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Two-year-old Chanci Ellioff was a passenger in an automobile driven by her mother, Jolene Sutterlin. The Sutterlin vehicle struck the rear of another vehicle. As a result of the accident, Chanci Ellioff suffered severe injuries. Through a guardian ad litem, the child sued her mother and the driver of the other vehicle for their alleged negligence in causing the accident. The trial court granted defendant Sutterlin’s motion for summary judgment, stating that a parent is immune from an action by a child for injuries caused by the parent’s tortious conduct. On appeal, in Merrick v. Sutterlin, the Washington Supreme Court reversed the judgment, holding that the doctrine of parental tort immunity does not apply to a parent whose negligent driving has injured her child.

The Merrick decision is noteworthy for two reasons. First, the court overturned Stevens v. Murphy, which had severely limited the ability of a child to recover damages caused by his parent’s negligent operation of an automobile. Second, although the court criticized the doctrine of parental tort immunity, it declined to abolish it. Thus, the extent to which the immunity will be retained in future cases is unclear.

This note outlines the origins of the doctrine of parental tort immunity and its development in Washington, placing special emphasis on the doctrine’s underlying policies and their applicability in automobile negligence cases. This note then discusses the problems which may arise from the Merrick court’s failure to abolish the parental immunity entirely. Looking to the future, this note suggests that the immunity be abolished in favor of a standard of care recognizing the legal duty of a parent to act as a reasonably prudent parent.


2. The other driver, Robert Ronish, settled with plaintiff and was no longer a party when the case was appealed to the Washington Supreme Court. Id.

3. The mother had been tried and convicted of negligent driving. Merrick, 93 Wn. 2d at 412, 610 P.2d at 891.


5. 69 Wn. 2d 939, 421 P.2d 668 (1966). For discussion of this case, see notes 52–60 and accompanying text infra.
I. LEGAL BACKGROUND

A. Origin of the Doctrine of Parental Tort Immunity

In its broadest form, parental tort immunity prevents an unemancipated minor from suing his parent or parents for personal injuries caused by the tortious conduct of either or both parents. The doctrine was not part of the English common law. Rather, it originated in three American cases that have become known as the "great trilogy."8

In Hewellette v. George,9 the Mississippi Supreme Court wrote the first opinion holding that parents are immune from tort liability to their children. In Hewellette, a minor child sought damages from her mother for the mother's wrongful commitment of the child to an insane asylum. Denying recovery, the court reasoned that the peace of society and the reposes of families dictate that a minor child may not assert a claim for injuries caused by a parent.10

In the second member of the great trilogy, McKelvey v. McKelvey,11 the Tennessee Supreme Court affirmed the dismissal of a suit in which a child sought recovery against her father and stepmother for alleged cruel and inhuman treatment. The court announced, without citation to authority, that the parental tort immunity doctrine was recognized at common law.12

In Roller v. Roller,13 the third member of the great trilogy, the Washington Supreme Court heard an appeal from a judgment in which a minor child was granted recovery against her father, who had raped her.
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court reversed the judgment. With questionable logic, the court stated that the abused child’s action was barred because of “the interest that society has in preserving harmony in domestic relations.”\(^{14}\) The court declared that at common law it is “well established that a minor child cannot sue a parent in tort.”\(^{15}\) The court explained that the lack of judicial precedent for parental tort immunity was because the principle was so well understood that few had ever attempted to litigate the issue.\(^{16}\)

After the great trilogy, courts across the country uniformly adopted the doctrine of parental tort immunity. Soon, however, courts began to question the rationale for the rule and to create exceptions where parental immunity could no longer be supported.\(^{17}\)

B. The Borst Analysis: Limited Justification for Parental Immunity

Since the creation of parental tort immunity, American courts favoring the doctrine have offered five major reasons for its existence. In *Borst v. Borst*,\(^{18}\) the Washington Supreme Court’s analysis suggests that none of these reasons warrant application of the immunity in cases involving automobile negligence.

In *Borst*, decided a half century after *Roller v. Roller*,\(^{19}\) an unemancipated minor had been permanently injured by his father’s allegedly negligent operation of a truck while in the furtherance of his partnership’s business.\(^{20}\) Through a guardian *ad litem*, the child sued his father, but the

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14. *Id.* at 243, 79 P. at 788.

15. *Id.* at 245, 79 P. at 789.

16. *Id.* at 246, 79 P. at 789. The only case authority cited was Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891). The court in *Roller* apparently failed to uncover the holding of McKelvey v. McKelvey, 11 Tenn. 388, 77 S.W. 664 (1903).

17. For example, suit has always been allowed when the minor was emancipated at the time of the injury. *Tort Actions between Members of the Family—Husband & Wife—Parent & Child*, supra note 8, at 194. Suit has been allowed by some courts where defendant has liability insurance. *E.g.*, Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932). If the negligent parent had died, a few courts allowed the minor child to sue the estate since family harmony was no longer endangered by the child’s suit. *E.g.*, Brennecke v. Kilpatrick, 336 S.W.2d 68 (Mo. 1960) (en banc). Some courts have also abrogated the rule in cases in which the conduct is intentional or willful, wanton or reckless. *E.g.*, Brown v. Selby, 206 Tenn. 71, 332 S.W.2d 166 (1960) (intentional); Cowgill v. Boock, 189 Or. 282, 218 P.2d 445 (1950) (gross negligence and willful misconduct). Finally, some courts have allowed suit where the tortious conduct arose from a business activity. *E.g.*, Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952); Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930); Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939). In essence, the creation of this last exception was the limited issue before the court in *Borst v. Borst*, 41 Wn. 2d 642, 251 P.2d 149 (1952). *See* notes 18–44 and accompanying text *infra*.

18. 41 Wn. 2d 642, 251 P.2d 149 (1952).

19. 37 Wash. 242, 79 P. 788 (1905).

20. The child, a five-year-old boy, was playing with a cardboard box along the edge of the front yard of the family home. He ventured out into the street with the box and was struck by a truck operated by his father. 41 Wn. 2d at 643, 251 P.2d at 149.
trial court dismissed the action. On appeal, the Washington court held that the child could maintain the cause of action, and thus created an exception to the parental tort immunity doctrine established in Roller. Before announcing this doctrinal change, the Borst court undertook an extensive analysis of the principal arguments advanced for the immunity.

The reason most often given in support of parental tort immunity is the public interest in maintaining family tranquility. The rationale is that harmony in domestic relations cannot be preserved if a child is allowed to sue a parent in tort. As the Borst court noted, this position ignores three counterarguments. First, if the family's harmony has not already been disrupted by the tort, that harmony is strong enough to withstand a suit. Second, when liability insurance is present, as is likely in automobile cases, a parent is protected from ultimate financial responsibility for the damages. Thus, the family as a whole stands to gain from the child’s

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21. 41 Wn. 2d at 658, 251 P.2d at 157.
22. The Borst court also reviewed the law up to the time of the Roller decision, and determined that the Roller statement that the doctrine was part of the common law was “clearly erroneous.” 41 Wn. 2d at 647, 251 P.2d at 151.
23. See note 14 and accompanying text supra.
24. See, e.g., Luster v. Luster, 229 Mass. 480, 13 N.E.2d 438, 439 (1938): “Such actions, at least when not collusive, would almost inevitably tend to the destruction of the peace and unity of family life and to the impairment of parental authority and discipline.”
25. Borst v. Borst, 41 Wn. 2d at 650, 251 P.2d at 153. “In the comparatively rare case where a child brings such an action, the likelihood is that either the peace of the home has already been disturbed beyond repair, or that, because of the existing circumstances, the suit will not disturb existing tranquility.” Id.
26. In ruling on immunity, the courts often discuss the role of insurance. The existence of insurance does not create liability; however, its presence is of considerable significance in the decision to abrogate immunity. E.g., Briere v. Briere, 107 N.H. 432, 224 A.2d 588, 590 (1966). The argument is that if a parent insures against misfortune due to his negligence, it is senseless to give this source of compensation to the general public but to deny it to his own child. See Wick v. Wick, 192 Wis. 260, 212 N.W. 787, 790 (1927) (Crownhart, J., dissenting).
27. One may argue that not all parents have insurance or that the damages are beyond the coverage of the policy, and thus in those cases, the family tranquility argument and the family exchequer argument, see notes 32–34 and accompanying text infra, are still valid. When there is no insurance coverage, however, it is unlikely that suit will be brought against the parent in the first place. James, Accident Liability Reconsidered: The Impact of Liability Insurance, 57 YALE L. J. 549, 553 (1948). See also Gibson v. Gibson, 3 Cal. 3d 914, 922, 479 P.2d 648, 653, 92 Cal. Rptr. 288, 293 (1971);
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suit. Indeed, family stability may be enhanced because the child receives compensation that may not be available from the family's own resources. Third, even if the possibility of discord is conceded, parent and child are free to litigate contract-and property disputes;\(^{27}\) since the threat to family peace is at least as great in these cases, it is inconsistent to prevent the child's personal injury suit on the pretext of family harmony.\(^{28}\)

The second justification for the doctrine is that the ability of the parent to discipline the child would be impaired by allowing the child's tort action.\(^{29}\) Yet, a child's action in property or contract\(^{30}\) may also challenge parental authority. Moreover, any validity to the second justification is absent in the situation where the activity, such as driving an automobile, has nothing to do with parental authority and discipline over children.\(^{31}\)

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The Washington Supreme Court has previously considered the existence of insurance in deciding to abrogate an immunity. In Pierce v. Yakima Valley Memorial Hosp. Ass'n, 43 Wn. 2d 162, 260 P.2d 765 (1953), the court abrogated the immunity of charitable institutions. The court explicitly stated that it is wholly immaterial whether an individual defendant has liability insurance. That the protection afforded by liability insurance was generally available to charitable institutions was an appropriate consideration, however. \(\text{Id.}\) at 172, 260 P.2d at 771. This same analysis should be extended to parental immunity for automobile negligence. Liability insurance is generally available; that a particular parent is not insured is irrelevant to the court's decision.

Some insurers may attempt to exclude family members from an insured's policy coverage. If successful, the above reliance upon insurance would be misplaced. The Washington Supreme Court, however, has declared that family or household exclusion clauses in automobile insurance policies are void as against public policy. Mutual of Enumclaw Ins. Co. v. Wiscomb, 95 Wn. 2d 373, — P.2d — (1981).

\(^{28}\) Borst v. Borst, 41 Wn. 2d at 651, 251 P.2d at 153, quoting Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743, 748 (1952).

\(^{29}\) E.g., Mesite v. Kirchstein, 109 Conn. 77, 145 A. 753, 755 (1929):

Authority in the parent to require obedience in the child is indispensable to the maintenance of unity in the family. Anything which undermines this authority, brings discord into the family, weakens its government, and disturbs its peace, is an injury to society and to the state. Few things could bring about this unhappy condition more quickly or widen the breach between parent and child further than the bringing of an action at law for personal injuries by a minor child against the parent.

See also Luster v. Luster, 299 Mass. 480, 13 N.E.2d 438 (1938).

\(^{30}\) See notes 27–28 and accompanying text supra.

\(^{31}\) The court in Borst responded to the discipline argument as follows:

The field of parental control and discipline covers such matters as the maintenance of the home, chastisement, and no doubt other activities which need not here be delineated. But when the parental activity whereby the child was injured has nothing to do with parental control and discipline, a suit involving such activity cannot be said to undermine those sinews of family life. 41 Wn. 2d at 651, 251 P.2d at 153–54.
A third reason advanced to support parental tort immunity is the "family exchequer" argument: to allow a child to recover compensation from his parent would reduce the amount of family resources available for the support of other children. The prevalence of liability insurance in most cases, including automobile negligence cases, moots this argument since a source outside the family bears the cost of damages. The family exchequer argument also fails because it "leaves out of the picture the depletion of the child's assets of health and strength through the injury."

The fourth argument favoring immunity is that a parent and child may collude to defraud the parent's liability insurer. Although there is greater opportunity for collusion in such cases, the possibility of collusion merely requires the court to proceed with greater caution. The law allows tort suits in other situations fraught with the possibility of collusion, such as those between close friends, driver and guest, and husband and wife. As in those cases, the potential for fraud is not a sufficient reason to immunize tortfeasors from liability.

32. The family exchequer argument originated with Roller:

[The public has an interest in the financial welfare of other minor members of the family, and it would not be the policy of the law to allow the estate, which is to be looked to for the support of all the minor children, to be appropriated by any particular one.] 37 Wash. at 245, 79 P. at 789.

The plaintiff in Roller sought $2000, and had attached the homestead of the defendant. Since the other minor children of the defendant were residing there and were motherless, the court's concern for them is understandable. The exchequer theory does not withstand legal analysis, however. See notes 33-34 and accompanying text infra.

33. See note 26 and accompanying text supra.

34. Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905, 909 (1930). In other words, even if a family's own resources are used to compensate the injured child, such a result may be desirable as public policy since the child, through the injury, may have greater need for the resources than do the other children.

35. Under this argument, immunity is justified because the suit may be so friendly that collusion might be involved. This is the "flip side" of the family tranquility argument, that the suit would be so unfriendly that it would disturb the household peace. Borst v. Borst, 41 Wn. 2d at 653, 251 P.2d at 154.

36. "Courts must depend upon the efficacy of the judicial processes to ferret out the meritorious from the fraudulent in particular cases." Id. at 653, 251 P.2d at 155.

37. At one time, Washington had a host-guest statute providing immunity. The purpose was to prevent collusion between host and guest to defraud insurance companies. Wash. Rev. Code § 46.08.080 (1970), repealed, 1974 Wash. Laws, 1st Ex. Sess., ch. 3 § 1.

38. See Freehe v. Freehe, 81 Wn. 2d 183, 500 P.2d 771 (1972). The court rejected this fraud-collusion argument because it "presupposes that courts are so ineffectual and the jury system is so imperfect that fraudulent claims cannot be distinguished from the legitimate." Id. at 189, 500 P.2d at 775, quoting Goode v. Martinis, 58 Wn. 2d 229, 234, 361 P.2d 941, 945 (1961).

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The fifth argument is based upon an analogy to the husband-wife relationship. Historically, that relationship was protected by a tort immunity. The Borst court realized that the analogy is faulty because there is no legal identity of parent and child, as there previously was between husband and wife. Moreover, since Borst, the Washington Supreme Court has abrogated the doctrine of intraspousal tort immunity. Therefore, the fifth argument in support of parental immunity is groundless.

After making the above analysis, the Borst court concluded that the only remaining rationale for immunity is to allow parents to exercise discretion in fulfilling their duty to rear and discipline their children. Since the operation of an automobile is not uniquely a parental function, the Borst analysis supports subjecting a parent to suit in automobile negligence cases.

C. Subsequent Limitation of the Borst Analysis

The Washington Supreme Court initially followed the Borst analysis. Subsequently, however, some of the Borst court’s reasoning was misinterpreted, and parents were largely immune from suit in automobile negligence cases until Merrick v. Sutterlin.

After Borst, the court first addressed the issue of parental tort immunity in DeLay v. DeLay. A minor sought recovery from his father for inju-

40. E.g., McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903).
41. Borst v. Borst, 41 Wn. 2d at 654, 251 P.2d at 155.
43. The Borst court also noted several other reasons that have been offered in support of the rule of parental tort immunity: (1) that the parent may inherit any money the child recovers in such an action; (2) that the child might be permitted to bring a stale action after reaching majority; and (3) that the concept of a sovereign family government demands the immunity rule. The Borst court discounted these reasons as too insubstantial to warrant judicial consideration. 41 Wn. 2d at 655, 251 P.2d at 155-56.
44. The court stated:
The duty to discipline the child carries with it the right to chastise and to prescribe a course of conduct designed for the child's development and welfare. This in turn demands that the parents be given a wide sphere of discretion.

In order that these parental duties may adequately be performed, it is necessary that the parents be not subject to the risk of suit at the hands of their children. If such suits were commonplace, or even possible, the freedom and willingness of the father and mother to provide for the needs, comforts and pleasures of the family would be seriously impaired. Public policy therefore demands that parents be given immunity from such suits while in the discharge of parental duties.

41 Wn. 2d at 656, 251 P.2d at 156.
45. 54 Wn. 2d 63, 337 P.2d 1057 (1959).
ries resulting from allegedly negligent supervision.\textsuperscript{46} The \textit{DeLay} court held the father immune because the father had knowingly acted in his parental capacity.\textsuperscript{47} This result comported with the \textit{Borst} analysis because the parent was arguably acting within the necessary scope of discretion envisioned in \textit{Borst}.

In \textit{Hoffman v. Tracy},\textsuperscript{48} a minor child sued her mother's estate for personal injuries sustained in an automobile accident caused by her mother's drunkenness.\textsuperscript{49} The court affirmed a jury verdict for the child. It reasoned that when a parent takes a child in an automobile and drives it while intoxicated, that parent is "temporarily abdicating [her] parental responsibilities."\textsuperscript{50} Under the circumstances, the parent's estate was denied immunity.\textsuperscript{51}

A year later, in \textit{Stevens v. Murphy},\textsuperscript{52} the issue was whether minor children could sue their parent for personal injuries resulting from that parent's alleged gross negligence in operating an automobile.\textsuperscript{53} At the time of the accident, the father was transporting his children to visit their grandmother. The court stated that this act "was an exercise of his paren-

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\item[46.] The minor son asked his father for money to buy some gasoline for his automobile. The father refused and directed the boy to drain some gasoline from his logging truck. While the boy was removing the plug in the bottom of the tank, the gas ignited and burned him. Through a guardian \textit{ad litem}, the boy sued his father. Plaintiff received a judgment which was reversed on appeal. \textit{Id.} at 64, 337 P.2d at 1058.
\item[47.] \textit{Id.} The court also held that the son was not emancipated although he was living away from his father and without his support. \textit{Id.} at 65, 337 P.2d at 1058. Emancipation was the main issue in the case.
\item[48.] 67 Wn. 2d 31, 406 P.2d 323 (1965).
\item[49.] The minor child was injured when the car in which she was a passenger went off the highway and struck a utility pole. The mother, who was driving, the owner of the car, and the minor's younger brother were all killed in the accident. A guardian \textit{ad litem} brought suit on the child's behalf against the estate of her mother and that of the owner of the car. Evidence of the mother's intoxication was introduced at trial and the jury was instructed that they could find for plaintiff if they found that the mother was driving while intoxicated and that the intoxication was a proximate cause of the accident. The jury returned a verdict for plaintiff. \textit{Id.} at 32--33, 406 P.2d at 324.
\item[50.] \textit{Id.} at 38, 406 P.2d at 327. The court relied heavily on Cowgill v. Boock, 189 Or. 282, 218 P.2d 445 (1950), cited with approval in \textit{Borst}, 41 Wn. 2d at 656--57, 251 P.2d at 156.
\item[51.] While the result in \textit{Hoffman} may be desirable, the court's analysis strayed from the \textit{Borst} reasoning because it assumed that a parent needs discretion to drive an automobile—its decision turning on a finding that the parent abused that discretion. This assumption became the basis of the decision in \textit{Stevens v. Murphy}, 69 Wn. 2d 939, 421 P.2d 668 (1966), which severely limited the \textit{Borst} reasoning. See notes 52--61 and accompanying text \textit{infra}.
\item[52.] 69 Wn. 2d 939, 421 P.2d 668 (1966).
\item[53.] On defendant father's motion, the trial court dismissed the action against him. On appeal, plaintiff did not attempt a frontal attack on the parental tort immunity doctrine under the \textit{Borst} analysis. Instead, plaintiff argued that the court should create two narrow exceptions to the doctrine: (1) it does not apply when a parent loses custody by a divorce decree; and (2) it does not apply if the parent's conduct constitutes gross negligence. \textit{Id}.
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tal responsibility." Accordingly, the court held that parental immunity applied.

A careful reading of *Borst v. Borst* indicates that *Stevens* was decided incorrectly. Under the *Borst* analysis, the only reason for holding a parent immune from suit is because he was acting within the scope of discretion needed to fulfill his parental obligations. In *Stevens*, the father’s decision to take his children on a visit to their grandmother undoubtedly related to the children’s upbringing and was indeed within his parental discretion. What the *Stevens* court ignored, however, is that the father was not being sued for his decision to take the children visiting; he was being sued for negligently making a left turn. Arguably, the pertinent relationship between the parties at the time of making the left turn was that of driver and passenger, not parent and child. Nevertheless, the *Stevens* decision constricted *Borst* and prevented litigation between a child and a parent for the parent’s negligent, nonbusiness operation of an automobile. In *Merrick v. Sutterlin*, the Washington Supreme Court overturned *Stevens* and approved the *Borst* analysis.

II. THE MERRICK DECISION

In *Merrick v. Sutterlin*, the court traced the development of the doctrine of parental tort immunity and its treatment in Washington. The court specifically approved the *Borst* court’s analysis of the policy considerations often advanced as justifications for the immunity. Noting that parental immunity has been generally condemned by academicians, the court also observed that the trend of modern cases is to limit or abolish the doctrine.

54. *Id.* at 947, 421 P.2d at 673.
55. 41 Wn. 2d 642, 251 P.2d 149 (1952).
56. *See* notes 18–44 and accompanying text *supra*.
57. *See* note 44 and accompanying text *supra*.
58. Plaintiffs alleged that their injuries were caused by their father’s gross negligence in making a left turn off a highway. 69 Wn. 2d at 940–41, 421 P.2d at 669.
59. The parent-child relationship adds nothing to the duty to operate one’s vehicle safely. *See* Holodook v. Spencer, 36 N.Y.2d 35, 50–51, 324 N.E.2d 338, 396, 364 N.Y.S.2d 859, 871 (1974); Lemmen v. Servais, 39 Wis. 2d 75, 158 N.W.2d 341, 344 (1968). Thus, for such a task, a parent should not need the discretion provided by immunity.
60. The *Stevens* decision limits *Borst* by making a business-nonbusiness distinction. Under this interpretation, *Borst* turned not on the nature of the father’s conduct (driving) but rather on the purpose for which the truck was used. This interpretation conflicts with the *Borst* court’s emphasis on examining the nature of the parent tortfeasor’s conduct. *See* note 44 *supra*.
62. *Id*.
63. *See* notes 18–44 and accompanying text *supra*. 

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Accordingly, the Merrick court overturned Stevens v. Murphy\(^\text{64}\) and held that a minor child injured by his parent’s negligence in an automobile accident has a cause of action against that parent.\(^\text{65}\) The court declined to adopt a broad holding that would have abolished the immunity entirely. The court also declined to specify the extent to which the doctrine would be retained.\(^\text{66}\) Instead, such issues were reserved for future consideration on a "case-by-case" basis.

III. ANALYSIS

The Merrick court decided to narrow the scope of its decision by leaving to future cases the question of what portions of the parental tort immunity doctrine would be retained.\(^\text{67}\) The court had two alternatives to this case-by-case approach. First, the court could have promulgated a comprehensive rule purporting to state the kinds of conduct for which a parent would be immune. Second, the court could have abrogated the immunity altogether. In light of the problems likely to be engendered by a case-by-case approach or by a comprehensive rule, this note concludes that the abrogation of the doctrine of parental tort immunity in its entirety would have been the best course.

A. The Case-by-Case Approach

The Merrick court’s reluctance to abrogate the doctrine of parental tort immunity is understandable since some form of the doctrine has been a part of Washington law for three-quarters of a century. Ideally, a case-by-case determination would allow the court to continue narrowing the application of the doctrine on a reasoned basis. Each issue would be fully briefed, and thus previously unforeseen problems could be avoided. This approach, however, will cause a temporary uncertainty of the law. Attorneys will not know when a suit can be maintained, in spite of a case’s apparent merits.\(^\text{68}\) When suit is brought, the losing party will be encouraged to appeal as long as the law in this area is in a state of flux.

The more critical problem with the court’s opinion is that it implicitly envisions the retention of the doctrine in some cases.\(^\text{69}\) To the extent that

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\(^\text{64}\) 69 Wn. 2d 939, 421 P.2d 668 (1966).
\(^\text{65}\) 93 Wn. 2d at 416, 610 P.2d at 893.
\(^\text{66}\) Id.
\(^\text{67}\) Id.
\(^\text{68}\) The Merrick court provides little guidance to attorneys other than to note that some "situations of parental authority and discretion . . . should not lead to liability." Id.
\(^\text{69}\) See note 68 supra. The court stated further that the details of any portion of the immunity that should be retained would be developed on a case-by-case determination. Id.
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this assumption is true, a case-by-case approach may cause the law to
become convoluted and burdened with artificial and arbitrary distinctions.

As future courts proceed on the task of deciding whether immunity
should be retained in a particular case, they must be guided by the only
remaining rationale for the doctrine: that parents need broad discretion to
fulfill their parental duties. Thus, in each case, the court must answer
two questions to determine whether immunity should be granted. First,
does the parent need discretion for the type of conduct involved in the
case before the court? Second, did the parent abuse his discretion?

There can be no generally applicable rule dictating when a parent needs
discretion. Each court must answer this question in light of the particular
facts of the case before it. If an appellate court retains parental tort immu-
nity in a particular case, it creates a precedent. Under stare decisis, a sub-
sequent court will have to review the facts of the case before it and com-
pare them with those of cases with precedential value. If the court decides
that the immunity should be retained, it must distinguish the case from
prior cases where the immunity was held inapplicable. Conversely, if the
court does not grant the immunity, it must distinguish the case from cases
where the immunity was retained. There is, however, no clear line of
demarcation between parental conduct that requires discretion and con-
duct that does not. Consequently, a case-by-case determination of when
immunity should be retained may result in artificial distinctions.

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70. See note 44 and accompanying text supra.
71. Indeed, when it first created the parental immunity doctrine in Washington, the Roller court
made a similar conclusion regarding immunity in general.

[If it be once established that a child has a right to sue a parent for a tort, there is no practical
line of demarkation which can be drawn; for the same principle which would allow the action in
the case of a heinous crime, like the one involved in this case, would allow an action to be
brought for any other tort. The principle permitting the action would be the same. The torts
would be different only in degree.

37 Wash. 242, 244, 79 P. 788, 789 (1905).

The futility of attempting to make such a differentiation has led one judge to conclude that "[i]f the
immunity from suit is removed for an automobile tort, it follows logically that it is removed for all
dissenting).

72. If DeLay v. DeLay, 54 Wn. 2d 63, 337 P.2d 1057 (1959), is still maintained along with
Merrick, the potential for artificial distinctions is easily realized. Under DeLay, see notes 46–47 and
accompanying text supra, a subsequent court may logically hold that a parent is immune from any
claims of negligent supervision. Under Merrick, a subsequent court may logically hold that a parent
is vulnerable to suit for the negligent operation of any vehicle or tool. What then should a court do in
a case in which a child is injured by a rock flying from a power mower operated by his father? Under
this hypothetical, was the accident caused by the father’s negligence in operating the mower too close
to his child, thus presumably vulnerable to suit, or was it caused by the father’s negligence in su-
 pervising the child and allowing him to get too close, thus presumably immune? Either view would
require an artificial distinction.

To an extent, New Jersey has faced the problem above. In a case closely analogous to Merrick, the
court abrogated parental tort immunity for injuries arising from the parent’s negligence in operating
A consideration of governmental immunity, for example, illustrates the danger of determining the applicability of an immunity on a case-by-case basis. To limit the doctrine of governmental immunity, Washington courts allowed suit if the negligence of the defendant municipality, through its officers and employees, was in the exercise of its corporate, private, or proprietary powers, but not if the negligence was in the exercise of its governmental, public, or legislative duties. Decisions interpreting the immunity resulted in distinctions that were barely discernible and, hence, heavily criticized. Governmental immunity became "fraught with technicalities and absurd distinctions," and decisions were made "in accordance with a mass of confused rules and ponderous maxims." The cause of the problem was the same as that present in the doctrine of parental immunity—a difficulty in distinguishing between immune and non-immune conduct. If portions of the parental immunity doctrine are retained on a case-by-case approach, the doctrine may be expected to become similarly convoluted.

an automobile. France v. A.P.A. Transp. Corp., 56 N.J. 500, 267 A.2d 490 (1970). As in Merrick, the court provided no further guidance than to state that "there may be areas involving the exercise of parental authority and care over a child which should not be justiciable in a court of law." 267 A.2d at 494. Subsequently, a lower appellate court allowed a suit for a child's injuries sustained while the father was mowing the lawn. Gross v. Sears, Roebuck & Co., 158 N.J. Super. 442, 386 A.2d 442 (App. Div. 1978). The court in this case stressed the affirmative nature of the father's act while belittling the evidence supporting a claim of negligent supervision. Two trial courts, however, have issued opinions on the issue of negligent supervision, each reaching a contrary conclusion. See Fritz v. Anderson, 148 N.J. Super. 68, 371 A.2d 833 (Law Div. 1977) (parents immune from a claim of negligent supervision when their child was injured by falling into an excavation); Convery v. Maczka, 163 N.J. Super. 411, 394 A.2d 1250 (Law Div. 1978) (mother not immune from a claim of negligent supervision when her child was injured when he jumped off a chair).


74. In Indian Towing Co. v. United States, 350 U.S. 61, 65 (1955), Justice Frankfurter described the distinctions as a "quagmire that has long plagued the law of municipal corporations." He stated further: "[T]he decisions in each of the States are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound." Id.

For a partial bibliography of critical discussions in this area of law, see Comment, Abolition of Sovereign Immunity in Washington, 36 WASH. L. REV. 312, 313 (1961).

75. Comment. Abolition of Sovereign Immunity in Washington, supra note 74, at 316.

76. Id.

77. Hagerman v. City of Seattle, 189 Wash. at 706, 66 P.2d at 1157 (Blake, J., dissenting). See notes 71-72 and accompanying text supra.

78. The potential for such problems arising from a limited holding like that in Merrick has led one court to conclude that "[p]iecemeal abrogation of established law by judicial decree is, like a partial amputation, ordinarily unwise and usually unsuccessful." Skinner v. Whitley, 281 N.C. 476, 189 S.E.2d 230, 233 (1972).
The second question, whether a parent has abused his discretion, will lead to the same problem as the first question, whether a parent needs discretion. Under *Hoffman v. Tracy*, a parent's discretion is limited to conduct not amounting to willful misconduct; if he acts with willful misconduct, then he will be held to have "temporarily abdicat[ed] his parental responsibilities" and will not be granted immunity from his child's suit.

A judicial determination of willful misconduct is the same in principle as a judicial determination of negligence by establishing specific rules of conduct as matters of law. Justice Holmes believed that the latter proposition was desirable; he felt that such standards ought increasingly to be fixed by the court so that people would know in advance, to the greatest possible extent, just what they are supposed to do in any given circumstance. These decisions would provide notice to people of what constitutes tortious conduct, thereby allowing them to adjust their conduct accordingly. Such rules of conduct, however, lack flexibility, and thus their mechanical application may result in unjust decisions that could be avoided only by making artificial distinctions. As a result, Holmes' position has been heavily criticized and the trend in this century has been against judges "forming standards of behavior that amount to rules of law." Washington courts have generally declined to determine negli-
gence as a matter of law and have specifically refused to do so in cases involving parental conduct.

Washington courts should also avoid deciding the applicability of immunity by determining as a matter of law whether a parent has abused his discretion by willful misconduct. Initially, such determinations may provide notice to parents of when they are immune, a desirable result only if one assumes that tort law affects behavior. Even if the validity of this assumption is conceded, the inflexibility of making such determinations as a matter of law will result in artificial distinctions in subsequent cases, and thus any certainty as to what is or is not immune conduct will be diminished. Indeed, this uncertainty undercuts the only remaining rationale supporting the immunity. In Borst v. Borst, the court said that to ensure that parents adequately perform their duties “it is necessary that the parents be not subject to the risk of suit at the hands of their children.” Determining the immunity on a case-by-case basis, however, leaves the parent uncertain about his immunity. Thus, he is subject to the risk of suit, and the reason for the immunity fails.

B. The Comprehensive Rule Approach

The Merrick court could have adopted a comprehensive rule purporting to state specific kinds of conduct for which a parent is immune. In Goller v. White, the Wisconsin Supreme Court adopted such a rule. The court

84. The court in McQuillan v. City of Seattle, 10 Wash. 464, 38 P. 1119 (1895), set forth the only two classes of cases in which the question of negligence may be determined by the court as a matter of law:

The first is where the circumstances of the case are such that the standard of duty is fixed, and the measure of duty defined, by law, and is the same under all circumstances. And the second is where the facts are undisputed, and but one reasonable inference can be drawn from them. If different results might be honestly reached by different minds then negligence is not a question of law, but one of fact for the jury.

Id. at 466, 38 P. at 1120 (citations omitted).

This first category refers generally to those cases where the standard of care is clearly defined by statute and remains the same under all circumstances, such as cases involving negligence per se. Breivo v. City of Aberdeen, 15 Wn. App. 520, 525, 550 P.2d 1164, 1168 (1976). There is no such standard for parental conduct.

85. See Sundstrom v. Puget Sound Traction, Light & Power Co., 90 Wash. 640, 156 P. 828 (1916) (declining to find parents contributorily negligent as a matter of law for sending children, three and seven-years-old, to the neighborhood store; issue was for jury); Bruner v. Little, 97 Wash. 319, 166 P. 1166 (1917) (declining to find parents contributorily negligent as a matter of law for letting eight-year-old child cross the street unattended).

86. See notes 71-72 and accompanying text supra (noting that determining as a matter of law when a parent needs discretion and therefore has immunity, will lead to untenable distinctions).

87. 41 Wn. 2d 642, 251 P.2d 149 (1952).

88. Id. at 656, 251 P.2d at 156.

89. 20 Wis. 2d 402, 122 N.W.2d 193 (1963).
in that case abrogated the doctrine of parental tort immunity except: "(1) where the alleged negligent act involves an exercise of parental authority over the child; and (2) where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care."90

The Goller approach is plagued with the same defects as a case-by-case approach since "the problems inherent in construing the . . . exceptions present a real danger of arbitrary line-drawing."91 These problems arise because it is impossible to set forth a rule of law that states when a child can and cannot sue his parents that can be universally applied. Not surprisingly, the Wisconsin court and other courts92 adopting this comprehensive rule have had difficulty in applying it to particular factual situations.93 Significantly, one of the states originally following the Goller

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90. Id. at 413, 122 N.W.2d at 198.
91. Anderson v. Stream, 295 N.W.2d 595, 598 (Minn. 1980).
92. Michigan has adopted judicially a variation of the Goller rule of categorical exemption. See Plumley v. Klein, 388 Mich. 1, 199 N.W.2d 169 (1972) (has variation of "reasonable parental authority" in the first Goller exemption, and "reasonable parental discretion" in the second Goller exemption). See also Rigdon v. Rigdon, 465 S.W.2d 921 (Ky. 1971). The addition of "reasonable" in Plumley was done without further comment by the court. Presumably, however, under this formulation of the rule, immunity within each exemption is not absolute. Indeed, the addition may make a sham of the exemptions for "a literal interpretation of the modifier 'reasonable' would mean that a parent is immune from liability only in situations where he is non-negligent in exercising his parental authority (or discretion)." Anderson v. Stream, 295 N.W.2d 595, 598 (Minn. 1980).

Minnesota had also adopted a variation of the Goller approach. See Silesky v. Kelman, 231 Minn. 431, 161 N.W.2d 631 (1968). In Anderson v. Stream, 295 N.W.2d 595 (Minn. 1980), however, the Minnesota Supreme Court rejected that approach and abolished the immunity entirely. See note 94 infra.

93. For example, after Goller was decided, the Wisconsin court was confronted with whether a failure to give a child proper instructions on how to leave a school bus and cross a highway was within a Goller exemption. Lemmen v. Servais, 39 Wis. 2d 75, 158 N.W.2d 341 (1968). The court held that such parental conduct was protected by an exemption. Two years later, the same court was asked whether the negligent supervision of a child playing on a swing set fit within an exemption. Cole v. Sears, Roebuck & Co., 47 Wis. 2d 629, 177 N.W.2d 866 (1970). The court held that although education falls within the protection of an exemption, the supervision of child’s play did not. Finally, in Thoreson v. Milwaukee & Suburban Transp. Co., 56 Wis. 2d 231, 201 N.W.2d 745 (1972), the court faced a factual situation in which a child, left alone in the living room while his mother went to the neighbors, walked out of the house and ran in front of a bus. Relying on Lemmen, the mother argued that her negligence was in failing to educate the child not to leave the house and therefore that she was immune. Relying on Cole, the bus company, seeking contribution, argued that her negligence was in not supervising the child properly and therefore that she was not immune. The court recognized that the distinction between the two was artificial and overemphasized. Accordingly, it held that in either case, the conduct did not fall within an exception, apparently overruling Lemmen.

The Thoreson court stated that the exclusion was limited to "legal duties." Immunity did not "extend to the ordinary acts of upbringing, whether in the nature of supervision or education which are not of the same legal nature as providing food, clothing, housing, and medical and dental services." Id. at 247, 201 N.W.2d at 753. This distinction between legal and moral duties of a parent does not provide much better guidance for when a parent should be immune. Further, it too is an
approach has recently rejected it in favor of abolishing the immunity doctrine entirely. Likewise, instead of attempting to adopt a comprehensive rule, Washington should simply abrogate parental tort immunity altogether.

C. Abrogation of the Immunity

The only way the courts can avoid a quagmire caused by tenuous distinctions and confusing holdings is to abrogate the doctrine of parental tort immunity entirely. A parent’s liability would then be based upon the jury deciding the issue of negligence, without a prior determination of immunity by the court. A criticism of total abrogation is that the discretion a parent needs to perform his obligations would no longer be safeguarded by the law. A response to this criticism is that the parent’s discretion may still be protected by making it part of the jury’s consideration on the issue of negligence. Thus, the questions of when a parent needs discretion and whether he has abused it, presently the court’s focus in determining immunity, would be part of the jury’s inquiry of parental negligence. This note therefore proposes abolishing the immunity; the question of parental negligence should be determined by the jury in light of its assessment of the discretion, if any, that the parent needs.

The jury is especially qualified to make these determinations. The questions of when and how much discretion is needed would be determined after the jury hears all the evidence in the case. A defendant parent, for example, could adduce evidence showing that his conduct was not tortious when cognizance is taken of the child’s behavioral problems or of the unique parent-child relationship involved. The jury could adjust its view of reasonableness in light of all relevant circumstances.


94. In Anderson v. Stream, 295 N.W.2d 595 (Minn. 1980), the Minnesota Supreme Court rejected the Goller approach it had adopted earlier in Silesky v. Kelman, 231 Minn. 431, 161 N.W.2d 631 (1968). The Anderson court reasoned that the standard was not very helpful for it would still require a case-by-case analysis to determine whether or not the particular conduct at issue was within one of the exemptions. Furthermore, the court was concerned that the standard added "to the potential of arbitrary decision-making in the area." 295 N.W.2d at 598. The determinative consideration for the court’s decision was "that the areas of parental authority and discretion, for which the Silesky exceptions were designed to provide safeguards, can be effectively protected by use of a 'reasonable parent standard.'" Id. See notes 104–19 and accompanying text infra.

95. See discussion accompanying note 70 supra.


97. See notes 104–19 and accompanying text infra.
Moreover, treating parental liability as a question of fact\textsuperscript{98} avoids the growth of technical and artificial legal distinctions that may otherwise result. Since the jury’s determination is not a rule of law, it applies only to the case before it.\textsuperscript{99} Juries do not have to distinguish or overturn a prior decision, as does a court when dealing with a rule of law that the court feels would result in an unjust decision. Instead, each jury decides on the particular merits and unique equities of the case before it.\textsuperscript{100} Accordingly, the law would not become fraught with artificial distinctions, as might happen if the immunity doctrine is retained.\textsuperscript{101}

With the abolition of parental tort immunity, the factfinder could apply a standard of care very similar to the “reasonable person” standard ordinarily applied.\textsuperscript{102} Because, however, a parental tort occurs in the context of a special relationship, the standard should be adjusted to account for the parent’s needed discretion.\textsuperscript{103} Therefore, the factfinder should apply a modified standard of the “reasonably prudent parent.”

\textsuperscript{98} A fact is “something which has happened or existed,” while law is typically defined as a “body of principles and rules which are capable of being predicated in advance.” Bohlen, \textit{Mixed Questions of Law and Fact}, 72 U. PA. L. REV. 111, 112 (1924). The determination of reasonable conduct by a jury is something between a finding of fact and a declaration of law. \textit{Id.} at 115. Accordingly, one commentator has suggested that “the terms ‘law’ and ‘fact’ are merely short terms for the respective functions of judge and jury.” L. GREEN, \textit{JUDGE AND JURY} 279 (1930). The important difference between these two functions is that a judicial ruling announces a fixed rule or principle to which others must conform in the future. Bohlen, \textit{supra}, at 116. A jury determination is only of consequence to the immediate case before it. \textit{See note 99 infra.}

\textsuperscript{99} L. GREEN, \textit{supra} note 98, at 179. In Bohlen, \textit{supra} note 98, the author states:

The decision of a jury determines the standard for the one case, and for that case only. It operates only \textit{ex post facto}. . . . [A] standard, once used to determine the wrongfulness of the act or omission of the defendant in a particular case, has fulfilled its purpose. It has no force, binding or persuasive, in determining whether identical conduct under identical circumstances is right or wrong. Thus, room is left for a change of standard when a change in the physical conditions of life, or a change in the public valuation of the respective interests concerned, require [sic] it.

\textit{Id.} at 116-17.

\textsuperscript{100} It is important to be aware that although the question is one for the jury, the court still sets “outer limits” within which the jury may decide. James, \textit{Functions of Judge and Jury in Negligence Cases}, 58 YALE L.J. 667, 677 (1949). In addition to ruling on the sufficiency of proof, the judge limits the jury by its instructions and by its rulings on evidence. \textit{Id.} at 679–85. \textit{See also} L. GREEN, \textit{supra} note 98, at 157–59; Bohlen, \textit{supra} note 98, at 117.

\textsuperscript{101} \textit{See notes} 71–85 and accompanying text \textit{supra.}

\textsuperscript{102} Typically, a jury is instructed to make its determination of negligence by comparing the conduct at issue with that expected of a reasonably prudent person acting under the same or similar circumstances. Grand Trunk Ry. of Canada v. Ives, 144 U.S. 408, 416 (1891); Chadwick v. Ek, 1 Wh. 2d 117, 95 P.2d 398 (1939); Morehouse v. City of Everett, 141 Wash. 399, 252 P. 157 (1926); \textit{See James, supra note 100, at 676.}

\textsuperscript{103} The reasonably prudent person has been a very adaptable standard. For example, it has been adjusted at times to account for a child’s conduct. Burget v. Saginaw Logging Co., 198 Wash. 61, 63, 86 P.2d 1117, 1118 (1939) (standard adjusted to consider the child’s capacity, intelligence, knowledge, experience and discretion, ability to remember instructions, and all attendant circumstances); Hanson v. Washington Water Power Co., 165 Wash. 497, 502, 5 P.2d 1025, 1027 (1931)
IV. THE "REASONABLY PRUDENT PARENT" STANDARD

In the place of parental tort immunity, Washington courts should substitute a standard of care defined by the reasonably prudent parent’s conduct. Under this standard, a jury would be instructed that it should not find a parent liable for the injury of his child unless it finds that the parent failed to act as a reasonably prudent parent under the same or similar circumstances.

In *Gibson v. Gibson*, the California Supreme Court adopted such a standard when it abrogated the parental tort immunity doctrine. The court recognized that the parent-child relationship is unique in many respects and that traditional concepts of negligence should not be applied without considering the nature of the relationship. Accordingly, the court held that “[t]he standard to be applied is the traditional one of reasonableness, but viewed in light of the parental role.”

Critics of this standard object to leaving the issue of parental negligence to the jury because, they say, it is inappropriate for activity involving the unique parent-child relationship to be measured against a common standard. They are particularly skeptical about applying a common

(child required to exercise the care expected of a reasonably prudent person of the child’s age and understanding, under the same or similar circumstances). The standard has also been adjusted for a blind person, e.g., *Masterson v. Lennon*, 115 Wash. 305, 197 P. 38 (1921), a physically disabled person, e.g., *Sterling v. New England Fish Co.*, 410 F. Supp. 164 (W.D. Wash. 1975) or one with special expertise, e.g., *Jarrard v. Seifert*, 22 Wn. App. 476, 591 P.2d 809 (1979); WASH. REV. CODE § 4.24.290 (1979) (standard for healing professions).

104. 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971).

105.  Id. Recently, in *Anderson v. Stream*, 295 N.W.2d 595 (Minn. 1980), the Minnesota Supreme Court also abrogated the doctrine of parental tort immunity and adopted the reasonably prudent parent standard set forth in *Gibson*. See note 107 and accompanying text infra.

A few other states have made broad holdings purporting to abolish the doctrine. See *Peterson v. City & County of Honolulu*, 51 Hawaii 484, 462 P.2d 1007 (1970); *Rupert v. Stienne*, 90 Nev. 397, 528 P.2d 1013 (1974); *Briere v. Briere*, 107 N.H. 432, 224 A.2d 588 (1966); *Falco v. Pados*, 444 Pa. 372, 282 A.2d 351 (1971) (but note concurring opinion which added the caveat of the *Goller* exemptions; see notes 89-90 and accompanying text supra). It is not clear with what these courts have replaced the doctrine. Presumably they will apply a standard similar to the one in *Gibson*. See note 107 and accompanying text infra.


107.  Id. at 921, 479 P.2d at 653, 92 Cal. Rptr. at 293. In other words, the proper test of a parent’s conduct is: “[W]hat would an ordinarily reasonable and prudent parent have done in similar circumstances?”  Id. (emphasis in original).

108. For example, the Idaho Supreme Court refused to adopt a reasonable parent standard because the citizens of its state were “too diverse and independent to be judged by a common standard in such a delicate area as the parent-child relationship.” *Pedigo v. Rowley*, 610 P.2d 560, 564 (Idaho 1980). The New York court has expressed the same concern: “Considering the different economic, educational, cultural, ethnic and religious backgrounds which must prevail, there are so many combinations and permutations of parent-child relationships that may result that the search for a standard would necessarily be in vain—and properly so.” *Holodook v. Spencer*, 36 N.Y.2d 35, 50, 324 N.E.2d 338, 346, 364 N.Y.S.2d 859, 871 (1974) (quoting lower court opinion, 43 A.D.2d 129, 135, 350 N.Y.S.2d 199, 204 (1973)).
standard of reasonableness to a case where the duty allegedly breached is one of supervision. They are concerned that a standardized norm will constrict a parent’s discretion to make difficult judgments concerning how much independence a child should have to mature and develop properly. This criticism is not well founded. It presumes that the reasonably prudent parent standard is a totally objective standard that clearly outlines what a parent can and cannot do. To the contrary, like the reasonable person standard, the reasonable parent standard is never defined in terms of particular qualities and characteristics of human conduct. Rather, the reasonable person is the personification of each court’s or jury’s social judgment after hearing the merits of the particular case. Thus, there is

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The reluctance to allow a claim of negligent supervision may be due to a concern that a parent may hesitate to initiate a suit on the child’s behalf against a third party because of the fear that he too may be liable. A parent’s automobile liability insurance may not protect him against a third party tortfeasor seeking contribution for alleged negligent supervision of the child. Instead, a parent would need a comprehensive homeowner’s policy or other liability insurance.

Although Washington is a comparative negligence state, it does not at present recognize contribution. Wenatchee Wenoka Growers Ass’n v. Krack Corp., 89 Wn. 2d 847, 576 P.2d 388 (1977). The court explicitly left open the option, however, to adopt judicially the doctrine of contribution: "[W]e neither hold nor mean to suggest that we will reject further consideration of this matter in an appropriate case." Id. at 854, 576 P.2d at 392.


111. See Grand Trunk Ry. of Canada v. Ives, 144 U.S. 408, 416–17 (1891); L. Green, supra note 98, at 164, 173–74; Bohlen, supra note 98, at 113.

112. Bohlen, supra note 98, at 113. See generally L. Green, supra note 98. In chapter five of this book, Professor Green argues that the reasonably prudent person is a "ritualistic formula," a mere figure of speech that courts use in translating the negligence issue for the jury’s judgment and in articulating a decision for purposes of a record. It serves as a prophylaxis. As a statement, it appears to be objective; however, when the jury passes judgment, the standard is no more than a sobering caution to the jury that they are dealing with society’s power and not their own. Thus, each of the possible assortments of qualities and characteristics of the persons involved may be a factor in the
an element of subjectivity within the standard that allows for the consideration of all peculiar factors involving parent and child in that particular case. The reasonably prudent parent standard would also allow the jury to consider the practical responsibilities, expectations, and limitations that flow from the parent-child relationship.

Admittedly, even though the reasonably prudent parent is a subjective standard, a parent’s conduct would receive the scrutiny of a jury. Consequently, the parent’s discretion in raising his children may be limited. The parent, however, would not be subjected to any greater examination nor to any greater risk of second-guessing than that to which the court would subject him when it determines immunity by answering the questions whether a parent needs discretion and whether the parent has abused it. Furthermore, to ameliorate any potential problems of prejudice, juries can be reminded that reasonable parents can disagree over the best method of raising a child. Appropriate instructions would help to ensure that parents will be given the proper discretion to perform their duties.

The successful application of a similar standard to parental conduct in cases of imputed negligence attests to the feasibility of the reasonably prudent parent standard. Also, Washington courts have successfully

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113. See Seavey, Negligence—Subjective or Objective?, 41 HARV. L. REV. 1 (1927). In this classic statement, Professor Seavey concludes "that there is no standardized man; that there is only in part an objective test; that there is no such thing as reasonable or unreasonable conduct except as viewed with reference to certain qualities of the actor . . . ." Id. at 27. By adapting the standard to the reasonably prudent parent, the special considerations of being a parent are emphasized.


115. See discussion accompanying note 70 supra.

116. In Anderson v. Stream, 295 N.W.2d 595 (Minn. 1980), the court expressly allayed the fear that juries cannot make these decisions responsibly. [W]e reject the contention that juries are incapable of rationally and equitably deciding whether a parent has acted negligently in exercising his parental control and discretion. Our system of justice places great faith in juries, and we see no compelling reason to distrust their effectiveness in the parent-child context. Id. at 600.

117. At one time, there was a rule of imputing a parent’s contributory negligence to his child. Washington abrogated this doctrine at an early date. E.g., Roth v. Union Depot Co., 13 Wash. 525, 545–46, 43 P. 641, 647 (1896). In those cases in which the doctrine was still maintained, the parent’s conduct was judged against a standard of reasonableness much as it would be in cases between parent and child. A multitude of factors were considered. See, e.g., Murray v. Scranton Ry., 36 Pa. Super. Ct. 576, 580 (1908) ("The situation of the parents, the character of their home, the weather,
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applied a standard of reasonableness to parents in cases in which parents seek to recover in their own right for expenses arising from a child’s injury. Likewise in criminal law, a standard of reasonableness has been applied to activity arising from the parent-child relationship.

The reasonably prudent parent standard is a workable mechanism by which a jury can make its decision. Resort to the standard avoids the problems engendered by an obscure immunity doctrine. Moreover, subjecting parental conduct to a jury’s scrutiny under this standard ensures that clearly unacceptable conduct will give rise to tort liability. At the same time, parents are provided adequate discretion to discharge the obligations of parenting.

V. CONCLUSION

A basic principle of tort law is that one who has been injured by another’s tortious conduct should be compensated by the tortfeasor. Thus, liability is the rule; immunity is an exception. As an exception, parental tort immunity cannot be adequately justified. Borst v. Borst was an important step in recognizing this conclusion. Merrick v. Sutterlin was a logical extension of the Borst analysis. Unfortunately, Merrick suggests that the doctrine may still be applied to some kinds of parental conduct. To do so, however, would be inappropriate. A piecemeal application of immunity to conduct that cannot be clearly differentiated will result in arbitrary distinctions and a confusion of the law in this area. Washington would do better by totally abandoning the doctrine of parental tort immunity. Consequently, the Borst-Merrick transition of allowing suit for auto-

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the health of the children, their manner of living, and all the attending surroundings are elements to be considered . . . ."

118. E.g., Vinnette v. Northern Pac. R.R., 47 Wash. 320, 91 P. 975 (1907); Cox v. Hugo, 52 Wn. 2d 815, 329 P.2d 467 (1958). In Cox, the court quoted favorably from Doren v. Northwestern Baptist Hosp. Ass'n, 240 Minn. 181, 191-92, 60 N.W.2d 361, 368 (1953): "The rule is well established that a parent is required to exercise that degree of care for a child which a reasonably prudent person would exercise under the same conditions." 52 Wn. 2d at 821, 329 P.2d at 470.

The Cox court then held that parents are not negligent in the care of their children simply by allowing the children to play outside without their constant surveillance. In refusing to impose such an impracticable standard, the court stated that "[p]arents are not required to restrain their children within doors at their peril." Id. at 820, 329 P.2d at 470.

119. State v. Williams, 4 Wn. App. 908, 484 P.2d 1167 (1971). In this case, a husband and wife were found guilty of manslaughter for negligently failing to provide their child with medical attention necessary for the child’s survival. To raise the defense of excusable homicide, defendants would have had to have exercised "ordinary caution." The court defined ordinary caution as "the kind of caution that a man of reasonable prudence would exercise under the same or similar circumstances." Id. at 913, 484 P.2d at 1171. When measured against this standard, defendants were found to be negligent and thus guilty.
mobile negligence should be extended by subsequent courts to all parental conduct. If parents are thought to need discretion for certain conduct, this may still be protected by the factfinder's use of a reasonably prudent parent standard.

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