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Will Junior's First Words Be "I'll See You in Court"

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Will Junior's First Words Be "I'll See You In Court!"?

Hartman v. Hartman[1]

I. INTRODUCTION

The doctrine of parental immunity, in its original form, prevented children from suing their parents in tort.[2] Although the immunity once enjoyed almost universal acceptance, it has been the target of modern criticism.[3] The vast majority of states which once embraced the immunity have either limited or wholly abrogated its application.[4]

In Missouri, parental immunity only prevented minors from asserting causes of action based in negligence against their parents.[5] Over time, Missouri courts limited the application of parental immunity to actions by unemancipated minors which could jeopardize family relations.[6] In *Hartman v. Hartman*, the Missouri Supreme Court wholly abolished parental immunity and adopted a "reasonable parent" standard of care.[7]

II. FACTS AND HOLDING

In *Hartman v. Hartman*,[8] the Missouri Supreme Court consolidated two cases (*Hartman* and *Armstrong*) for a re-examination of the application of the parental immunity doctrine in Missouri.[9]

In the *Hartman* case, two unemancipated minor children filed a negligence action for personal injuries against their father and grandfather.[10] The children alleged that the defendants negligently maintained and operated a gas stove that exploded and injured the children.[11] The father filed a

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1. 821 S.W.2d 852 (Mo. 1991) (en banc).

2. Gail D. Hollister, *Parent-Child Immunity: A Doctrine in Search of a Justification*, 50 FORDHAM L. REV. 489, 489 (1982).

3. *See id.* at 525-27; Martin J. Rooney & Colleen M. Rooney, *Parental Tort Immunity: Spare the Liability, Spoil the Parent*, 25 NEW ENG. L. REV. 1161, 1161-65 (1991); Carolyn L. Andrews, Note, *Parent-Child Torts in Texas and the Reasonable Prudent Parent Standard*, 40 BAYLOR L. REV. 113 (1988).

4. Rooney & Rooney, *supra* note 3, at 1161 n.3; *see also* Romualdo P. Eclavea, Annotation, *Liability of Parent for Injury to Unemancipated Child Caused by Parent's Negligence—Modern Cases*, 6 A.L.R. 4TH 1066 §§ 6-18 (1981 & Supp. 1992).

5. *Hartman*, 821 S.W.2d at 855.

6. Fugate v. Fugate, 582 S.W.2d 663, 667 (Mo. 1979) (en banc) (quoting Brennecke v. Kilpatrick, 336 S.W.2d 68, 73 (Mo. 1960) (en banc)).

7. *Hartman*, 821 S.W.2d at 858.

8. *Id.*

9. *Id.* at 852.

10. *Id.* at 852-53.

11. *Id.* at 853.

motion for summary judgment, alleging that the parental immunity doctrine prevented unemancipated, minor children from asserting a negligence claim against a custodial parent.[12] The trial court sustained the motion to dismiss and the Missouri Court of Appeals, Eastern District, affirmed.[13]

In the *Armstrong* case, Tracy Armstrong, an unemancipated minor, brought an action for negligence against her mother Mary Armstrong.[14] Michael Armstrong, Sr. also brought a claim against Mary Armstrong for the wrongful death of their son Michael Armstrong, Jr., an unemancipated minor.[15] Tracy was severely injured, and Michael Jr. was killed after being struck by a van while pushing Mary Armstrong's stalled vehicle on the I-435 Bridge in Kansas City.[16] The plaintiffs alleged that Mary Armstrong's negligence, combined with the negligence of the van operator, caused Tracy's injuries and Michael Jr.'s death.[17]

The defendant, Mary Armstrong, filed a motion to dismiss for failure to state a cause of action.[18] She asserted that the parental immunity doctrine barred her daughter's negligence claim and the claim for the wrongful death of her son.[19] The trial court granted the motion, and the plaintiffs appealed to the Missouri Court of Appeals, Western District.[20] The Missouri Supreme Court granted transfer prior to the issuance of an opinion by the court of appeals.[21]

After evaluating the theory and application of parental immunity by Missouri courts, the Missouri Supreme Court found an insufficient basis to retain the immunity.[22] The court held that parental immunity would no longer bar any action by a child against his or her parent.[23] The court then reversed the judgments of the lower courts and remanded them for further proceedings.[24]

12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 853-58.
23. *Id.* at 858.
24. *Id.* at 858-59.

III. LEGAL BACKGROUND

A. Development of the Doctrine

1. Nationally

Parental immunity is a judicially created doctrine first applied in the case of *Hewellette v. George*.[25] *Hewellette* barred a child's claim for false imprisonment against her parents on the rationale that parental immunity must exist in order to preserve family harmony.[26] Two other courts soon applied the newly formed immunity and, together with *Hewellette*, are considered the "great trilogy" foundation of the doctrine.[27] Parental immunity was soon adopted in all but five states.[28]

Throughout the years, various rationales have been put forth in support of parental immunity. These include maintaining adequate leeway for parents in the exercise of parental authority,[29] avoidance of fraud or collusion between family members,[30] protection of family assets and maintenance of a proportionate share of the wealth between family members,[31] avoidance of the possibility that a tortfeasor parent may profit by inheriting the child's recovery,[32] and the analogous familial relationship which supports immunity between spouses.[33]

2. Missouri

Missouri first considered the issue of parental immunity in *Wells v. Wells*.[34] The Missouri Court of Appeals at Kansas City recognized a negligence cause of action between an unemancipated child and her mother resulting from an automobile accident.[35] The court reasoned that because

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25. 9 So. 885 (Miss. 1891).

26. *Id.* at 887.

27. McKelvey v. McKelvey, 77 S.W. 664 (Tenn. 1903) (child barred from suing father or stepmother for cruel and inhumane treatment); Roller v. Roller, 79 P. 788 (Wash. 1905) (child raped by father could not sue for pain and suffering).

28. These states were Hawaii, Nevada, South Dakota, Utah, and Vermont. *See* Petersen v. City & County of Honolulu, 462 P.2d 1007 (Haw. 1970) (no parental immunity); Rupert v. Stienne, 528 P.2d 1013 (Nev. 1974) (no parental immunity); Elkington v. Foust, 618 P.2d 37 (Utah 1980) (no immunity for intentional torts); Wood v. Wood, 370 A.2d 191 (Vt. 1977) (indicated that limitations might be placed upon parent-child actions in the future). South Dakota courts have not considered the issue.

29. *McKelvey*, 77 S.W. at 664.

30. Coleman v. Coleman, 278 S.E.2d 114, 114 (Ga. 1981); Hastings v. Hastings, 163 A.2d 147, 150 (N.J. 1960).

31. *Roller*, 79 P. at 789.

32. *Id.*

33. *Id.*; *McKelvey*, 77 S.W. at 665.

34. 48 S.W.2d 109 (Mo. Ct. App. 1932).

35. *Id.* at 110-11.

Missouri did not bar property actions between children and parents, even though a suit could cause family disharmony, tort actions should likewise not be barred merely because of the possibility of family discord.[36]

A few years later in *Cook v. Cook*,[37] the Missouri Court of Appeals at Springfield followed the "prevailing common law rule" and applied parental immunity to bar an unemancipated child's assault action against her father.[38] The court noted that the parental immunity doctrine was based upon sound public policy that favored maintaining domestic harmony and that Missouri had adequate criminal remedies for willful and malicious acts harmful to children.[39]

The courts in Missouri remained split upon the issue for fifteen years until the Missouri Supreme Court resolved the conflict by applying parental immunity in *Baker v. Baker*.[40] *Baker* barred a toddler's cause of action for negligent operation of an automobile against her father.[41] The *Baker* decision was grounded in the public's interest in maintaining family harmony and the fact that no common law right allowed minors to bring a tort cause of action against a parent.[42]

B. Modification and Decline of Parental Immunity

1. Nationally

The first court to significantly modify parental immunity was the Wisconsin Supreme Court in *Goller v. White*.[43] *Goller* retained parental immunity only if the parent's acts could be classified as an exercise of parental authority or the exercise of discretion in providing goods, care, or services to the child.[44] *Goller*'s approach has been followed in a substantial number of jurisdictions.[45]

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36. *Id.* at 111.

37. 124 S.W.2d 675 (Mo. Ct. App. 1939).

38. *Id.*

39. *Id.* at 677.

40. 263 S.W.2d 29 (Mo. 1953).

41. *Id.* at 31-32.

42. *Id.* at 30-32.

43. 122 N.W.2d 193 (Wis. 1963) (allowed a negligence suit by a son to recover for injuries received in a farming accident).

44. *Id.* at 198.

45. *See, e.g.*, Sandoval v. Sandoval, 623 P.2d 800, 801-02 (Ariz. 1981) (en banc) (immunity abrogated in Arizona except where act involves an exercise of parental authority or discretion with respect to necessities or other care provided by parents); Turner v. Turner, 304 N.W.2d 786, 789 (Iowa 1981) (immunity abrogated where tortious conduct is outside the area of parental authority and discretion); Rigdon v. Rigdon, 465 S.W.2d 921, 923 (Ky. 1971) (parents immune only if negligence involved the reasonable exercise of parental authority or discretion with respect to the provision of care and necessities); Plumley v. Klein, 199 N.W.2d 169, 172-73 (Mich. 1972) (immunity exists only if negligence involved the reasonable exercise of parental authority or discretion with respect to the provision of care and necessities.); Ashley v. Bronson,

By allowing child-parent suits under limited circumstances, these courts have attempted to balance a child's right to redress with a parent's burden of child rearing.[46] The rationale for limiting parental liability is not to reward negligent parents, but rather to enable parents to discharge the important parental duties which society exacts from them.[47] Another rationale is that judicial scrutiny of parental acts both invades the autonomy of a family and allows juries and judges to second-guess parental decisions with only a brief view of the family situation.[48]

The *Goller* standard has met with varying success and resulted in scholarly criticism because of the difficulty in categorizing parental actions.[49] There is no clear definition of which acts are within the scope of a reasonable exercise of parental authority or an exercise of discretion in the provision of necessities.[50] The lack of a bright-line standard leaves courts and juries with little guidance, which in turn results in inconsistent and varied outcomes.[51] Another criticism of this approach is that it gives parents the right to act negligently so long as their conduct can be categorized within one of the exceptions.[52]

A few jurisdictions have adopted the "reasonable parent" standard which was first introduced by the California Supreme Court in *Gibson v. Gibson*.[53] The reasonable parent standard imposes the duty on parents to act as an ordinary, reasonable, and prudent parent under similar circumstances.[54] Liability is imposed if the parent fails to exercise this standard of care.[55] Advantages of this approach are that the reasonableness standard is familiar

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473 N.W.2d 757, 759 (Mich. Ct. App. 1991) (parents immune from injuries caused by negligent supervision); Small v. Rockfeld, 330 A.2d 335, 343 (N.J. 1974) (immunity abrogated where neither the exercise of parental authority nor the adequacy of child care is an issue); Foldi v. Jeffries, 461 A.2d 1145, 1152 (N.J. 1983) (immunity abrogated for negligent supervision unless conduct rises to level of willful or wanton failure to supervise); Felderhoff v. Felderhoff, 473 S.W.2d 928, 933 (Tex. 1971) (immunity in Texas for injuries caused by ordinary negligence involving a reasonable exercise of parental authority or discretion with respect to provision of care and necessities).

46. Hollister, *supra* note 2, at 512.

47. Lemmen v. Servaise, 158 N.W.2d 341, 344 (Wis. 1968); *see also* Hollister, *supra* note 2, at 512-15.

48. Rooney & Rooney, *supra* note 3, at 1169-70 nn.60-65.

49. Hollister, *supra* note 2, at 513-14; Rooney & Rooney, *supra* note 3, at 1169-70 nn.60-65.

50. Hollister, *supra* note 2, at 513-15.

51. *Id.*

52. Gibson v. Gibson, 479 P.2d 648, 653 (Cal. 1971); *Hartman*, 821 S.W.2d at 857.

53. *Gibson*, 479 P.2d at 653 (parental immunity abrogated and reasonable parent standard adopted); Anderson v. Stream, 295 N.W.2d 595, 601 (Minn. 1980) (immunity abrogated and reasonable parent standard adopted); *Hartman*, 821 S.W.2d at 858 (parental immunity abrogated and reasonable parent standard adopted).

54. *Gibson*, 479 P.2d at 653; Hollister, *supra* note 2, at 525-26.

55. Hollister, *supra* note 2, at 526.

to courts and juries, and the standard has been successful in the past.[56] Moreover, this standard gives juries the flexibility to take into account factors such as differences in cultures and heritages, but allows adequate room for a high degree of parental deference.[57]

The criticism of the reasonable parent standard of care is that given the economic, social, and cultural varieties of our nation, there is no such thing as "the reasonable parent."[58] It is also argued that juries are incapable of applying this vague standard and will substitute their views of proper childrearing practices.[59] Another criticism of the reasonable parent approach is that it allows too many opportunities for trivial interferences with the family and fails to grant adequate respect for family autonomy and parental discretion.[60]

A recent yet substantial trend is to abolish the immunity to the extent of the parents' liability insurance or to abolish the immunity only in automobile accidents.[61] There are two schools of thought about abolishing the immunity

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56. Andrews, *supra* note 3, at 125-27.

57. Hollister, *supra* note 2, at 525-27; Andrews, *supra* note 3, at 125-27; Carla M. Marcolin, Note, Rousey v. Rousey: *The District of Columbia Joins the National Trend Toward Abolition of Parental Immunity*, 37 CATH. U. L. REV. 767, 788-89 (1988).

58. Pedigo v. Rowley, 610 P.2d 560, 564 (Idaho 1980) ("The people of Idaho are too diverse and independent to be judged by a common standard in such a delicate area . . . ."); *see* Marcolin, *supra* note 57, at 788.

59. Marcolin, *supra* note 57, at 788 n.176.

60. Rooney & Rooney, *supra* note 3, at 1180.

61. *See, e.g.*, Ooms v. Ooms, 316 A.2d 783, 785 (Conn. 1972) (parents immune except for injuries caused by negligence in the operation of a motor vehicle); Schneider v. Coe, 405 A.2d 682, 684 (Del. 1979) (parental immunity bars negligent supervision actions); Williams v. Williams, 369 A.2d 669, 672-73 (Del. 1976) (parents are not immune for negligent operation of a motor vehicle to the extent liability insurance exists); Ard v. Ard, 414 So. 2d 1066, 1067-70 (Fla. 1982) (Florida retained parental immunity except to the extent of parents' liability insurance coverage); Cates v. Cates, 588 N.E.2d 330, 335 (Ill. Ct. App.), *appeal granted*, 146 Ill. 2d 624 (1992) (abrogated parental immunity for child's injuries in negligent operation of motor vehicle cases, and other actions are to be decided on a case by case basis); Nocktonick v. Nocktonick, 611 P.2d 135, 141-42 (Kan. 1980) (immunity abrogated for injuries arising out of automobile accidents); Black v. Solmitz, 409 A.2d 634, 639 (Me. 1979) (immunity abrogated in automobile cases); Hahn v. Berkshire Mut. Ins. Co., 547 N.E.2d 1144, 1145 (Mass. Ct. App. 1989) (immunity abrogated in actions arising out of automobile accidents); Triplett v. Triplett, 237 S.E.2d 546, 547 (N.C. Ct. App. 1977) (parents immune except in cases regarding automobile accidents); Unah v. Martin, 676 P.2d 1366, 1369-70 (Okla. 1984) (qualified parental immunity allows actions for negligence in automobile accidents because of compulsory automobile insurance); Sixkiller v. Summers, 680 P.2d 360, 372 (Okla. 1984) (willful misconduct in supervision of child is not protected); Wright v. Wright, 191 S.E.2d 223, 225 (Va. 1972) (immunity upheld when injuries are due to negligence incident to the parental relationship); Smith v. Kauffman, 183 S.E.2d 190, 193-95 (Va. 1971) (qualified parental immunity which allows a child to recover in automobile accidents); Merrick v. Sutterlin, 610 P.2d 891, 893 (Wash. 1980) (en banc) (immunity abrogated where child's injury was sustained in automobile accident due to parent's negligence); Courtney v. Courtney, 413 S.E.2d 418, 427-28 (W. Va. 1991) (Parental immunity is only abrogated in negligent operation of motor vehicle cases because

in automobile accidents. The first is to allow actions against parents because of the likelihood that the parents have mandatory automobile insurance.[62] The rationale is that the court need not worry about disrupting family harmony if the parents are insured because the family will not directly incur any financial burden.[63] The second is really an application of the *Goller* standard by a judicial determination that negligence in the operation of an automobile is not within the scope of protected parental authority or discretion.[64]

However, the approach which allows recovery to the extent of liability insurance has drawn much criticism.[65] It is contrary to our notion of justice to hinge certain plaintiffs' recovery on the extent to which the defendant carries liability insurance.[66] An example of this is embodied in the *Federal Rules of Evidence* in which the presence of liability insurance is barred from trial due to the policy that fault should not be based on ability to pay.[67] Children's ability to bring a cause of action against their parents should likewise not be hinged on the parents' ability to pay.

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of the substantial likelihood of insurance. The immunity is also abrogated when a parent causes injury or death because of intentional or willful conduct if it is not a result of corporal punishment or discipline.); *see also* CONN. GEN STAT. § 52-572(c) (1979); N.C. GEN. STAT. § 1-539.21 (Supp. 1991).

62. *See, e.g., Unah*, 676 P.2d at 1369.

63. Diane C. Freniere, *Private Causes of Action Against Manufacturers of Lead-based Paint: A Response to the Lead Paint Manufacturers' Attempt to Limit Their Liability by Seeking Abrogation of Parental Immunity*, 18 B.C. ENVTL. AFF. L. REV. 381, 401 n.157 (1991).

64. *See, e.g., Smith*, 183 S.E.2d at 195.

65. Rousey v. Rousey, 528 A.2d 416, 419-21 (D.C. 1987); *Hartman*, 821 S.W.2d at 856 ("Formulation of different rules for the insured and uninsured, however, is not justified.").

66. Marcolin, *supra* note 57, at 786.

67. FED. R. EVID. 411.

Only a few states wholly retain the immunity today,[68] while others have partially limited its application.[69] The remaining states have either completely abrogated the doctrine or never originally adopted it.[70]

2. Missouri

Soon after Missouri adopted the parental immunity doctrine, several exceptions and limitations were placed on its application.[71] In *Wurth v. Wurth*,[72] the court declined to extend the immunity to an emancipated minor who was personally liable for expenses connected with her injuries.[73] In *Brennecke v. Kilpatrick*,[74] the court refused to grant immunity to the estate of a deceased parent on the rationale that the state's interest in preserving family harmony did not extend past the lives of the parents.[75] The court announced that because parental immunity was a policy-based exception to the

68. Mathis v. Ammons, 453 F. Supp. 1033 (E.D. Tenn. 1978); American Fire & Casualty Co. v. State Farm Mut. Auto Ins. Co., 273 So. 2d 186 (Ala. 1973) (Alabama parents immune from liability for injuries caused by parents' negligence); Thomas v. Inmon, 594 S.W.2d 853 (Ark. 1980) (Arkansas parents and those standing in loco parentis are immune in negligence actions); Coleman v. Coleman, 278 S.E.2d 114 (Ga. Ct. App. 1981) (parents are immune from liability for negligent acts); Pedigo v. Rowley, 610 P.2d 560 (Idaho 1980) (immunity exists for negligent supervision or failure to supervise; however, no position is taken in other factual settings); Vaughan v. Vaughan, 316 N.E.2d 455 (Ind. Ct. App. 1974) (parents immune from liability in negligence actions); Bondurant v. Bondurant, 386 So. 2d 705 (La. Ct. App. 1980) (immunity exists between child and parents if parents are married or between child and custodial parent if parents are divorced); Rayburn v. Moore, 241 So. 2d 675 (Miss. 1970) (parents are immune from liability for parental negligence); Pullen v. Novak, 99 N.W.2d 16 (Neb. 1959) (parents immune from liability caused by parents' negligence); Fitzgerald v. Valdez, 427 P.2d 655 (N.M. 1967) (parents immune from liability for parental negligence); Campbell v. Gruttemeyer, 432 S.W.2d 894 (Tenn. 1968) (parent immune from liability to unemancipated child for injuries caused by parental negligence); Oldman v. Bartshe, 480 P.2d 99 (Wyo. 1971) (parents immune from liability for parental negligence); Ball v. Ball, 269 P.2d 302 (Wyo. 1954) (parents immune from liability).

69. Schlessinger v. Schlessinger, 796 P.2d 1385, 1390 (Colo. 1990) (en banc) (parents immune unless willful or wanton misconduct or act arises out of parents' pursuit of business or employment activities); Rousey v. Rousey, 528 A.2d 416 (D.C. 1987) (en banc) (parental immunity abolished and *Restatement* position adopted); Holodook v. Spencer, 324 N.E.2d 338 (N.Y. 1974) (no parental immunity, but parents have no legal duty to supervise children).

70. Hebel v. Hebel, 435 P.2d 8 (Alaska 1967) (Alaska parents not immune for injuries in negligence causes of action); Briere v. Briere, 224 A.2d 588 (N.H. 1966) (no parental immunity); Nuelle v. Wells, 154 N.W.2d 364 (N.D. 1967) (no parental immunity for negligence); Kirchner v. Crystal, 474 N.E.2d 275 (Ohio 1984) (parental immunity abolished); Falco v. Pados, 282 A.2d 351 (Pa. 1971) (abrogated parental immunity for personal tort actions); Elam v. Elam, 268 S.E.2d 109 (S.C. 1980) (no parental immunity).

71. *Hartman*, 821 S.W.2d at 854.

72. 322 S.W.2d 745 (Mo. 1959) (en banc).

73. *Id.* at 746.

74. 336 S.W.2d 68 (Mo. 1960) (en banc).

75. *Id.* at 69-73.

general rule of liability, it should not be applied in cases when the justification for the exception was nonexistent.[76] Thus, the general rule in Missouri was that parental immunity would not apply if the child was emancipated or if the maintenance of the suit would not seriously disturb family relations.[77]

In *Fugate v. Fugate*,[78] the court refused to extend immunity to a post-dissolution, noncustodial parent after an evidentiary hearing revealed that there would not be a disruption in the family relationship because of the action.[79] The court emphasized that it was balancing the child's right to recover for personal injuries against both the parent's right to control and discipline a child and the parent's duty to support and properly care for a child.[80] Finally, *Kendall v. Sears, Roebuck & Co.*[81] held that parental immunity barred contribution from a father when an evidentiary hearing determined that there would be a disruption in family tranquility if the claims against the father were allowed.[82] The court also held that the application of parental immunity should be determined on a case by case basis through an evidentiary hearing to determine the applicability of one of the exceptions.[83] This limited application of parental immunity was abolished by the *Hartman* case in which the Missouri Supreme Court wholly abrogated parental immunity and adopted the reasonable parent standard in children's actions for negligence against their parents.[84]

Two months after the *Hartman* decision, a bill was introduced in the Missouri Legislature which would bar unemancipated children under eighteen years of age from bringing negligence causes of action against their custodial parents.[85] As the force behind the bill, its sponsor articulated several of the popular criticisms of abolishing parental immunity, including intrusion of the courts into family decision-making, the potential for numerous suits, and the inability of the judicial system to set child-rearing standards.[86] However,

76. *Id.* at 73.

77. Fugate v. Fugate, 582 S.W.2d 663, 667 (Mo. 1979) (en banc).

78. 582 S.W.2d 663 (Mo. 1979) (en banc).

79. *Id.* at 667.

80. *Id.* at 669.

81. 634 S.W.2d 176 (Mo. 1982) (en banc).

82. *Id.* at 179.

83. *Id.* at 180. The two exceptions were when the plaintiff was an emancipated minor and when maintenance of the suit would not seriously disturb familial relationships. *Id.* at 179.

84. *Hartman*, 821 S.W.2d at 858.

85. Mo. H.R. 1809, 86th Legislative Assembly, 2d Regular Sess. (1992).

86. State Representative David C. Hale stated that the *Hartman* decision "expose[s] the parents of this state to the process of having every child-rearing decision and exercise of parental authority second-guessed by the courts." Fred W. Lindecke, *Bill Would Bar Children from Suing Parents*, ST. L. POST-DISPATCH, Feb. 29, 1992, at A4. He also expressed his concerns that "[i]n today's suit-happy climate, this kind of judicial standard will rapidly evolve into [providing] a cause of action for 'bad parenting.'" *Id.* Moreover he felt that "[p]arents will be exposed to suits for being too strict or not strict enough. Hired-gun psychologists and lawyers will take over the process of defining child-rearing standards in Missouri." *Id.*

Hartman still stands as the law in Missouri because the bill failed to pass the legislature before the end of the 86th Legislative Session.[87]

IV. THE INSTANT DECISION

In *Hartman v. Hartman*, the Missouri Supreme Court began its analysis by examining the common law development of the doctrine of parental immunity, recognizing that the doctrine was judicially created based upon the policy of preservation of family harmony.[88] The court noted that although numerous justifications for parental immunity exist, the rationales espoused by Missouri and the majority of jurisdictions were the public policy interests in the maintenance of family harmony and avoidance of subverting parental control or discipline.[89] The court set out the development of parental immunity in Missouri, characterizing the *Wurth*,[90] *Brenneke*,[91] *Fugate*,[92] and *Kendall*[93] decisions as a "piecemeal abrogation of the immunity."[94]

The court then balanced the public policy interest in maintaining family harmony against the interest of an injured child to recover for injuries, and found that the child's interest in recovery was greater.[95] The court reasoned that once a wrong has been committed, the harm to a family relationship has already occurred and cannot be restored by prohibiting suit.[96] Less weight was afforded to the policy of preserving family harmony because the abolition of spousal immunity in Missouri has not resulted in disruption of families.[97] The court commended the judicial system's ability to adjust the duty of care between married persons and stated that the courts should be given the same deference in parent-child disputes.[98]

Because the application of parental immunity was limited in tort cases and was wholly inapplicable in property and contract cases, the court reasoned that the public policy interest in maintaining family harmony was not actually, substantially furthered.[99] Finally, the court stated that it was better to abrogate parental immunity in its entirety than to develop even more exceptions to an eroded rule.[100]

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87. The bill was introduced on February 26, 1992, then was sent to the House Committee on Judiciary February 27, 1992, where it remained until May 15, 1992, the end of the session.

88. *Hartman*, 821 S.W.2d at 854-55.

89. *Id.* at 854.

90. *See supra* note 72 and accompanying text.

91. *See supra* note 74 and accompanying text.

92. *See supra* note 77 and accompanying text.

93. *See supra* note 81 and accompanying text.

94. *Hartman*, 821 S.W.2d at 854.

95. *Id.* at 854-55.

96. *Id.* (citing Peterson v. City & County of Honolulu, 462 P.2d 1007, 1009 (Ha. 1969)).

97. *Id.* at 855, 858.

98. *Id.*

99. *Id.* at 855 (citing Fugate v. Fugate, 582 S.W.2d 663, 666 n.3 (Mo. 1979) (en banc)).

100. *Id.* at 855-56.

Once the doctrine had been abrogated, the court tackled the problem of maintaining parental discretion in the exercise of care, control, and discipline while not allowing parents to exercise their parental prerogatives completely without concern for liability.[101] In deciding which rule to adopt in Missouri, the court reviewed the approaches of other jurisdictions that had abolished parental immunity.[102]

The first approach the court considered was to abolish the immunity to the extent of the parents' insurance.[103] However, the court rejected this approach because it would only serve to contribute to the piecemeal approach to parental immunity by constituting yet another exception to the rule.[104] Moreover, differential treatment accorded insured versus uninsured parents would not be justified and would be inconsistent with Missouri law.[105]

The second alternative the court considered was to adopt the *Goller* standard and abrogate the immunity except when the injury involves an exercise of parental authority or when the negligent act involves exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care.[106] The court rejected this standard because of the difficulties in applying the standard, its arbitrariness, and the inconsistent verdicts that have resulted in other jurisdictions.[107] The aspect of the doctrine which the court found most troubling was that it gives parents a "'carte blanche' to act negligently with respect to their children so long as the parents' conduct falls within one of the exceptions."[108]

The final option the court considered was the *Gibson* reasonable parent standard.[109] The court explained that this standard was most satisfactory because it allows parents deference if exercised within a reasonable degree.[110] The court found that the reasonable parent standard is sufficiently flexible to allow for disparate child rearing practices while permitting a child or third party plaintiff recovery if parents fail to meet the standard.[111] The court also commented that a single standard of care, applicable in all cases, avoids the arbitrary line-drawing of the *Goller* standard.[112]

The court also found support for the reasonable parent standard in the position set forth in the *Restatement (Second) of Torts*:[113] parental status is not enough to give rise to immunity, and the reasonable, prudent parent standard is appropriate for suits involving negligent exercises of parental

101. *Id.* at 856.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* (citing Goller v. White, 122 N.W.2d 193, 198 (Wis. 1963)).
107. *Id.* at 856-57.
108. *Id.* at 857.
109. *Id.* (citing Gibson v. Gibson, 479 P.2d 648 (Cal. 1971)).
110. *Id.*
111. *Id.*
112. *Id.*
113. RESTATEMENT (SECOND) OF TORTS § 895(G) (1977).

discretion.[114] The court then addressed the criticism that the degree of care required from parents is not judicially determinable.[115] The court found that the judicial system has already demonstrated its capacity to adjust the standard of care in intra-family suits in the context of actions between spouses.[116] Because statutes regulating juvenile proceedings require parents to exercise reasonable parental discipline and authority,[117] the court felt that the Missouri Legislature endorsed the reasonable parent standard.[118] All of the justices concurred in the decision to abolish parental immunity and adopt a reasonable parent standard of care.[119]

V. COMMENT

A. The Case for Abrogating the Immunity

The general rule is that persons should be held liable for the consequences of their acts; therefore, any exceptions to the rule should be adequately justified.[120] Courts, commentators, and politicians have struggled for decades to provide an adequate justification in support of parental tort immunity.[121] However, the justifications have failed to stand up to judicial and scholarly scrutiny.[122]

Fears that removal of the immunity will create an incentive for trivial interferences with every parenting decision are not realistic and will not materialize in Missouri.[123] The number of suits between parents and children will certainly increase once the bar is removed; however, this increase probably will not be dramatic. When the Missouri Supreme Court removed intra-spousal immunity, the number of suits between spouses remained quite small.[124] In fact, only six cases have reached any Missouri appellate court since the removal of the immunity six years ago.[125]

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114. *Hartman*, 821 S.W.2d at 857 (citing RESTATEMENT (SECOND) OF TORTS § 895(G) & cmt. k (1977)).

115. *Id.* at 858.

116. *Id.*

117. MO. REV. STAT. § 211.185.1-.185.2 (Supp. 1990).

118. *Hartman*, 821 S.W.2d at 858.

119. *Id.* at 858-59.

120. Hollister, *supra* note 2, at 525.

121. *Id.* at 508.

122. *Id.*

123. *Id.* at 525-27.

124. The Missouri Supreme Court abolished spousal immunity in both intentional tort and negligence actions. Townsend v. Townsend, 708 S.W.2d 646, 649 (Mo. 1986) (en banc) (intentional torts); S.A.V. v. K.G.V., 708 S.W.2d 651, 652 (Mo. 1986) (en banc) (negligence actions).

125. *See* American Family Mut. Ins. Co. v. Ward, 789 S.W.2d 791 (Mo. 1990) (en banc); Purk v. Purk, 817 S.W.2d 915 (Mo. Ct. App. 1991); Hussman v. Government Employees Ins. Co., 768 S.W.2d 585 (Mo. Ct. App. 1989); Cameron Mut. Ins. Co. v. Proctor, 758 S.W.2d 67 (Mo. Ct. App. 1988); Hoekstra v. Jenkins, 730 S.W.2d 263, 267 (Mo. Ct. App. 1987); Hester

Damage or injury is required before a child plaintiff can make a prima facie negligence case.[126] Therefore, only parenting decisions and acts which result in actual harm to the child will be actionable. Moreover, the often substantial expenses of litigation also create a barrier for children who would bring trivial or frivolous negligence claims against their parents.

B. Third Parties

Another, and possibly the most compelling, rationale for abrogating the immunity is that the immunity bars negligent third parties who injure the child from reducing their proportional liability by the child's parent's negligence.[127] Third parties are barred from seeking contribution against a parent because parental immunity protects the parent from a direct action by the child.[128] The rationale is that a third party should not be able to do indirectly what the child cannot do directly.[129] This issue arises when a parent's negligence combines with the negligence of a third party to injure the child.[130] The child then sues the third party who then impleads or seeks contribution from the parent.[131]

Negligent third parties were present in both the *Armstrong* and *Hartman* cases, which were consolidated in *Hartman v. Hartman.*[132] In *Armstrong*, the mother's alleged negligence combined with the van operator's negligence, and in *Hartman* it was the alleged negligence of the father and of the grandfather in the operation of the gas stove that caused the injuries.[133] The bar to contribution is most inequitable when the third party is only slightly negligent as compared to the parent because the third party is forced to shoulder the entire burden of liability, although he or she is only responsible for a fraction of it.[134] When parental immunity shelters a negligent parent from liability, the result is always inequitable to third parties who are held responsible for more damage than they actually caused.[135]

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v. Rymer, 717 S.W.2d 251 (Mo. Ct. App. 1986).

126. Downey v. Mitchell, 835 S.W.2d 554, 555 (Mo. Ct. App. 1992).

127. Rooney & Rooney, *supra* note 3, at 1178-79.

128. Kendall v. Sears, Roebuck & Co., 634 S.W.2d 176, 179 (Mo. 1982) (en banc).

129. *Id.* at 179-80.

130. *See* Rooney & Rooney, *supra* note 3, at 1178.

131. *Id.*

132. *Hartman*, 821 S.W.2d at 852-53.

133. *Id.*

134. Rooney & Rooney, *supra* note 3, at 1179.

135. *Id.*

C. *The Reasonable Parent Standard*

Adoption of the reasonable parent standard is the best solution to the problem of parent-child actions. First, the reasonableness standard of care has been tried and tested, and the judicial system is familiar with the nuances of its application.[136] The court's ability to adjudicate intra-family suits is demonstrated by its ability to adjust the duty of care in actions between spouses.[137] The success of the reasonable parent standard is also demonstrated by other jurisdictions' ability to apply the standard and reach equitable results.[138]

Second, the reasonable parent standard allows equitable results to be reached in cases involving negligent third parties.[139] When a parent's negligence combines with a third party's, the third party will now only shoulder the proportion of damages he or she actually caused.[140] Third parties will no longer bear the burden of harm caused by negligent parents.[141]

The reasonable parent standard is also more equitable because the standard will be uniformly applied to all parents, whereas the former Missouri approach only benefitted some parents.[142] Non-custodial parents and parents in "non-harmonious" families were treated as any other third person, while other parents were completely immune.[143]

Finally, the reasonable parent standard may be less intrusive into family autonomy. The old approach hinged on a pre-trial judicial determination of the status of "family harmony" in each case.[144] This highly subjective inquiry may have been more personal and intrusive than a trial on the merits of the underlying negligence action.

VI. CONCLUSION

Missouri's abolition of parental immunity in *Hartman v. Hartman*, and adoption of the reasonable parent standard of care, strikes a suitable balance between the interests of injured children and third parties and the parent's

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136. *See supra* notes 56-57 and accompanying text; *see also* Marcolin, *supra* note 57, at 788-89; Andrews, *supra* note 3, at 126-27.

137. *Hartman*, 821 S.W.2d at 857.

138. Hollister, *supra* note 2, at 525 & n.223.

139. *See* Rooney & Rooney, *supra* note 3, at 1178-79 nn.126-30.

140. *Id.*

141. *Id.*

142. *See* Kendall v. Sears, Roebuck & Co., 634 S.W.2d 176, 179 (Mo. 1982) (en banc); Fugate v. Fugate, 582 S.W.2d 663, 667 (Mo. 1979) (en banc).

143. *Kendall*, 634 S.W.2d at 179.

144. *Id.*

interest in having an adequate degree of discretion and family autonomy. The reasonable parent standard will provide a proven, uniform standard, with enough discretion and flexibility to reach equitable solutions in diverse and delicate situations.

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