "ideal family" mold.<sup>62</sup>

To insure the exercise of this freedom of choice, the law needs to recognize the importance of a variety of child-raising theories. There are undoubtedly many basic human values held in common by all parents. Variety is necessary, however, to allow parents to supervise their children in a way that is most compatible with their values for children's behavior, methods of discipline, and interpersonal style.<sup>63</sup> This is especially so because these values are often tied to religious beliefs, cultural backgrounds, and socio-economic status.<sup>64</sup>

The danger underlying the use of the negligence standard in judging conduct so lacking in objective standards yet so value-laden is the potential for jury bias. In effect, the jury bases the decision on their individual perceptions of *proper* child supervision methods.<sup>65</sup> There is no accurate jury instruction to define "proper" or to characterize a reasonably prudent parent.<sup>66</sup> Be-

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<sup>59</sup> See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923).

<sup>60</sup> *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974). In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) the Supreme Court held unconstitutional under the due process clause of the fourteenth amendment an Oregon law which required all children between the ages of eight and sixteen to attend public schools. The Court struck down the law because it unreasonably interfered with the liberty of parents to direct the upbringing of their children. *Id.* at 534-35.

<sup>61</sup> See, e.g., *Holodook v. Spencer*, 36 N.Y.2d 35, 50, 324 N.E.2d 338, 346, 364 N.Y.S.2d 859, 871 (1974).

<sup>62</sup> See A. CLARKE-STEWART, *CHILD CARE IN THE FAMILY: A REVIEW OF RESEARCH AND SOME PROPOSITIONS FOR POLICY* 81 (1977). In fact, the United States Supreme Court has held certain attempts at standardization to be unconstitutional. In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) the Court stated that "[t]he fundamental theory of liberty upon which all governments in this union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only." *Id.* at 535.

<sup>63</sup> A. CLARKE-STEWART, *supra* note 62, at 81.

<sup>64</sup> See S. AMBRON, *supra* note 54, at 195-98 (1975); *Paige v. Bing Constr. Co.*, 61 Mich. App. 480, 485, 233 N.W.2d 46, 49 (1975).

<sup>65</sup> *Holodook v. Spencer*, 43 App. Div. 2d 129, 135, 350 N.Y.S.2d 199, 204-05 (1973).

<sup>66</sup> *Id.*

cause the jurors must substitute their judgment for that of the parents,<sup>67</sup> the danger exists that the jurors will base their decision on arbitrary and intrusive standards. Moreover, unlike the typical contract, property or personal injury suit, child supervision is an act which most jurors have engaged in and about which they have firmly set views.<sup>68</sup> The jurors' views are based on differing cultural, religious, and socio-economic backgrounds, and parents who do not share those same views may suffer discriminatory judgments.<sup>69</sup> For example, a jury comprised mostly of highly protective parents probably would find liability more readily than a jury comprised of parents whose child-rearing views emphasize a child's independence.<sup>70</sup>

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<sup>67</sup> See *Sorenson v. Sorenson*, 339 N.E.2d 907, 916 (Mass. Sup. Jud. Ct. 1975).

<sup>68</sup> *Holodook v. Spencer*, 43 App. Div. 2d 129, 135, 350 N.Y.S.2d 199, 205 (1973). Jurors will be second-guessing the propriety of parental decisions based on strong personal feelings and almost no legal guidance. These combined circumstances argue against the "unfettered jury discretion" which would result from applying the negligence standard. The "unfettered jury discretion" argument cannot be ignored merely because it is so often used. Everyone, parent and non-parent alike, has deep-rooted ideas about how to raise children. Even with firm judicial guidance, jurors must overcome very personal feelings to judge their peers' negligence. Without such guidance, the jury's task becomes monumental.

<sup>69</sup> *Paige v. Bing Constr. Co.*, 61 Mich. App. 480, 485, 233 N.W.2d 46, 49 (1975); *Holodook v. Spencer*, 43 App. Div. 2d 129, 135, 350 N.Y.S.2d 199, 204-05 (1973). In light of the potential for arbitrary and biased jury verdicts, it is particularly unfair to use a negligence standard to judge "parenting" conduct. Parenthood is essentially on-the-job training. Government bodies may require applicants to demonstrate a certain objective level of competency before engaging in many regulated activities. No state agency, on the other hand, can set an objective child-raising standard; parents are expected to master the formidable task of raising children through a process of trial and error. *W. Homan*, *supra* note 58, at 4-5. Since new parents have meager experience and knowledge on the subject of child rearing, they learn largely from their mistakes, becoming more adept at parenthood with the passage of time. *Id.* at 4. Because no clear standard is known to parents, they are chilled from exercising their parental discretion innovatively. See *Cherry v. Cherry*, 297 Minn. 93, 95, 203 N.W.2d 352, 353-54 (1972). This chilling effect of the negligence standard ultimately harms the child by hindering the development of trust between parent and child. *Felderhoff v. Felderhoff*, 473 S.W.2d 928, 933 (Tex. Sup. Ct. 1971). Because of the myriad day-to-day experiences common to the parent-child relationship, making a parent liable for every act or inadvertance could change substantially the casual and relaxed atmosphere of the family home. See Note, 16 U. KAN. L. REV. 562, 564 (1968).

<sup>70</sup> Jury composition may also result in harmful bias if the large number of persons retired or not employed outside the home who usually sit on juries are prejudiced, albeit subconsciously, against working mothers. Single-parent families and families where both of the parents work will not be able to exercise the

After-the-fact legal monitoring of child-rearing could affect the child supervision conduct of other parents as they become aware of the possible consequences of their own misjudgments. Parents, realizing that they may be held liable for inadequately supervising their children, could feel a strong incentive to prevent the occurrence of such claims.<sup>71</sup> Parents will thus feel constrained to trust their children less and to keep a closer watch over their daily activities,<sup>72</sup> hindering development of independence and responsibility in the child. Authorities agree that child independence must be encouraged because it is absolutely necessary for the normal development of a child's personality.<sup>73</sup> Excessive parental control and overprotection have destructive effects on the development of the child.<sup>74</sup>

Based upon the reasons discussed, it is clear that subjecting parental supervision claims to an ordinary negligence standard is untenable. Supervision, like other basic child-rearing decisions, is uniquely a matter for the exercise of parental judgment.<sup>75</sup> Within certain bounds,<sup>76</sup> parents, as the best judges of the character and development of their child, should have the right to determine how much independence and supervision their child should

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same degree of child supervision as will families where one of the parents remains in the home. See Woods, *The Unsupervised Child of the Working Mother*, 6 DEVELOPMENTAL PSYCH. 41 (1972). One writer suggests, however, that because a large number of jurors are parents themselves and will presumably empathize with the parent defendant, under a negligence standard a finding roughly equivalent to gross negligence may be necessary before the jury will find the parent liable. See Comment, *supra* note 10, at 204.

<sup>71</sup> W. PROSSER, *supra* note 25, § 4, at 23.

<sup>72</sup> *Lastowski v. Norge Coin-O-Matic, Inc.*, 44 App. Div. 2d 127, 136-37, 355 N.Y.S.2d 432, 442 (1974).

<sup>73</sup> See, e.g., D. DINKMEYER, *CHILD DEVELOPMENT: THE EMERGING SELF* 11 (1956); W. HOMAN, *supra* note 58, at 10.

<sup>74</sup> See *Holodook v. Spencer*, 36 N.Y.2d 35, 47, 324 N.E.2d 338, 343, 364 N.Y.S.2d 859, 867 (1974). See also S. AMBRON, *supra* note 54, at 189, 274; K. BERNHARDT, *BEING A PARENT: UNCHANGING VALUES IN A CHANGING WORLD* 86 (1970); D. LEVY, *MATERNAL OVERPROTECTION* 161-99 (1950); Williams, Bean, & Curtis, *The Impact of Parental Constraints on the Development of Behavioral Disorders*, 49 Soc. FORCES 283 (1970-71). These experts agree that excessive parental constraints and overprotection can cause the following: fingersucking, sleep disturbance, fears, negativism, sexually related problems, speech problems, temper tantrums, nervousness, timidity, failure in school, truancy, stealing, lying, difficulty in making friends, malfunctions of the intestinal tract, anxiety, and neurotic dependency patterns.

<sup>75</sup> *Holodook v. Spencer*, 36 N.Y.2d 35, 50, 324 N.E.2d 338, 346, 364 N.Y.S.2d 859, 871 (1974).

<sup>76</sup> See text accompanying notes 80-83 *infra*.

have.<sup>77</sup> Recognition of negligent parental supervision as a ground for contribution, however, leads to judicial intrusion into parental decision-making. This intrusion could put upon parents the heavy burden of having to keep their children under constant surveillance.<sup>78</sup> Such excessive parental control would be harmful to children because of the danger of stifling their emotional and physical development.<sup>79</sup>

### III. THE PROPOSED STANDARD—RECKLESS DISREGARD

Because of the problems of intrusiveness, jury bias, hindering parental discretion, and harming the child's development, courts should set a less stringent standard of care than ordinary negligence in the area of child supervision. This article suggests a standard of care under which parents are liable for inadequate supervision only when their conduct displays a reckless disregard for the child's risk of injury.<sup>80</sup> There are two benefits to establishing such a lenient standard of parental conduct: it insures that arbitrary jury determinations of liability will occur only in those cases in which the parents' conduct was clearly culpable; and it requires dismissal of those cases in which jury bias is most likely to occur, such as where parents' conduct violates only societal norms or popular values.

Prosser defines reckless disregard as highly unreasonable conduct, or an extreme departure from ordinary care, in a situation where a high degree of danger is apparent.<sup>81</sup> To amount to reckless disregard, conduct must be more than a mistake resulting from inexperience or mere thoughtlessness, inadvertance, or simple inattention.<sup>82</sup> In order to be entitled to contribution under this standard, the defendant must prove that the parents failed to adequately supervise their child despite an immediate foreseeable risk of injury.<sup>83</sup>

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<sup>77</sup> *Holodook v. Spencer*, 36 N.Y.2d 35, 50, 324 N.E.2d 338, 346, 364 N.Y.S.2d 859, 871 (1974).

<sup>78</sup> See text accompanying notes 71-72 *supra*.

<sup>79</sup> See notes 73-74 and accompanying text *supra*.

<sup>80</sup> *Cf. Horton v. Reaves*, 186 Colo. 193, 526 P.2d 304 (1974) (liability of a parent can be predicated only upon wilful and wanton misconduct).

<sup>81</sup> W. PROSSER, *supra* note 25, § 34, at 185.

<sup>82</sup> *Id.*

<sup>83</sup> The court in *Hairston v. Broadwater*, 73 Misc. 2d 523, 342 N.Y.S.2d 787 (1973) hinted at this rule when they stated that

[f]actors special to the situation, which put a parent on notice of the need for unusual supervision, or of a child's propensity or susceptibility to danger, or which reflect conduct which in some marked

Reliance on the reckless disregard standard here is supported by its use in analogous circumstances. One such instance is where there is an attempt to hold parents liable for a tort committed by their child. In such case, parents are not liable unless they had notice of a specific type of harmful conduct engaged in by their child and had an opportunity to control the conduct.<sup>84</sup> In other words, the defendant must show that the parents were aware of the dangerous situation created by their child's conduct and that they acted unreasonably in not controlling that conduct when the opportunity arose. Conceptually, a finding of parental liability based on inadequate supervision should not vary where the result is injury to the child rather than injury to a third party. Logically, parents should have no greater duty to protect their children from being injured by a third party than to protect third parties from being injured by their children.

The reckless disregard standard is also used in certain first amendment areas to prevent a chilling effect on the exercise of constitutionally protected rights.<sup>85</sup> Use of the reckless disregard standard in these cases allows freedom of discretion in exercising the right without allowing it to be exercised with impunity. Similarly, by requiring reckless disregard as the standard of care owed by parents in supervising their children, courts may prevent a chilling effect on the constitutionally protected right of parental freedom in child-raising matters.<sup>86</sup>

Additionally, the reckless disregard standard is used to promote freedom of discretion in decision-making. Governmental immunity, like parental immunity, has eroded in recent years.<sup>87</sup>

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way delineates parental culpability, may make out a case at law. Requisite factors of hazard and neglect must offer themselves before a parent can be deemed to have so offended standards of care and responsibility as to have breached a legal duty to a child, or to a stranger.

*Id.* at 533, 342 N.Y.S.2d at 797.

<sup>84</sup> See, e.g., *Linder v. Binder*, 50 Misc. 2d 320, 324, 270 N.Y.S.2d 427, 430, (1966). Most states have imposed by statute vicarious liability upon parents for the malicious, willful, or intentional acts of their children. Most of these statutes, however, are concerned with property damage. See Harper & Kime, *Duty to Control Conduct of Another*, 43 YALE L.J. 886 (1934).

<sup>85</sup> Public officials may not recover damages for a defamatory falsehood unless they prove that the statement was made with actual malice. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964). Actual malice means that the defendant made the statement with knowledge that it was false or with reckless disregard for the truth. *Id.* at 279-80.

<sup>86</sup> See text accompanying notes 59-60 *supra*.

<sup>87</sup> W. PROSSER, *supra* note 25, §§ 131-32.

Courts have retained a rule of limited immunity, however, to protect municipalities and public officials. For example, they are not liable for negligent supervision of employees or subordinates unless their conduct was reckless, wanton, or grossly negligent.<sup>88</sup> This rule protects public officials from being hindered in the discharge of their duties and government from being unduly burdened.<sup>89</sup>

Because of the intricacies of the parent-child relationship it is impossible to state an iron-clad rule as to when parental conduct will amount to reckless disregard. Judges and juries, however, may look to several factors as evidence of a breach of this less stringent duty of supervision owed to the child. Reckless disregard of the risk of injury to the child is strongly evidenced by the immediacy of that risk and the parents' unreasonable failure to alleviate it. Among those factors which determine the immediacy of the risk are, for example, the presence of a dangerous instrumentality, the risk of the child's disobedience, the child's age, and the affirmative nature of the parents' act. The outcome in many cases will depend upon the complex interaction of two or more of these factors.<sup>90</sup>

A primary factor in determining immediacy of the risk is whether the parents have provided their child with a dangerous instrumentality. In cases where they have, parents should run a greater risk of being found liable for negligent supervision.<sup>91</sup> "Negligent" supervision through mere parental inadvertance usually creates a risk of injury only to the child. Because a dangerous instrumentality is involved, the risk and foreseeability of injury to the child are greatly increased.<sup>92</sup> Moreover, where parents provide their child with a dangerous instrumentality they have created a risk of injury to the world at large.<sup>93</sup> Thus, parents who provide their child, an unlicensed driver, with a car, have created an immediate and foreseeable risk and should be liable for any resulting injury.

An additional factor is the risk of the child's disobedience, which creates a need for greater supervision of the child to mini-

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<sup>88</sup> See, e.g., *Leite v. City of Providence*, 463 F. Supp. 585, 591 (D.R.I. 1978).

<sup>89</sup> See W. PROSSER, *supra* note 25, § 132, at 987.

<sup>90</sup> For example, a court might hold an instrument to be dangerous if given to a four-year-old but not if given to a sixteen-year-old.

<sup>91</sup> See *Nolechek v. Gesuale*, 46 N.Y.2d 332, 385 N.E.2d 1268, 413 N.Y.S.2d 340 (1978).

<sup>92</sup> See *Id.* at 340, 385 N.E.2d at 1273, 413 N.Y.S.2d at 345.

<sup>93</sup> *Allstate Ins. Co. v. Reliance Ins. Co.*, 85 Misc. 2d 734, 739-40, 380 N.Y.S.2d 923, 928-29 (1976).

mize the likelihood of injury. In certain situations parental conduct which might otherwise be reasonable becomes inadequate when viewed in light of the child's prior disobedience.<sup>94</sup> Consider the following situation: a family lives near a construction site which contains obvious hazards to children. On several occasions the child has disobeyed the parents' orders and gone to the construction site to play. Under these circumstances, the parents have good reason to believe that their child will disobey them, and they need to exercise a greater degree of supervision over the child.

The age of the injured child is also a factor relevant to the question of whether the parents displayed a reckless disregard for the child's well-being. This is so because it is harder for a younger child to perceive and avoid hazardous situations. Consequently, parents need to exercise closer supervision over younger children in order to safeguard them from serious injuries. Conversely, older children are more capable of looking out for their own well-being, and parents do not need to supervise them as closely. When minors are of sufficient age and maturity to care for their own safety, a court should require a higher degree of culpability in order to hold the parents liable.<sup>95</sup>

The likelihood of liability should increase if an affirmative parental act, rather than mere inattentiveness, produced the risk of injury. One such situation involves actual parental encouragement or direction of the activity that leads to the child's injury.<sup>96</sup> For example, parents instructed their two-year-old child to go outside and pick up certain items on the lawn while the gardener was in the process of mowing the lawn. The child suffered serious injuries when he came into contact with the mower.<sup>97</sup> The parents

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<sup>94</sup> Compare *Cherry v. Cherry*, 95 Minn. 93, 203 N.W.2d 352 (1972) with *Thoreson v. Milwaukee & Suburban Transp. Co.*, 56 Wis. 2d 231, 201 N.W.2d 745 (1972). The *Thoreson* case also demonstrates that location can sometimes be an important factor. There, the fact that the child lived on a busy street, traveled by large vehicles such as buses, compounded the risk of injury presented by his disobedience.

<sup>95</sup> Before *Holodook v. Spencer*, 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974) was decided, two New York trial courts ruled that a contribution claim based on negligent parental supervision would not be allowed if the minor was sixteen years of age or older. At that age, if not mentally or physically deranged, minors are fully capable of providing for their own safety. *Searles v. Dardani*, 75 Misc. 2d 279, 283, 347 N.Y.S.2d 662, 665 (1973); *Holodook v. Spencer*, 73 Misc. 2d 181, 184, 340 N.Y.S.2d 311, 313 (1973).

<sup>96</sup> See, e.g., *Gibson v. Gibson*, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); *Howes v. Hansen*, 56 Wis. 2d 247, 201 N.W.2d 825 (1972).

<sup>97</sup> See *Howes v. Hansen*, 56 Wis. 2d 247, 201 N.W.2d 825 (1972).

made a conscious choice to so act and society expects them to have contemporaneously weighed the risk to their child. The parents were, or should have been, aware of the immediate risk of injury to which they were exposing their child. Consequently, they should be liable for failing to take sufficient precautions to prevent the injury.

Other relevant factors, like those listed above, will generally indicate the immediacy and seriousness of the risk of injury to the child. These factors may relate to the danger inherent in the circumstances which led to the child's injury as well as the child's capacity to recognize and respond to that danger. The child's intelligence and health may be relevant to the question of the child's capacity.<sup>98</sup> Courts must also look to factors which justify the parents' reaction to the risk of harm. These factors include the parents' financial situation, the character of the family home, the parents' particular values and philosophies concerning the supervision of their children, and any other extenuating circumstances that may excuse or justify the parents' conduct.

Requiring parental conduct that amounts to reckless disregard for a finding of liability in the area of supervision is an improvement over the present rules of parent-child tort law. It does not foreclose suit, as happens in states adhering to broad parental immunity rules. In states following *Goller v. White* or *Gibson v.*

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<sup>98</sup> An allegation that a child is handicapped, either physically or mentally, for example, may be a factor for consideration. It should not, however, be sufficient, without more, to allow a claim of negligent parental supervision to go to the trier of fact. Two justifications support this position. First of all

[s]uch cases are not legally distinguishable insofar as the degree of deference which must be given to the judgment of parents. There comes a point in the development of all children, even those suffering impairments and disabilities, when their parents must decide that they must be allowed to engage in certain activities with some independence. No less than in the case of the "normal" child, such a decision is an exercise of judgment . . . .

*Holodook v. Spencer*, 43 App. Div. 2d 129, 136, 350 N.Y.S.2d 199, 206 (1973). Secondly, as one writer points out:

The parent of a blind or crippled or retarded child has burdens enough without being singled out for a special additional monetary liability which the parents blessed with normal children would not confront. Whatever the higher standard imposed on the unfortunate parents, it should not be translated into a monetary liability likely to benefit only an insurance company. A rule which would carve out a special exception for the parent of the handicapped child, not to ease that parent's path but to place yet another obstacle on it, lacks compassion.

Siegal, *supra* note 50, at 253.

*Gibson*, on the other hand, the lower duty of parental care required by this standard will minimize judicial intrusion into child supervision decisions. At the same time, it allows defendants to recover contribution from the parents when the requisite degree of misconduct is proven. The reckless disregard standard will make it more difficult for defendants to satisfy their burden of going forward with the evidence on the claim for contribution. Thus, there will probably be more summary judgments and non-suits in favor of parents. As a result, fewer claims for contribution based on negligent parental supervision will reach the trier of fact. This result is beneficial to the extent that it prevents legal encouragement of excessive parental surveillance of and restraints upon children.<sup>99</sup> It probably will also discourage defendants from bringing such claims as a matter of course.<sup>100</sup> Further, the lower standard of care will reduce the problem of potential jury bias, since even "overprotective" parents on a jury would have to find the defendant parents guilty of reckless disregard before imposing liability upon them. Thus, using reckless disregard as the standard of care in negligent supervision contribution actions reconciles the right of co-defendants to an apportionment of liability with the strong interest in preserving freedom of parental discretion.

### CONCLUSION

Courts are restricting the scope of the traditional parental immunity doctrine and will undoubtedly continue to do so.<sup>101</sup> As they do, they will face claims by defendants who have negligently injured a child for contribution from the plaintiff's parents. These claims will allege negligent parental supervision of the child. Courts should seek to avoid the problems of intrusiveness, jury bias, hindrance of parental discretion, and harm to the child's development that are inherent in allowing such claims. They can accomplish this by establishing reckless disregard as the standard of care owed by parents in supervising their children.

Limiting liability in this manner will protect parents from potential claims for contribution based upon mere inattentiveness. Protection is not extended, however, to willful failures in the

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<sup>99</sup> Of course, the remorse that the parents feel over their child's injury will probably be enough, in and of itself, to assure that they will be more careful in the future. Absent severe parental misjudgment, however, this is a decision for the parents to make for themselves and not one which the law should coerce.

<sup>100</sup> See note 50 *supra*.

<sup>101</sup> See text accompanying note 39 *supra*.

performance of parental duties. The distinction raised is between mere non-supervision and conduct which, under the circumstances, amounts to reckless disregard. To disallow claims where an act of parental misjudgment is severe encourages and condones extremely careless behavior.

The factors suggested by this article provide courts with a basic framework for arriving at a rule that will stabilize the legal relationship of parent-child supervision. The rule also harmonizes the important public policies of parental discretion and family harmony with the right of co-defendants to an apportionment of liability. The ultimate result is that parental liability cannot be predicated solely on a finding that closer parental supervision would have prevented the injury. Parents should be liable only if the injury to their child could have been prevented by closer supervision and it can be concluded, taking all the proper factors into consideration, that the parents acted with reckless disregard in not supervising the child more carefully at the time of the injury.

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