Streenz v. Streenz: The End of an Era of Parental Tort Immunity

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In *Streenz v. Streenz*[1] the Supreme Court of Arizona considered whether an unemancipated minor child may bring a personal injury action based on negligence against its parents. Holding that such an action is not barred by parental immunity,[2] the court joined the position taken by a minority of other courts[3] and a majority of the legal commentators.[4] This break with the majority view[5] can be best understood through a con-

1. 106 Ariz. 86, 471 P.2d 282 (1970).

2. The doctrine of parental tort immunity prevents civil liability from being imposed between parent and child for conduct which would be a tort and result in liability if it occurred between two parties who were not in a parent-child relationship.

3. Jurisdictions which have abrogated parental tort immunity include the following: Hebel v. Hebel, 435 P.2d 8 (Alas. 1967); Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970); Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); Petersen v. City and County of Honolulu, 51 Hawaii 484, 462 P.2d 1007 (1969); Schenk v. Schenk, 100 Ill. App. 2d 199, 241 N.E.2d 12 (1968); Rigdon v. Rigdon, 465 S.W.2d 921 (Ky. 1970); Silesky v. Kelman, 281 Minn. 431, 161 N.W.2d 631 (1968); Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966); France v. A.P.A. Transport Corp., 56 N.J. 500, 267 A.2d 490 (1970); Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969); Nuelle v. Wells, 154 N.W.2d 364 (N.D. 1967); Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963); Smith v. Kauffman, 212 Va. 181, 183 S.E.2d 190 (1971).

4. Journal and treatise writers who have criticized the doctrine of parental tort immunity include: W. PROSSER, LAW OF TORTS § 122 (4th ed. 1971); 1 HARPER AND JAMES, LAW OF TORTS § 8.11 (1956); McCurdy, *Torts Between Parent and Child*, 5 VILL. L. REV. 521 (1960); Comment, *Tort Actions Between Members of the Family—Husband & Wife—Parent & Child*, 26 Mo. L. REV. 152 (1961). A list of other articles condemning the doctrine of parental tort immunity can be found in the dissenting opinion in Hastings v. Hastings, 33 N.J. 247, 254-55, 163 A.2d 147, 151 (1960). *But see* Cooperrider, *Child v. Parent in Tort: A Case for the Jury?*, 43 MINN. L. REV. 73 (1959).

5. Jurisdictions which uphold the doctrine of parental tort immunity include: Owens v. Auto Mut. Indem. Co., 235 Ala. 9, 177 So. 133 (1937); Rambo v. Rambo, 195 Ark. 832, 114 S.W.2d 468 (1938); Trevarton v. Trevarton, 151 Colo. 418, 378 P.2d 640 (1963); Traczyk v. Connecticut Co., 24 Conn. Supp. 382, 190 A.2d 922 (1963); Strahorn v. Sears, Roebuck & Co., 50 Del. 50, 123 A.2d 107 (1956); Denault v. Denault, 220 So. 2d 27 (Fla. App. 1969); Buttrum v. Buttrum, 98 Ga. App. 226, 105 S.E.2d 510 (1958); Smith v. Smith, 81 Ind. App. 566, 142 N.E. 128 (1924); Barlow v. Iblings, 261 Iowa 713, 156 N.W.2d 105 (1968); Downs v. Poulin, 216 A.2d 29 (Me. 1966); Latz v. Latz, 10 Md. App. 720, 272 A.2d 435 (1971); Luster v. Luster, 299 Mass. 480, 13 N.E.2d 438 (1938); Rodebaugh v. Grand Trunk W.R.R., 4 Mich. App. 559, 145 N.W.2d 401 (1966); Durham v. Durham, 227 Miss. 76, 85 So. 2d 807 (1956); Brennecke v. Kilpatrick, 336 S.W.2d 68 (Mo. 1960); Ball v. Ball, 73 Wyo. 29, 269 P.2d 302 (1954) (Montana law), *construing* Conley v. Conley, 92 Mont. 425, 15 P.2d 922 (1932); Pullen v.

sideration of the part that this decision plays in the current trend of increasing interest in protecting members of society from loss caused by another's negligence.

The abrogation of parental tort immunity is not an isolated event which is complete and comprehensible within itself. Instead, it is an integral part of an overall change in public policy. Only through an understanding of the larger concept can the parts be understood and placed in proper perspective. To provide a basis for this understanding, the historical background of the doctrine of parental immunity, the reasons for the demise of the doctrine, and some of the consequences of abrogation must be considered.

HISTORICAL BACKGROUND OF PARENTAL IMMUNITY

In the United States

The doctrine of parental immunity made its first recorded appearance on the American scene in the Mississippi case of *Hewlett v. George*.[6] In *Hewlett* a mother was held to be immune from liability for wrongfully committing her minor daughter to an insane asylum. Without citing any authorities, the Mississippi court barred the action by the daughter against the mother for the public policy reason of preserving domestic tranquility. The court noted that a child's only protection against parental abuse was in the criminal law.

Hewlett was soon followed by two other decisions, both sharing the common element of malicious treatment of a child on the part of a parent. In *McKelvey v. McKelvey*[7] the Supreme Court of Tennessee concluded that domestic tranquility would be served by denying redress to a minor who had been battered severely by her father and stepmother. Similarly, the Supreme Court of Washington in *Roller v. Roller* sought to preserve family peace and harmony by refusing to allow a 15-year-old girl to sue her father for rape.[8] From this sordid beginning, the stage was set for the growth of a doctrine[9] which barred actions between parents and their

Novak, 169 Neb. 211, 99 N.W.2d 16 (1959); Strong v. Strong, 70 Nev. 290, 267 P.2d 240 (1954); Fitzgerald v. Valdez, 77 N.M. 769, 427 P.2d 655 (1967); Capps v. Smith, 263 N.C. 120, 139 S.E.2d 19 (1964); Teramano v. Teramano, 6 Ohio St. 2d 117, 35 Ohio Ops. 2d 144, 216 N.E.2d 375 (1966); Hale v. Hale, 426 P.2d 681 (Okla. 1967); Chaffin v. Chaffin, 239 Ore. 374, 397 P.2d 771 (1964); Parks v. Parks, 390 Pa. 287, 135 A.2d 65 (1957); Castellucci v. Castellucci, 96 R.I. 34, 188 A.2d 467 (1963); Gunn v. Rollings, 250 S.C. 302, 157 S.E.2d 590 (1967); Smith v. Henson, 214 Tenn. 541, 381 S.W.2d 892 (1964); Wallace v. Wallace, 466 S.W.2d 416 (Tex. 1971); Stevens v. Murphy, 69 Wash. 2d 939, 421 P.2d 668 (1966); Groves v. Groves, 152 W. Va. 1, 158 S.E.2d 710 (1968); Oldman v. Bartshe, 480 P.2d 99 (Wyo. 1971).

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

7. 111 Tenn. 388, 77 S.W. 664 (1903).

8. 37 Wash. 242, 79 P. 788 (1905) (civil case which followed the father's conviction on the criminal charge of rape).

9. *See, e.g.*, Mesite v. Kirchenstein, 109 Conn. 77, 145 A. 753 (1928); Elias v. Collins, 237 Mich. 175, 211 N.W. 88 (1926); Taubert v. Taubert, 103 Minn. 247,

minor children for personal torts, whether intentional[10] or negligent[11] in character.

From the outset, the parental immunity doctrine has been subjected to severe criticism. The doctrine was irreconcilable with the fact that a cause of action between parent and child was recognized in matters affecting property and contracts.[12] Arbitrary application of it frequently produced inequitable results. Some of the inequities inherent in the doctrine were dealt with through exceptions to the general rule[13] while other inequities could only be eliminated by abrogation of the rule.[14] The initial retreat was an exception permitting an action against one, such as a stepparent, who merely stood in the place of a parent.[15] There appears, however, to be no discernible difference between the role of a stepparent and a natural parent which could justify such a distinction. Once this exception was made, a series of other decisions increasingly limited the scope of parental immunity.

Practically speaking, the doctrine has been eroded by exception to the point where there is some doubt whether there is a general rule of parental immunity. As exceptions to the general rule of parental immunity, personal tort actions between parent and child are allowed by various jurisdictions when: (1) the child has been emancipated by the parent's surrender of the right to his earnings and services, and to parental control;[16] (2) personal injuries were intentionally inflicted;[17] (3) the act constituted reckless misconduct;[18] (4) the relationship has been termi-

114 N.W. 763 (1908); Sorrentino v. Sorrentino, 248 N.Y. 626, 162 N.E. 551 (1928); Matarese v. Matarese, 47 R.I. 131, 131 A. 198 (1925). For an example of a case where the court was persuaded more by emotion than reason, see Small v. Morrison, 185 N.C. 577, 585-86, 118 S.E. 12, 16 (1923), wherein the court stated:

> If this restraining doctrine were not announced by any of the writers of the common law, because no case was ever brought before the courts of England, it was unmistakably and indelibly carved upon the tablets of Mount Sinai.

10. Miller v. Pelzer, 159 Minn. 375, 199 N.W. 97 (1924); Cook v. Cook, 232 Mo. App. 994, 124 S.W.2d 675 (1939).

11. Hastings v. Hastings, 33 N.J. 247, 163 A.2d 147 (1960); Ball v. Ball, 73 Wyo. 29, 269 P.2d 302 (1954) (applying Montana law).

12. Preston v. Preston, 102 Conn. 96, 128 A. 292 (1925); Lamb v. Lamb, 146 N.Y. 317, 41 N.E. 26 (1895); McLain v. McLain, 80 Okla. 113, 194 P. 894 (1921).

13. See text accompanying notes 16-24 *infra.*

14. For example, assume that a father has two minor daughters residing with him in his home. One child is an unemancipated minor, while the other child is married and therefore an emancipated minor. If an automobile accident occurs due to the father's negligence, the parental immunity doctrine bars an action by the unemancipated child, but not by the married daughter. Streenz v. Streenz, 11 Ariz. App. 10, 12, 461 P.2d 186, 188 (1969), *vacated,* 106 Ariz. 86, 471 P.2d 282 (1970).

15. Brown v. Cole, 198 Ark. 417, 129 S.W.2d 245 (1939); Treschman v. Treschman, 28 Ind. App. 206, 61 N.E. 961 (1901).

16. Martinez v. Southern Pacific Co., 45 Cal. 2d 244, 288 P.2d 868 (1955); Wurth v. Wurth, 322 S.W.2d 745 (Mo. 1959); Glover v. Glover, 44 Tenn. App. 712, 319 S.W.2d 238 (1958).

17. Gillett v. Gillett, 168 Cal. App. 2d 102, 335 P.2d 736 (1959); Wright v. Wright, 85 Ga. App. 721, 70 S.E.2d 152 (1952).

18. Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Cowgill v. Boock, 189 Ore. 282, 218 P.2d 445 (1950).

nated by the death of either parent or child, and the action is brought under a wrongful death[19] or survival statute;[20] (5) the action is for the wrongful death of the other parent[21] or loss of services of another child,[22] the rationale being that these are derivative actions based on the ability of another to bring suit; (6) the child was injured in the course of a business, rather than a personal, activity of the parent;[23] and (7) when the action is broung by a child against his parent's employer for the parent's tort within the scope of his employment.[24]

Whether these exceptions should be viewed as a natural process of judicial refinement[25] or as proof of distaste for the doctrine[26] is a matter of conjecture. After these exceptions are taken into account, however, the general rule of parental immunity seems to be: a living, unemancipated minor child does not have a cause of action against a living, natural parent for a personal negligent tort which did not occur in the course of a business activity, unless the action is for the death of or loss of services of the other parent or another child.

The first major departure from the widely disfavored doctrine occurred in 1963 when parental immunity was abrogated by the Supreme Court of Wisconsin in *Goller v. White*.[27] Exceptions to the abrogation were noted by the court where the alleged negligent act involved (1) an exercise of parental control and authority or (2) an exercise of parental discretion with respect to food and care.[28] In *Goller*, as has become the trend, the court reasoned that the existence of liability insurance had removed the last vestige of justification for a general rule of parental immunity. Moreover, that court demonstrated the strength of its belief that the doctrine of parental immunity should be abrogated notwithstanding a lack of liability insurance. The court held that the parent was not im-

19. Oliveria v. Oliveria, 305 Mass. 297, 25 N.E.2d 766 (1940); Logan v. Reaves, 209 Tenn. 631, 354 S.W.2d 789 (1962).

20. Davis v. Smith, 253 F.2d 286 (3d Cir. 1958) (Pennsylvania law); Brennecke v. Kilpatrick, 336 S.W.2d 68 (Mo. 1960).

21. Johnson v. Ottomeier, 45 Wash. 2d 419, 275 P.2d 723 (1954) (child, as personal representative of deceased mother's estate, allowed to bring an action against father's estate); *accord* Munsert v. Farmers Mut. Auto. Ins. Co., 229 Wis. 581, 281 N.W. 671 (1938) (parents had cause of action against unemancipated minor son for negligence resulting in death of another child).

22. Becker v. Rieck, 19 Misc. 2d 104, 188 N.Y.S.2d 724 (Sup. Ct. 1959) (derivative action by father against unemancipated minor son for personal injuries sustained by another child).

23. Signs v. Signs, 156 Ohio St. 566, 46 Ohio Op. 471, 103 N.E.2d 743 (1952); Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952).

24. Stapleton v. Stapleton, 85 Ga. App. 728, 70 S.E.2d 156 (1952); O'Connor v. Benson Coal Co., 301 Mass. 145, 16 N.E.2d 636 (1938).

25. *E.g.*, Streenz v. Streenz, 106 Ariz. 86, 94, 471 P.2d 282, 290 (1970) (dissenting opinion); Purcell v. Frazer, 7 Ariz. App. 5, 8, 435 P.2d 736, 739 (1967).

26. *E.g.*, Streenz v. Streenz, 106 Ariz. 86, 88, 471 P.2d 282, 284 (1970); Gibson v. Gibson, 3 Cal. 3d 914, 918, 479 P.2d 648, 650, 92 Cal. Rptr. 288, 290 (1971).

27. 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

28. See text accompanying notes 66-68 *infra* for a discussion of what these exceptions include and the justification for them. *See also* text & notes 116-23 *infra*.

mune from a negligence action by the child and at the same time gave effect to an exclusionary clause in the parent's liability insurance policy which excepted liability to any member of the insured's family residing with him.[29]

In Arizona

The historical development of the parental immunity doctrine in Arizona is more susceptible of concise statement. The doctrine was adopted in *Purcell v. Frazer*[30] and was discarded in major part three years later in *Streenz*.[31] As *Purcell* and *Streenz* are indistinguishable on their facts,[32] the demise of parental immunity in Arizona cannot be attributed to any factual distinctions between the two cases. Partial abrogation of the doctrine can be attributed to changes in public policy and in the emphasis placed on various elements in balancing the interests involved.

In *Purcell* the action was brought for the benefit of three minor children against their father for injuries sustained in an automobile accident allegedly caused by his negligence. In opposition to a motion to dismiss the complaint, the plaintiffs submitted an affidavit of the parent attesting to the fact that he had liability insurance. The affidavit indicated that the parent was amicable to having judgment entered against him should he be found to have been negligent. In spite of the attempted cooperation and assurance that domestic tranquility would not be disturbed, it was held that a parent is immune from liability to his unemancipated minor children for negligent driving of an automobile in which the children were riding at the time of the accident.[33] While not bound by precedent, the court relied on decisions in five other jurisdictions which inclined them "to rule in favor of an immunity sufficiently broad to cover the instant fact situation."[34] The many exceptions to the general rule of parental immunity were noted, but any apparent inconsistency attributable to the exceptions was dismissed as evidence of one of the prime functions of a court—making fine distinctions based on the facts of the case before them.

As a closing consideration, the court stated that the standard motor vehicle liability insurance policy covers "loss from liability imposed by law"

29. Goller v. White, 20 Wis. 2d 402, 404, 122 N.W.2d 193, 195 (1963).
30. 7 Ariz. App. 5, 435 P.2d 736 (1967). *See* 9 ARIZ. L. REV. 490 (1968).
31. 106 Ariz. 86, 471 P.2d 282 (1970).
32. Both cases involved an unemancipated minor child injured in an accident allegedly caused by a negligent parent who was covered by automobile liability insurance.
33. Purcell v. Frazer, 7 Ariz. App. 5, 435 P.2d 736 (1967).
34. *Id.* at 7, 435 P.2d at 738. The decisions cited were: Trudell v. Leatherby, 212 Cal. 678, 300 P. 7 (1931); Hastings v. Hastings, 33 N.J. 247, 163 A.2d 147 (1960); Nahas v. Noble, 77 N.M. 139, 420 P.2d 127 (1966); Chaffin v. Chaffin, 239 Ore. 374, 397 P.2d 771 (1964); Stevens v. Murphy, 69 Wash. 2d 939, 421 P.2d 668 (1966). *But see* Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971) (overruling *Trudell, supra*); France v. A.P.A. Transport Corp., 56 N.J. 500, 267 A.2d 490 (1970) (abrogating parental immunity in New Jersey).

upon the insured.[35] The *Purcell* court, however, failed to distinguish clearly between liability in the sense of responsibility and the legal liability which may attach to it. The immunity given a parent from suit by his minor children for personal tort arises from a procedural proscription, usually based on public policy, and not from a lack of violated duty to the child.[36] The defendant in *Purcell*, if proven negligent, was responsible for his child's injury, but the court chose not to impose that responsibility in terms of legal liability. Imposition of liability was precluded due to the court's balancing of the conflicting interests involved and its interpretation of public policy.

In *Streenz* an unemancipated minor child brought an action through a guardian ad litem against her parents for personal injuries sustained in an automobile accident allegedly caused by the negligence of the child's mother. The minor daughter was a passenger in an automobile driven by her mother who was blinded temporarily by the sun and lost control of the car causing it to leave the road and crash into a tree. At trial, the defendants moved for summary judgment on the basis of the parental immunity doctrine. The trial court granted the parents' motion and on appeal to the Arizona Court of Appeals, the decision of the trial court was affirmed.[37]

Vacating the court of appeals opinion, the Supreme Court of Arizona reversed the trial court decision and held that an unemancipated minor child was not barred by parental immunity from bringing an action against her parents for injuries sustained in an automobile accident allegedly caused by the negligent driving of one of the parents.[38] The court offered three major justifications for discarding the doctrine of parental immunity. First, the rationale of the authorities in favor of partial abrogation of the doctrine was more consistent with contemporary conditions and concepts of fairness.[39] Second, the principal basis for parental immunity, the preservation of domestic tranquility, had been undermined by numerous judicial exceptions to the rule[40] and by the almost universal existence of liability insurance in the realm of automobile accidents.[41] Third, the remaining policy reasons for the rule, such as the possibility of fraud and collusion, were outweighed overwhelmingly by the "vital interest of the public in protecting its members from loss caused by another's negligence."[42]

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35. 7 Ariz. App. at 9, 435 P.2d at 740.
36. Brennecke v. Kilpatrick, 336 S.W.2d 68, 73 (Mo. 1960).
37. Streenz v. Streenz, 11 Ariz. App. 10, 461 P.2d 186 (1969), *vacated*, 106 Ariz. 86, 471 P.2d 282 (1970).
38. Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970).
39. *Id.* at 87, 471 P.2d at 283. For a discussion of this point, see text accompanying notes 69-85 *infra*.
40. See text accompanying notes 16-24 *supra*; text & notes 116-23 *infra*.
41. 106 Ariz. at 88, 471 P.2d at 284.
42. *Id.* For a discussion of this point, see text accompanying notes 69-85 *infra*.

In choosing to partially abrogate a judicially created rule because of a change in public policy, the court was not without precedent or specific authority. Substantial support for such action is available in the case law[43] and in an Arizona statute which provides:

> The common law only so far as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people thereof, and not repugnant to or inconsistent with the constitution of the United States or the constitution or laws of this state, or established customs of the people of this state, is adopted and shall be the rule of decision in all courts of this state.[44]

In Arizona, by virtue of the above quoted statute, when the reason for a common-law rule no longer exists, the rule ceases.[45] The basis for the decision in *Streenz* is that the common-law doctrine of parental immunity[46] is no longer consistent with the "necessities of the people." Parental immunity being inconsistent with public policy, encroachments upon the doctrine appropriately lie within the domain of the courts.[47]

Abrogation of the parental immunity doctrine in *Streenz* was only partial since the court stated that the doctrine should be retained for limited purposes, such as when the alleged negligent act involves either (1) an exercise of parental authority over the child, or (2) an exercise of ordinary parental discretion with repect to the provision of food, clothing, housing, medical and dental services, and other care.[48]

The dissent in *Streenz* took exception to the majority's views due to a belief that domestic tranquility might be disturbed even if there was liability insurance to bear the expense of judgment.[49] Additional points enumerated by the dissent were that the complete revision of the doctrine should come only after careful study of the potential results and that the legislature was the proper body for such a study and revision.[50]

By choosing to partially abrogate the doctrine, the court has established its position in the struggle between conflicting concepts of the individual and relational rights and duties of the members of a family.

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43. *See* Windauer v. O'Connor, 13 Ariz. App. 442, 444, 477 P.2d 561, 563 (1970); Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 387, 381 P.2d 107, 109 (1963); Ray v. Tucson Medical Center, 72 Ariz. 22, 36, 230 P.2d 220, 229 (1951).

44. ARIZ. REV. STAT. ANN. § 1-201 (1956).

45. Windauer v. O'Connor, 13 Ariz. App. 442, 444, 477 P.2d 561, 563 (1970).

46. No attempt will be made to discuss whether the doctrine of parental immunity is of English or American origin. A list of authorities which discuss the origin of the doctrine can be found in Gibson v. Gibson, 3 Cal. 3d 914, 915, 479 P.2d 648, 649, 92 Cal. Rptr. 288, 289 (1971).

47. *See* cases cited note 43 *supra.*

48. 106 Ariz. at 89, 471 P.2d at 285, *citing* Goller v. White, 20 Wis. 2d 402, 413, 122 N.W.2d 193, 198 (1963).

49. 106 Ariz. at 89, 471 P.2d at 285. For a discussion of this point, see text accompanying notes 54-60 *infra.* The dissent also expressed the view that the only contemporaneous change in conditions was the existence of liability insurance.

50. For a discussion of the validity of this view, see text accompanying note 114 *infra.*

This position is epitomized by the court's statement that "[o]verwhelmingly weighted against the possibility of [suits disrupting domestic tranquility] is the vital interest of the public in protecting its members from loss caused by another's negligence."[51] Individual rights and duties of the members of the family are to be given equal or greater value than the relationship between a parent and his child.

JUSTIFICATION FOR THE DOCTRINE OF PARENTAL IMMUNITY

A thorough analysis of the doctrine of parental immunity requires that consideration be given to the validity of the various justifications offered in its support. There have been at least seven reasons offered by various courts as justification for barring otherwise valid claims through invocation of the doctrine.[52] Factors which have been considered sufficient to bar a child from suing his parent in tort range from disturbance of domestic tranquility to characterization of the family as a quasi-governmental unit. The primary justifications which have been relied on by the majority of courts are preservation of domestic tranquility, avoidance of fraud and collusion, and maintenance of parental care, discipline and control over the child.[53]

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

52. McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1072-77 (1930); McCurdy, *Torts Between Parent and Child*, 5 VILL. L. REV. 521, 528-29 (1960). *See also* Borst v. Borst, 41 Wash. 2d 642, 650-55, 251 P.2d 149, 153-56 (1952), discussing the reasons advanced by various courts to support the doctrine of parental immunity. The factors which have influenced the courts in applying the parental immunity doctrine are:

(1) Possibility of disturbing the domestic tranquility of the family unit. Purcell v. Frazer, 7 Ariz. App. 5, 435 P.2d 736 (1967); Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891).

(2) Danger of fraud and collusion. Villaret v. Villaret, 169 F.2d 677 (D.C. Cir. 1948) (applying Maryland law); Luster v. Luster, 299 Mass. 480, 13 N.E.2d 438 (1938); Hastings v. Hastings, 33 N.J. 247, 163 A.2d 147 (1960).

(3) Interference with parental care, discipline and control. Mesite v. Kirchenstein, 109 Conn. 77, 145 A. 753 (1928); Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927). *See* Cooperrider, *Child v. Parent in Tort: A Case for the Jury?*, 43 MINN. L. REV. 73 (1959).

(4) Depletion of family funds. It has been contended that to require a parent to pay damages to one child would result in a depletion of the family funds to the detriment of the other children. Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905). *But see* Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966).

(5) Possibility of succession by the tortfeasor to the amount recovered in damages by the injured party. It has been suggested that the parent might inherit, as next of kin, the amount paid in damages in the event of the child's death during minority. Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905).

(6) Analogy to the denial of a cause of action between husband and wife. Mesite v. Kirchenstein, 109 Conn. 77, 145 A. 753 (1928); Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905). *But see* W. PROSSER, LAW OF TORTS § 122, at 865 (4th ed. 1971), which rejects this argument as being totally inapplicable.

(7) Position of the family as a quasi-governmental unit. Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923) (concurring opinion); Matarese v. Matarese, 47 R.I. 131, 131 A. 198 (1925). *But see* Comment, *Parental Immunity—Wisconsin Clarifies the Rule*, 8 ST. LOUIS U.L.J. 247 (1963).

53. W. PROSSER, LAW OF TORTS § 122, at 866 (4th ed. 1971); McCurdy, *Torts Between Parent and Child*, 5 VILL. L. REV. 521, 546 (1960); 9 ARIZ. L. REV. 490, 491 (1968).

Domestic Tranquility

The basis for the domestic tranquility argument has commonly been that recognition of a cause of action on the part of a minor child against his parents would destroy the peace and harmony of the family relationship. On its face this would appear to be a very valid argument and its objective is certainly a worthy goal. Once the argument is removed from merely a conceptual consideration and applied to actual circumstances, however, it loses a great deal of validity.

The risk of disturbing domestic tranquility is much less in a negligence action, since any adverse judgment would usually be satisfied by liability insurance, than it is in a property action where financial responsibility generally falls upon the parent.[54] Yet, the law has long allowed property actions, such as a suit for conversion, between parent and child.[55] Denial of a negligence action may very well result in the precise evils sought to be avoided, namely, disturbance of the peace and harmony of the family. If a child is injured and angry enough to sue his parent, denying the child a legal remedy will neither soothe the child nor promote harmony in the family. Additionally, the family funds will be depleted since the actual damages will have to be borne by the family unit instead of being paid by available liability insurance.[56]

It is possible that a negligence action might be brought where there is no liability insurance to indemnify the negligent parent. Such a suit is, however, highly unlikely since it would not be profitable to prosecute an action against an insolvent defendant when there is little chance of satisfying a judgment.[57] This would seem to be especially true when the suit is within the family unit. Assuming the solvency of the family, the probability that liability insurance exists to indemnify any liability incurred is greatly increased. If, however, an action was brought by a child against his parent who had no insurance, it would appear that there was no domestic tranquility to be disturbed in the first instance.

Two other factors negate the validity of the domestic tranquility argument. First, it is completely anomalous for the law to afford less protection and compensation for injury to personal rights than it does for property rights.[58] If one class of rights is to be protected more than the other,

54. *See* Hebel v. Hebel, 435 P.2d 8 (Alas. 1967); Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970); Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); Self v. Self, 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962).

55. *See* cases cited note 12 *supra.*

56. W. PROSSER, LAW OF TORTS § 122, at 868 (4th ed. 1971).

57. It should be recognized, however, that in Arizona a judgment may be kept alive for at least ten years, if not indefinitely. *See* ARIZ. REV. STAT. ANN. § 33-964 (A) (Supp. 1971-72) (original judgment effective for a period of five years); *Id.* § 12-1611 (1956) (renewal of judgment by action); *Id.* §§ 12-1612, -1613 (1956) (renewal of judgment by affidavit).

58. Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970); Gibson v. Gibson,

greater protection should be given to a child's physical well-being than to his material assets. Second, the concern with disturbance of the peace and harmony of the family unit, as well as with parental control over the child, is completely antithetical to the fear of possible collusion between parent and child.[59] The former assumes that the parties involved are working against each other in disharmony, while the latter assumes a hand-in-hand pursuit of a common objective which is beneficial to both parent and child. Thus, if the defendant is covered by liability insurance, there is a possibility of fraud and collusion, but little likelihood that domestic tranquility and parental control will be disturbed.

The dissent in *Streenz* explored the possible impact on the tranquility and integrity of the family unit which is incurred whenever liability insurance is involved. In such a case, the parent is forced to play the conflicting roles of initiator of the suit and of defendant. When injury to a child occurs through the tortious conduct of the mother or father, these parents would be compelled to decide whether a suit should be instituted for the benefit of the child. Thereafter, the negligent parent would have to assume the role of a defendant who would be required to cooperate in good faith with the liability insurance carrier.[60] This assumption of conflicting roles may not result in a disturbance of domestic tranquility in the sense of animosity between the parent and child, but it could result in collusion and a corresponding breakdown in individual integrity. Deterioration of individual integrity would result in mistrust between members of the family thereby disturbing the unity of the family. While this view has some validity, it does not provide a sufficient basis for barring parent-child suits. Instead it merely brings to light another factor which must be considered.

Fraud and Collusion

It has been contended that to permit an unemancipated minor child to sue his parent for negligent tort would open the door to fraud and collusion, especially where any judgment would ultimately be paid by liability insurance. With financial pressure on the family from numerous sources, a parent with an injured child and liability insurance may be tempted to resort to fraud.[61] Assuming the child is injured under circumstances in which the liability insurance would not be applicable, the parent might fraudulently contend that the injury was sustained under

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).

59. Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955).

60. *See* Carpenter v. Superior Ct., 101 Ariz. 565, 422 P.2d 129 (1966).

61. If a child is to be allowed to sue his parent for negligent tort, it would appear that the parent will be allowed also to sue his minor child since the same justifications traditionally have been offered to bar both types of suit. *See* Streenz v. Streenz, 106 Ariz. 86, 90, 471 P.2d 282, 286 (1970) (dissenting opinion).

circumstances covered by the liability insurance. By so contending, the parent would profit financially since the actual expenses attributable to the injury would be borne by the insurance company instead of by the parent. Additionally, assuming that the injury did occur under circumstances covered by the liability insurance, the parent might be tempted to resort to fraud as to the extent of the injury in order to collect excessive damages from the insurance company. Having paid insurance premiums for several years, the parent may exhibit few qualms about the choice of means for realizing on his investment.[62]

The possibility of fraud and collusion exists to some degree in most negligence actions and when there is insurance to cover the liability, the probability increases.[63] The potential for fraud and collusion is not diminished by a child reaching the age of majority or in some other way attaining emancipation. Yet, an emancipated child can bring a negligence action against his parents while an unemancipated minor child is barred by parental immunity.

To deny a cause of action solely on the basis of the possibility of fraud and collusion inherent in the parent-child relationship implies that all similar causes of action between persons in a sympathetic relationship should be denied. For example, no cause of action for negligence should be allowed between relatives or even between close friends since the possibility of fraud and collusion is no less applicable to these relationships than it is to a parent-child relationship. Based on this type of reasoning, the only cause of action which could be recognized when liability insurance was involved would be between a plaintiff and defendant who were complete strangers and who were infuriated with each other.

Perhaps no other argument better repudiates the fear of fraud and collusion as a justification for parental immunity than does a statement by the Supreme Court of California:

> 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.[64]

The possibility of fraud and collusion does not in itself present a situation in which a cause of action should be denied, but rather one in which we must rely on the ability of the judge and jury to distinguish between fraud-

62. For an example of the high incidence of fraud when insurance is involved, see Paul, *Fighting Fraud: Insurance Companies Join Forces to Combat Fake Accident Claims*, Wall Street Journal, Nov. 1, 1971, at 1, col. 6.

63. *See generally* Comment, *Choice of Law in Arizona: Schwartz v. Schwartz, Something Old, Something New, Something Borrowed . . .* , 11 ARIZ. L. REV. 275, 287 (1969).

64. Klein v. Klein, 58 Cal. 2d 692, 695-96, 376 P.2d 70, 73, 26 Cal. Rptr. 102, 105 (1962).

ulent and valid claims.[65]

Parental Care, Control and Discipline

The final major justification offered for parental immunity is that of preservation of parental care, control and discipline. Even those courts which have abrogated the doctrine have expressed reticence to interfere with this area of the parent-child relationship. It is this justification that made the abrogation of the doctrine only partial in *Streenz*. It is in this area of the family relationship that some immunity must be accorded to enable the parent to discharge the duties which society exacts of him in fulfilling the parental role.[66]

The law imposes a duty on parents to care for and discipline their minor children.[67] The parents are given the legal right to inflict reasonable chastisement on their children for the punishment of faults and the enforcement of parental authority.[68] Cast into a day-to-day relationship and charged with these duties, the parent must continuously exercise his discretion as to the proper course of action both with respect to its effect on the family as a unit and on the child as an individual. These daily decisions concerning the welfare of the family and the child are always subject to human frailty and error. If a parent is to be able to fulfill his role, it is essential that he be afforded a certain degree of latitude with respect to the duties of care, control and discipline of the child. Liability for ordinary negligence at this level of the family relationship would subject the family to unbearable and unwarranted pressure which could result in a breakdown of the family unit. Some allowance must be given for the circumstances under which a parent is required to act.

WHY THE ERA OF PARENTAL TORT IMMUNITY ENDED

The decision in *Streenz* may be viewed as an addition to the list of Arizona cases which exhibit an increased "interest of the public in protecting its members from loss caused by another's negligence."[69] The abrogation of parental tort immunity is not an isolated event, but is an integral part of an overall change in public policy toward compensation of those members of society who have unfortunately suffered injury due to the negligence of another.[70] The abrogation of parental immunity was to

65. Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970); Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969).

66. Lemmen v. Servais, 39 Wis. 2d 75, 158 N.W.2d 341 (1968). *See also* Comment, *Parental Immunity—Wisconsin Clarifies the Rule*, 8 ST. LOUIS U.L.J. 247 (1963).

67. Shumway v. Farley, 68 Ariz. 159, 163, 203 P.2d 507, 510 (1949).

68. Emery v. Emery, 45 Cal. 2d 421, 429-30, 289 P.2d 218, 224 (1955). A parent does not have the right to inflict punishment which is excessive and unreasonable under the circumstances. If the right to chastise the child is abused, the parent is amenable to the criminal law.

69. *See* text accompanying notes 42-51 *supra*.

70. *Compare* Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970) (partial

be expected as a logical step in the sequence of events currently in process.[71]

Society is becoming more acutely aware of its fellow men and the need for compensation without regard to the relationships involved when injury occurs.[72] This increased awareness is not only of the plight of the injured victim, but also of all of the circumstances necessary for a determination of the most desirable results.[73] Only by being aware of all of the facts can the conflicting interests be properly balanced. Formerly, the possibility of disturbing the unity of the family had, for public policy reasons, caused the scale to be tipped in favor of parental immunity. The importance of family unity has not changed, but other values and circumstances, including the concern for uncompensated accident victims, have. The number of automobile accidents has increased with a corresponding growth in the number of people who carry liability insurance.[74] When these factors are added to the balancing of interests involved in a consideration of the value of parental immunity, the result should be a restriction of the applicable scope of the doctrine.

Changes Instituted by the Judiciary

This trend of increased social consciousness is discernible in the recent line of cases abrogating various immunities in Arizona. The doctrines of charitable institution tort immunity[75] and governmental tort immunity[76] met their demise in Arizona within the span of the last ten years. In both instances the court noted that when the reasons for the existence of a declared public policy are no longer valid, the court would without hesitation declare that such public policy no longer exists. Subsequently, the *Streenz* decision was handed down. Thereafter, the doctrine of inter-

abrogation of parental tort immunity) *with* Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963) (abrogation of governmental tort immunity) *and* Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P.2d 220 (1951) (abrogation of the tort immunity of charitable institutions).

71. The demise of the doctrines of sovereign and charitable institution tort immunity may be the first sign within a given jurisdiction of the prospective abrogation of parental and interspousal tort immunity. *See* Bodenheimer, *Justice Peters' Contribution to Family and Community Property Law*, 57 CALIF. L. REV. 577, 593 (1969), which suggests that three California decisions led to the demise of the parental immunity doctrine in that jurisdiction. The cases were: Self v. Self, 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962) (rule of interspousal immunity for intentional torts abandoned); Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962) (abrogation of interspousal tort immunity for negligent torts); Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955) (injured child allowed to sue her father for willful or malicious tort and to sue her brother for negligence).

72. *See, e.g.*, articles cited notes 81-82 *infra*.

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

74. *See* Note, *A Social Insurance Scheme for Automobile Accident Compensation*, 57 VA. L. REV. 409, 410-13 (1971).

75. Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P.2d 220 (1951).

76. Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963). *See also* Comment, *Governmental Immunity in Arizona—The Stone Case*, 6 ARIZ. L. REV. 102 (1964); "Duty of Public Officials," 12 ARIZ. L. REV. 89, 229 (1970).

spousal tort immunity was partially abrogated.[77] In a very brief opinion, the Supreme Court of Arizona held "that a spouse may, after a divorce from the offending spouse, sue to recover damages for an intentional tort."[78] This last decision may be only a small step toward a complete elimination of interspousal tort immunity, but it is a beginning and perhaps an indication of a future total abrogation.[79] Each of these decisions manifest a refusal to be bound by a rule which operates to shackle justice and, in turn, each represents a recognition of a change in public policy.

Changes Within the Insurance Field

Changes are taking place in the insurance field which demonstrate the trend of increased social consciousness. Whether these changes are viewed as profit-motivated or humanitarian, they are taking place and are either part of the trend or a direct effect.

The current system for compensating personal injury sustained in an automobile accident has numerous deficiencies.[80] Among these deficiencies are the lack of compensation for injuries caused by an uninsured or inadequately insured motorist, liability only for fault with assumption of risk and contributory negligence available as defenses, and the expense and delay of litigation required to obtain compensation. To meet these deficiencies in part or in total, numerous remedies have been offered.[81] Foremost among these remedies have been numerous "no-fault" insurance plans.[82] Compensation without regard to fault might be considered as the ultimate in social consciousness since it gives recognition to the

77. Windauer v. O'Connor, 107 Ariz. 267, 485 P.2d 1157 (1971).

78. *Id.* at 268, 485 P.2d at 1158.

79. The decision in *Windauer* provides very little assistance in a determination of the current status of the doctrine of interspousal tort immunity in Arizona. It does, however, demonstrate the court's propensity toward allowing such actions. In a very confusing opinion, the court allowed an action for an intentional tort holding that the action did not arise until after the parties were divorced even though the injury occurred during the marriage. Additionally, reference was made to the problems inherent in the abrogation of interspousal tort immunity in a community property state such as Arizona. This last point may be considered as an offer of the right of first refusal to the legislature.

80. *See* W. PROSSER, LAW OF TORTS § 84, at 556 (4th ed. 1971); Note, *A Social Insurance Scheme for Automobile Accident Compensation*, 57 VA. L. REV. 409 (1971).

81. E.g., Green, *Automobile Accident Insurance Legislation in the Province of Saskatchewan*, 31 J. COMP. LEG. & INT'L L. 39 (3d ser. 1949); James, *The Columbia Study of Compensation for Automobile Accidents: An Unanswered Challenge*, 59 COLUM. L. REV. 408 (1959); Simonett & Sargent, *The Minnesota Plan: A Responsible Alternative to No-Fault Insurance*, 55 MINN. L. REV. 991 (1971); Note, *A Social Insurance Scheme for Automobile Accident Compensation*, 57 VA. L. REV. 409 (1971); Comment, *Uninsured Motorist Coverage in Virginia*, 47 VA. L. REV. 145 (1961).

82. Hastings, *Automobile Accident Reparations—The Bar and the Public Interest—Part I*, 52 CHI. B. REC. 380 (1971); Note, *The Massachusetts "No-Fault" Automobile Insurance Law: An Analysis and Proposed Revision*, 8 HARV. J. LEGIS. 455 (1971); Note, *No-Fault Automobile Insurance—A Premature Destruction of the Tort Liability Reparations System in Automobile Accident Cases*, 46 NOTRE DAME LAW. 542 (1971).

fact that negligence has nothing to do with need for compensation. Negligence is a factor in the determination of moral and legal liability, but it has nothing to do with the financial burden attributable to injury. Adoption of no-fault insurance would render moot many of the problems associated with allowing negligence actions between parent and child for automobile accidents.[83]

Additionally, other forms of extended insurance coverage are currently available to the general public on a voluntary basis. For an additional premium, a motorist can obtain coverage that entitles him to recover from his own insurance company for injury caused by an "uninsured motor vehicle."[84] "First-aid" coverage can also be obtained which obligates the insurer to compensate the injured party for the initial medical expenses of the accident, such as emergency room expenses, without regard to fault or legal liability of the insured. This coverage can be extended, by payment of an additional premium, to cover all such expenses within a year after the accident.[85]

Some of these changes can be discounted as merely additional protective purchases by the insured, but others such as "no-fault" and "first-aid" insurance cannot be. It does not really matter how these changes are classified since each is either cause or effect in the trend of increased social consciousness. When the changes within the insurance field are considered in conjunction with the abrogation of the various tort immunities, it becomes apparent that a major change in public policy has occurred. The abrogation of parental immunity was to be expected in view of the change in public policy and is a direct result of the change.

IMPACT ON OTHER AREAS

Whatever the merits of allowing a minor child to sue his parent for the commission of a negligent tort, the point made by the dissent in *Streenz* "that the cure proposed by the majority [might be] worse than

83. The typical no-fault plan calls for compensation of any injured victim of an automobile accident without regard to the fault of any of the parties involved. Basic recovery under such a policy would be obtained through an administrative proceeding with policy coverage and existence of the injury being the only facts in issue. Since a determination of fault will not be necessary, many of the problems associated with allowing negligence actions between parent and child for automobile accidents will be eliminated or considerably diminished. For example, the same attorney will be able to represent both the parent and child in the proceedings to collect on the no-fault insurance policy. For a discussion of the professional ethics problem involved in such dual representation under the current system of insurance coverage, see text accompanying notes 87-91 *infra*. See text accompanying notes 92-103 *infra* for a discussion of the problem of nondisclosure of insurance under the current system of insurance coverage.

84. *See* Slutes, *Recent Developments in Arizona's Uninsured Motorist Coverage*, 12 ARIZ. L. REV. 749 (1970).

85. *See generally* Ehrenzweig, *"Full Aid" Insurance for the Traffic Victim—A Voluntary Compensation Plan*, 43 CALIF. L. REV. 1, 25 (1955), suggesting that the concept of "first-aid" coverage can be extended to provide for complete compensation.

the disease"[86] may prove to have a great deal of validity. The impact of the *Streenz* decision will be felt in as widely diverse areas of the law as professional ethics, evidence and contracts.

Professional Ethics Problem

While the abrogation of parental immunity initially would not appear to involve a question of professional ethics, such a problem has been presented to the Committee on Rules of Professional Conduct of the State Bar of Arizona.[87] An Arizona law firm requested a formal opinion as to the propriety, in view of the decision in *Streenz*, of the same attorney representing both the parents and their minor children as plaintiffs in a personal injury action against a third person in which there is raised the issue of contributory negligence or the sole negligence of one of the parents. The Committee's opinion indicated that in light of Canon 5 of the *Code of Professional Responsibility*, "undoubtetdly a conflicting situation would be presented requiring independent counsel for the children."

Canon 5 states, "A lawyer should exercise independent professional judgment on behalf of a client."[88] Ethical considerations, therefore, require that a lawyer not allow the interests of one client to dilute his loyalty to another client.[89] His independent judgment would be affected adversely if he undertook dual representation which required him to argue on behalf of one client that which he must oppose in fulfilling his duty to another client. In fact, since a lawyer's judgment may be affected by either an actual or a potential divergence in the interests of his clients, the mere possibility of divergence would make such dual representation improper. The potential harm to a client must be weighed against those factors which favor allowing dual representation, with any doubt being resolved against its propriety.[90]

The same lawyer, therefore, could not represent both the parent and his minor child in a personal injury action if there were any possibility that the opposing party might raise the issue of negligence or contributory negligence on the part of the parent. If it were deemed advisable for the child to pursue a cause of action against the parent as well as against the opposing party, independent legal counsel would be required for the parent and for the child. One lawyer could not undertake such dual representation and still fulfill his role as an advocate for the best interests of each client.[91]

86. 106 Ariz. at 89, 471 P.2d at 285.
87. STATE BAR OF ARIZONA COMMITTEE ON RULES OF PROFESSIONAL CONDUCT, OPINIONS, NO. 71-21 (1971).
88. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 5 (1969).
89. *See generally* Weddington, *A Fresh Approach to Preserving Independent Judgment—Canon 6 [Canon 5] of the Proposed Code of Professional Responsibility*, 11 ARIZ. L. REV. 31 (1969).
90. *Id.* at 46.
91. *See* Weddington, *supra* note 89, at 48, which notes that there is a similar

Disclosure of Insurance

Since the widespread prevalence of liability insurance was cited as an enabling factor in allowing negligence actions between parent and child,[92] an assessment must be made of the role that such insurance will play in future decisions. Courts which have considered the existence of liability insurance in their decisions have consistently offered it only as a supplementary argument for abrogation of parental immunity.[93] While this is understandable since insurance does not create liability where none existed before, it is not necessary to relegate insurance to a subservient role. Liability in terms of responsibility has always existed, but for public policy reasons the possibility of disturbance of the family has prevented legal liability from attaching. Once the impediment of potential harm to the family is removed, as many contend is done by liability insurance, then the normal liability for negligent conduct should attach. Insurance has not created liability, but has merely removed a barrier to enforcement of liability and the last vestige of justification for a general rule of parental tort immunity.

The almost universal existence of liability insurance, particularly in the automobile accident realm, was a proper element to consider in abrogating parental tort immunity.[94] Insurance, however, is not a proper element to consider in the determination of liability. Therefore, disclosure of the fact that the defendant is covered by liability insurance is improper. Arizona has a general rule of nondisclosure of liability insurance to the jury in negligence actions since such information normally is not relevant and may be prejudicial.[95] In general, any evidence, implication or suggestion that the particular defendant at trial is covered by liability insurance will be deemed prejudicial to the defendant and therefore a ground for mistrial[96] without regard to when or where the disclosure occurs.[97] In fact, plaintiff's counsel is charged with an affirmative duty to prevent such

conflict of interest in the dual representation of the driver of a car and his passenger. Due to the conflict of interest inherent in the situation, an attorney could not represent both the driver of a car and his passenger in an action against the driver of another car, unless there is a legal bar to the passenger suing his own driver.

92. See text accompanying note 41 *supra.*

93. *E.g.*, Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970); Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966).

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

95. *See generally* M. UDALL, ARIZONA LAW OF EVIDENCE § 122, at 262 (1960); Comment, *Disclosure of Insurance in Negligence Trials—The Arizona Rule*, 5 ARIZ. L. REV. 83 (1963).

96. Muehlebach v. Mercer Mortuary & Chapel, Inc., 93 Ariz. 60, 378 P.2d 741 (1963). This general rule of nondisclosure due to prejudicial effect and irrelevancy is qualified somewhat when the action involved is an automobile accident case. *Id.*

97. Dunipace v. Martin, 73 Ariz. 415, 242 P.2d 543 (1952) (during voir dire); Northern Arizona Supply Co. v. Stinson, 73 Ariz. 109, 238 P.2d 937 (1951) (outside courtroom); Butane Corp. v. Kirby, 66 Ariz. 272, 187 P.2d 325 (1947) (argument by counsel); Fike v. Grant, 39 Ariz. 549, 8 P.2d 242 (1932) (examination of witnesses).

disclosure.[98] There are exceptions to the rule where it becomes necessary to refute a plea of poverty[99] or where it is relevant to prove some fact in issue.[100] Conversely, since the plaintiff cannot benefit from the jurors being informed that the defendant has liability insurance, the defendant cannot invoke their sympathy by disclosing that he does not have insurance.[101] Disclosure of insurance to the jury in a negligence case is therefore subject to objection on the grounds of both prejudicial effect and irrelevancy.

Allowing negligence actions between parent and child, however, presents a situation in which there is a greater potential for injustice due to the relationship of the parties. Assuming that the general rule of nondisclosure of insurance to the jurors will be followed, the decision of the jury may be adversely affected by speculation on their part. They may speculate on the possibility of harm to the domestic tranquility of the family if the parent is found liable and personally bears the expense of satisfying the judgment. Assuming that many jurors carry liability insurance,[102] they may presume that no suit would have been brought by the child if the parent was not covered by liability insurance. In either case there is a potential for injustice. In the former, if the jury refuses to find for the child in spite of the negligence of the parent and there is insurance, the expenses attributable to the injury will have been unjustly imposed on the family. In the latter, if they award a judgment for the child in spite of the parent's innocence and there is no insurance, they will have succeeded again in unjustly exerting financial pressure on the family unit. This predicament is not unique to a parent-child suit, but it is made more acute due to the relationship of the parties involved. Under circumstances such as these, speculation as to the existence of insurance may be one of the determinative factors in the outcome of the suit.

While nondisclosure of insurance may result in some prejudice to the child's cause of action or to the parent's defense, depending on which assumptions the jury makes, this problem cannot be solved by openly disclosing the existence or lack of insurance. In fact, disclosure of insurance would be more susceptible to prejudicial effect than withholding such information since the jury could then be certain where the expense of judgment would fall. A desire to impose the expense attributable to the injury on an insurance company rather than the family might result in a

98. Consolidated Motors, Inc. v. Ketcham, 49 Ariz. 295, 66 P.2d 246 (1937).
99. Big Ledge Copper Co. v. Dedrick, 21 Ariz. 129, 185 P. 825 (1919).
100. Arizona-Hercules Copper Co. v. Crenshaw, 21 Ariz. 15, 27, 184 P. 996, 1000 (1919) (establishment of employer-employee relationship).
101. *See* M. UDALL, *supra* note 95, at 266 (1960), *citing* Simmons v. Williamson, 54 Ga. App. 559, 188 S.E. 362 (1936).
102. *See* Petersen v. City & County of Honolulu, 51 Hawaii, 484, 491, 462 P.2d 1007, 1011 (1969), where the dissent suggests that since the majority of jurors are cognizant of insurance coverage in cases being tried by them, the court should give recognition to this fact by permitting insurance companies to be named as actual parties since they are the real parties in interest.

judgment for the child without regard to the parent's innocence. Conversely, if it were disclosed that the parent was not covered by liability insurance, the jury might be predisposed to find for the parent without regard to the parent's negligence. No gain is obtained by substituting potential prejudice due to a known fact for that due to speculation.

A perfect solution to this dilemma is not currently available under the present system for compensating personal injury attributable to negligence. Until a solution is obtained, reliance must be placed on the ability of the judge and jury to make decisions based on the facts of each case and not on speculation as to the existence of liability insurance. In the realm of automobile accidents, enactment of no-fault insurance legislation may provide the ultimate solution. Since the only issues would be policy coverage and the existence of the injury, the possibility of a prejudicial finding on the question of fault would be eliminated.[103]

Insurance Policy Exclusion

In Arizona, insurance companies have lost the defense of parental immunity in an automobile negligence action. The question thus arises whether the insurance companies can, through the inclusion of a restrictive provision in the policy, exclude liability for suits by a child against his parent.

In the absence of an express exclusion the parent's liability insurance policy would cover an injury to the child caused by the negligent operation of the insured automobile by the parent. Through the use of a "family" exclusion clause, the insurance company could attempt to disclaim coverage for injury to the insured or any member of his family who resides in the same household. Such a clause was held valid and enforceable in *New York Underwriters Insurance Co. v. Superior Court.*[104] In that case the named-insured, Trujillo, was injured while riding as a passenger in his own automobile due to the negligence of the driver. Trujillo's insurer sought a declaratory judgment that the policy issued to the driver was primary because of an exculpatory clause in Trujillo's policy which negated coverage for injuries to the named-insured. The driver's insurer petitioned the supreme court for a writ of prohibition to prevent further proceedings in the declaratory judgment action contending that the exculpatory provision was contrary to the statutory omnibus clause[105]

103. *See* note 83 *supra.* For an indication of the likelihood that no-fault insurance will soon be adopted in Arizona, see *No-Fault Insurance Amendment Backed,* Tucson Daily Citizen, Jan. 25, 1972, at 36, col. 4.

104. 104 Ariz. 544, 456 P.2d 914 (1969). *See generally* "Omnibus Clause—Exclusion of Insured From Coverage," 12 ARIZ. L. REV. 89, 222 (1970).

105. ARIZ. REV. STAT. ANN. § 28-1170(B)(2) (Supp. 1971-72). The omnibus provision provides that an owner's liability insurance policy "shall insure the person named therein and any other person, as insured, using the motor vehicle or motor vehicles with the express or implied permission of the named insured, against loss from liability imposed by law for damages arising out of the ownership, maintenance or use of the motor vehicle or motor vehicles."

incorporated in all motor vehicle liability policies[106] and was, therefore, illegal and void.

The court upheld the validity of the clause noting that the principal purpose of the Arizona Uniform Motor Vehicle Safety Responsibility Act[107] was to protect the "public using the highways from financial hardship which may result from the use of automobiles by financially irresponsible persons."[108] In view of the stated purpose, the court reasoned that Trujillo did not come within the class of persons sought to be protected by the Act. Moreover, it was noted that the Act was not intended to restrict the privilege of an individual to contract with his insurer to exclude his own personal recovery under the policy.

It is apparent that an insurer has an interest in protecting itself from collusive lawsuits whenever possible. Therefore, one of the justifications offered for a "family" exclusion clause is to exempt the insurance company from liability to those persons who because of the closeness of their relationship would be likely to assert a fraudulent claim.[109] Additionally, such a clause allows the insurer to severely limit its risk by excluding liability to the class of persons which are most likely to be injured whenever an accident involving the insured automobile occurs. Protection of insurance companies from any possibility of collusive lawsuits and allowing them to extensively limit insurance coverage must, however, be considered in terms of the damage done to other interests.

Giving effect to the exculpatory provision involved in *New York Underwriters* did not result in any financial hardship to the injured party since the driver's insurer was thereby liable. Such would not be the case, however, where the driver is not covered by another policy. This is precisely the situation that would be presented where a parent and his unemancipated minor child were involved in an accident which was not due to the negligence of a third party. In such a case, notwithstanding the fact that the parent carried an applicable liability insurance policy, the parent and child would be without liability insurance coverage. The parent as the named-insured and the child as a member of the parent's household would both be denied coverage through the use of a "family" exclusion clause. Thus, in this situation insurance, which was part of the justification for depriving the parent of immunity, would not be available.

In so far as the decision in *New York Underwriters* indicates that the insurer can exclude coverage for the insured's family, it may be impliedly overruled by the *Streenz* decision. The holding in *New York Un-*

106. Jenkins v. Mayflower Ins. Exch., 93 Ariz. 287, 380 P.2d 145 (1963).
107. ARIZ. REV. STAT. ANN. §§ 28-1101 *et seq.* (1956), *as amended*, (Supp. 1971-72).
108. 104 Ariz. at 545, 456 P.2d at 915, *quoting* Schecter v. Killingsworth, 93 Ariz. 273, 280, 380 P.2d 136, 140 (1963).
109. *See* State Farm Mut. Auto. Ins. Co. v. Thompson, 372 F.2d 256, 258 (9th Cir. 1967).

derwriters can be distinguished by limiting it to its specific facts. As noted above, no financial hardship resulted to the injured party since other insurance was available to provide compensation. This would not be the case where a parent's liability insurance policy contained a "family" exclusion clause and no other coverage was available. In these circumstances, the purported purpose of the Act would be served by preventing the potential financial hardship to the family which might result from allowing the parent to exclude recovery by members of the family residing with him.

The court in *New York Underwriters* supported its conclusion by noting that the Act was not intended to restrict the privilege of an individual to exclude his own personal recovery. It might be contended that the Act was intended to restrict the privilege of an individual to exclude the recovery of or adversely affect the rights of other parties. This contention finds support in the decisions in *Jenkins v. Mayflower Insurance Exchange*[110] and subsequent cases[111] interpreting the *Mayflower* doctrine. In *Mayfower* the court held that the omnibus clause prescribed by the Act was a part of every motor-vehicle liability policy. By so holding, the court invalidated a restrictive endorsement in a liability policy which negated coverage if the automobile was operated by a member of the armed services. In the subsequent case of *Sandoval v. Chenoweth*[112] the *Mayflower* doctrine was reaffirmed and it was held that the provision of the Act that "no violation of the policy shall defeat or void the policy"[113] was also applicable to all automobile liability insurance policies. This line of cases indicates that complete freedom of contract between the insured and insurer is not allowed when the rights of other parties may be adversely affected. Therefore, the parent may be able to exclude his own personal recovery but may not be allowed to exclude the recovery of other members of his household including his minor child.

110. 93 Ariz. 287, 380 P.2d 145 (1963).

111. State Farm Mut. Auto. Ins. Co. v. Thompson, 372 F.2d 256 (9th Cir. 1967) (defense of non-cooperation not available to extent of liability policy limits required by Arizona statute); Weekes v. Atlantic Nat'l Ins. Co., 370 F.2d 264 (9th Cir. 1966) (invalidated an exclusionary provision which negated coverage while automobile was being operated "by any person under the influence of intoxicants"); Travelers Ins. Co. v. McElroy, 359 F.2d 529 (9th Cir. 1966) (invalidated a provision which excluded coverage from leased vehicles which were not being used exclusively in the business of the named-insured); Harleysville Mut. Ins. Co. v. Clayton, 103 Ariz. 296, 440 P.2d 916 (1968) (voided a provision excluding coverage when the vehicle was being driven by the owner's husband); Dairyland Mut. Ins. Co. v. Andersen, 102 Ariz. 515, 433 P.2d 963 (1967) (invalidated a restrictive endorsement excluding coverage when a named individual was operating the vehicle); Universal Underwriters v. Dairyland Mut. Ins. Co., 102 Ariz. 518, 433 P.2d 966 (1967) (invalidated a restrictive endorsement excluding coverage when the insured's automobile was being operated by an employee). *See generally* Kepner, *Arizona Automobile Liability Insurance—Beyond Mayflower*, 10 ARIZ. L. REV. 301 (1968); Comment, *Automobile Liability Insurers in Arizona—Are They Absolutely Liable?*, 5 ARIZ. L. REV. 248 (1963).

112. 102 Ariz. 241, 428 P.2d 98 (1967) (defense of lack of notice held not available).

113. ARIZ. REV. STAT. ANN. § 28-1170(F)(1) (Supp. 1971-72).

For the time being an insurance company may attempt to exclude liability to the insured's family by express provision in the insurance policy. In view of the *Streenz* decision, however, little reliance should be placed on the validity of such a provision.

Appropriate Body for Abrogation of Parental Tort Immunity

In view of the possible widespread impact, the judiciary may not have been the proper body to abrogate the doctrine of parental immunity. Due to the legislature's greater ability to inquire into all facets of the problem, it might have been better suited to handle the problem through action on a broad front covering all affected areas of substantive law. In fact, that is the position taken by the Supreme Court of Arizona in respect to interspousal tort immunity.[114] That, however, is not a complete answer to the problem. The immunity afforded a parent from suit by his minor child arose from a procedural restriction asserted by the judiciary for public policy reasons. Public policy no longer requires that a parent be given complete immunity. It seems entirely appropriate that the judiciary, which promulgated the doctrine of parental immunity, should abrogate the doctrine to the extent that it no longer serves the best ends of justice.[115] If the child has a just claim and there is no reason to bar the claim, it should be recognized and the injury compensated. If allowing the claim causes an impact on other areas of the law, the legislature can solve any problems caused by the court's determination. A solution to each of the problems will, in time, be obtained and, hopefully, at a net gain to society.

THE LAST WORD IN PARENTAL IMMUNITY

Although the court in *Streenz* did not find it necessary to delineate the scope of the limited immunity still afforded a parent, it is possible to make some assessment of what is included. Clearly, the parent will be held liable for negligence resulting in an automobile accident without regard to whether he is covered by liability insurance. Any other course would be contrary to the rationale of the *Streenz* decision. Beyond this any assessment of the immunity to be given a parent based on the *Streenz* decision is purely a matter of speculation. In fact, the possible exceptions to abrogation for acts of ordinary parental discretion with respect to discipline and care were speculation on the part of the court since the case before them was one involving negligence resulting in an automobile accident.

If any criticism is to be levied against the Supreme Court of Arizona, it is not for lack of courage, but for a failure to act promptly and to provide clear guidelines when it did act. The court overruled a bad prece-

114. Windauer v. O'Connor, 107 Ariz. 267, 485 P.2d 1157 (1971).
115. Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 393, 381 P.2d 107, 113 (1963).

dent and willingly departed from the beaten path of the majority. The decision in *Goller v. White*[116] was handed down seven years prior to the decision in *Streenz*. The time was appropriate for another step forward in the rescission of the parental immunity doctrine. By choosing to follow the leader rather than to establish the lead, the court has approved a view which will inevitably result in the drawing of arbitrary distinctions as to when particular conduct falls within the limited immunity.[117]

It seems obvious that the parent will be able to exercise a certain amount of authority over the child which, if directed toward someone else, would be tortious conduct. Therefore, a parent can confine his child to his room or spank him for misbehaving without being liable for false imprisonment or battery.[118] It is not yet possible, however, to determine how the supreme court would handle an extreme case such as confinement which lasts for several days. Whether the parent is to be given immunity under such circumstances, or whether he is to be held liable on the basis of intentional tort are open questions. If he is to be held liable on the basis of having committed an intentional tort, the dividing line to be drawn between an ordinary act of parental discipline and an intentional tort is undefined. For Arizona, definite answers to these questions and others can only be determined by legislation or future decisions.

Streenz is not the last word in Arizona on parental immunity since the judiciary or the legislature must determine under what circumstances, if any, a parent will be given immunity from suit by his unemancipated minor child. When the time comes for this determination, the California decision of *Gibson v. Gibson*[119] should be consulted for appropriate guidance. Although the court recognized that the uniqueness of the parent-child relationship dictates that "traditional concepts of negligence cannot be blindly applied to it,"[120] it refused to exempt activities involving parental discretion from the abrogation of parental immunity. Instead, the court introduced a new twist into a traditional doctrine:

> [A]lthough a parent has the prerogative and the duty to exercise authority over his minor child, this prerogative must be exercised within reasonable limits. The standard to be applied is the traditional one of reasonableness, but viewed in light of the parental role. Thus, we think the proper test of a parent's conduct is this: what would an ordinarily reasonable and prudent *parent* have done in similar circumstances?[121]

116. 20 Wis. 2d 402, 122 N.W.2d 193 (1963).
117. Gibson v. Gibson, 3 Cal. 3d 914, 922, 479 P.2d 648, 653, 92 Cal. Rptr. 288, 293 (1971).
118. *Cf. id.* at 921, 479 P.2d at 652, 92 Cal. Rptr. at 292.
119. *Id.*
120. *Id.*
121. *Id.* at 921, 479 P.2d at 653, 92 Cal. Rptr. at 293. The reasonable parent test indicated by the *Gibson* case is to be distinguished from the requirement that the parent be reasonable in disciplining his child. The former makes the parent amenable to a civil action by the child for damages, while the latter makes the parent amenable to the criminal law. *See* text & note 68 *supra.*

The basis for choosing a reasonable parent approach was a belief that the *Goller*[122] view would result in arbitrary distinctions as to when particular conduct fell within or without the immunity guidelines and that a parent should not be able to act negligently with impunity by bringing himself within the "safety" of parental immunity.[123] Perhaps this—a reasonable parent test—will be the last word on parental immunity in Arizona.

CONCLUSION

The principal reason for creating the doctrine of parental immunity was to preserve domestic tranquility. The result obtained in many cases was the creation of the precise evil that the courts had sought to prevent. The courts have refined the doctrine by making exceptions, however, where application of the rule would be patently unfair and without justifiable purposes. A broad rule has been continually narrowed in the scope of its application due to changing circumstances and different public policies.

Although there is a place for parental immunity in our society, the immunity given a parent should be limited. Negligence is the failure to do what a reasonable man would do under the same or similar circumstances.[124] The circumstances under which he acts are merely taken into account in assessing whether his actions were reasonable and therefore not negligent.[125] Since a parent is confronted with a unique situation in the area of parental care and discipline, the liability of a parent should be assessed in view of his role as a parent. If a reasonable parent would have acted similarly under comparable circumstances, the parent should not be liable to his child. Otherwise, the parent should be accountable to his child just as he would be to a complete stranger. A reasonable parent test should be adopted as the last word on parental immunity in Arizona.

122. See text accompanying notes 27-28 *supra*.
123. Gibson v. Gibson, 3 Cal. 3d 914, 922, 479 P.2d 648, 653, 92 Cal. Rptr. 288, 293 (1971).
124. W. PROSSER, LAW OF TORTS § 32, at 149 (4th ed. 1971).
125. *Id.* at 150.