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Parent-Child Tort Immunity in Oklahoma: Some Considerations for Abandoning the Total Immunity Shield

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PARENT-CHILD TORT IMMUNITY IN OKLAHOMA: SOME CONSIDERATIONS FOR ABANDONING THE TOTAL IMMUNITY SHIELD

Parent-child tort immunity shields parents from suits for acts of ordinary negligence which result in personal injury to their unemancipated minor children. It similarly gives children a shield for their acts of negligence which cause injury to their parents.[1] This comment will primarily examine the parental immunity aspect of the doctrine, from its origin to its current status in Oklahoma. This analysis will provide the basis for a suggested alteration of the Oklahoma immunity rule to allow suits by minors against their parents for acts of ordinary negligence in certain instances.

HISTORY OF PARENT-CHILD IMMUNITY

Two reasons were originally espoused by early cases[2] for denying an unemancipated minor a cause of action in tort against his parents. First, it was asserted that a cause of action for a minor's personal injury tort claims against his parents did not exist at common law.[3] Second, policy reasons were invoked to deny the right to bring such a cause of action. Under this rationale, it was urged that denying a minor a cause of action against his parents would decrease the possibility of undue interference with harmonious family relations.[4] A suit between

1. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS (4th ed. 1971) [hereinafter cited as PROSSER]; McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030 (1930); McCurdy, *Torts Between Parent and Child*, 5 VILL. L. REV. 521 (1960).

2. Three leading early cases are Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905).

3. *See* Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905).

4. In Hewellette v. George, the Mississippi Supreme Court declared:

> [S]o long as the parent is under obligation to care for, guide, and control, and the child is under reciprocal obligation to aid and comfort and obey, no . . . action . . . can be maintained. The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor

parents and child for personal injury was perceived to be a challenge to the authority of the parents[5] and a deprivation to any other children of the benefit of the family fund when one child was awarded compensation from that fund.[6] Liability insurance has added a new reason to deny a cause of action due to the danger of fraud and collusion between parent and child.[7] The current status of the parent-child immunity doctrine shows that seventeen states have abrogated, limited or rejected the doctrine,[8] while four states have not reached the question.[9]

The Rule in Oklahoma

The parent-child tort immunity issue is no stranger to the Oklahoma courts.[10] *Tucker v. Tucker*,[11] the leading decision in Oklahoma,

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child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The state, through its criminal laws, will give the minor child protection from parental violence and wrong-doing, and this is all the child can be heard to demand.

68 Miss. at —, 9 So. at 887. *See* McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905).

5. *See, e.g.*, Roller v. Roller, 37 Wash. 242, 79 P. 788, (1905).

6. *Id.* Additional problems in allowing such a suit were listed by the court, including: the promotion of undesired litigation; the difficulty in drawing distinctions between actionable and nonactionable torts; and the possibility of the parent inheriting the damages awarded the child. *Id.* at —, 79 P. at 789.

7. The vast majority of personal injury suits between parent and minor child involve automobile accidents. *See* Annot., 41 A.L.R.3rd 904 (1972). Denying a course of action between parent and minor unemancipated child, due to the danger of fraud and collusion, is inconsistent with denying a cause of action to prevent the disruption of family harmony. For the family to bring a fraudulent claim, it must act harmoniously, although collusively. *See* PROSSER, *supra* note 1, § 122, at 868.

8. *See* Emmert v. United States, 300 F. Supp. 45 (D.D.C. 1969); Xaphes v. Mossey, 224 F. Supp. 578 (D. Vt. 1963); Hebel v. Hebel, 435 P.2d 8 (Alaska 1967); Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970); Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); Petersen v. City and County of Honolulu, 51 Hawaii 484, 462 P.2d 1007 (1970); Schenk v. Schenk, 100 Ill. App. 2d 199, 241 N.E.2d 12 (1968); Rigdon v. Rigdon, 465 S.W.2d 921 (Ky. 1971); Plumley v. Klein, 388 Mich. 1, 199 N.W.2d 169 (1972); Silesky v. Kilman, 281 Minn. 431, 161 N.W.2d 631 (1968); Rupert v. Stienne, 90 Neb. 397, 528 P.2d 1013 (1974); Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966); France v. A.P.A. Transport Corp., 56 N.J. 500, 267 A.2d 490 (1970); Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969); Nuelle v. Wells, 154 N.W.2d 364 (N.D. 1967); Falco v. Pados, 444 Pa. 372, 282 A.2d 351 (1971); Smith v. Kauffman, 212 Va. 181, 183 S.E.2d 190 (1971); Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

The Supreme Court of Texas has indicated in Felderhoff v. Felderhoff, 473 S.W.2d 928 (Tex. 1971), that it may abrogate or limit the parent-child immunity doctrine when presented with the issue. *See* Comment, *The Balance Between Individual Rights and Family Preservation: The Future of the Parent-Child Immunity Doctrine in Texas*, 4 ST. MARY'S L.J. 48 (1972).

9. The four states that have not considered the issue are Idaho, Kansas, South Dakota and Utah. Comment, *The Demise of Parent-Child Tort Immunity*, 12 WILLAMETTE L.J. 605, 606 n.10 (1976).

10. *See, e.g.*, Markham v. State Farm Mut. Auto. Ins. Co., 464 F.2d 703 (10th

denied plaintiff recovery from his parents for personal injuries suffered due to their alleged negligence. *Tucker* was based on the premises that at common law there was no cause of action agianst one's parents and that public policy precluded the action. The court therefore concluded that no action existed in Oklahoma until expressly created by the legislature, as had previously been done in regard to children's property rights.[12]

The rationale of *Tucker* appears to be faulty in at least two respects. First, the Oklahoma Supreme Court had earlier held that the statutes giving minors the power to sue parents in regard to property matters were merely declaratory, not in derogation, of the common law.[13] Furthermore, instead of expressly banning these personal injury actions, the common law simply was not confronted with the issue.[14] Finally, it should be noted that *Tucker* involved an action, instituted after the minor had reached majority, for injuries received during minority.[15] Thus, minority does not confer an immunity which disappears when the child reaches majority or is emancipated; the cause of action is not tolled until the child's disability ends.[16] The court's focus is on the status of the parties at the time the wrong was sustained.[17]

Exceptions to the Immunity Rule in Oklahoma

The rule banning parents as possible defendants of their children's personal injury actions is not absolute. Some of the common ex-

Cir. 1972); Workman v. Workman, 498 P.2d 1384 (Okla. 1972); Stewart v. Harris, 434 P.2d 902 (Okla. 1967); Hale v. Hale, 426 P.2d 681 (Okla. 1967); Wooden v. Hale, 426 P.2d 679 (Okla. 1967); Hill v. Graham, 424 P.2d 35 (Okla. 1967); Hampton v. Clendinning, 416 P.2d 617 (Okla. 1966); Tucker v. Tucker, 395 P.2d 67 (Okla. 1964); Van Wart v. Cook, 557 P.2d 1161 (Okla. Ct. App. 1976); Bassett v. Bassett, 521 P.2d 434 (Okla. Ct. App. 1974). All of these cases involved automobile accidents.

11. 395 P.2d 67 (Okla. 1964).

12. These statutes, [citing OKLA. STAT. tit. 30, § 7 (1961) and OKLA. STAT. tit. 10, § 8 (1961), which provide that parents, *qua* parents, have no control over their children's property] and others similar to them, are the basis of the child's right to sue the parent when property rights are involved. There are no comparable statutes plainly indicating that the minor may sue the parent in tort.

Id. at 69.

13. *In re* Guardianship of Hight, 194 Okla. 214, 148 P.2d 475 (1944).

14. PROSSER, *supra* note 1, § 122, at 865.

15. 395 P.2d at 69-70.

16. *Id. See* Hampton v. Clendinning, 416 P.2d 617 (Okla. 1966). *See also* Note, *Torts: Estate and Employer Liability for Ordinary Negligence to the Child of a Primary Tortfeasor in Oklahoma*, 20 OKLA. L. REV. 93 (1967).

17. *Cf.* Nuelle v. Wells, 154 N.W.2d 364 (N.D. 1967) (taking contrary approach in face of a statutory scheme similar to that of Oklahoma).

ceptions[18] include wanton or gross negligence,[19] intentional torts,[20] majority[21] and emancipation.[22] The parental shield has also been extended to those in *loco parentis* to the child;[23] however at least one Oklahoma court has permitted an action between a minor and an employer, where the employee, who was primarily liable for the child's injuries, stood in *loco parentis* to the plaintiff.[24] This result may be explainable by noting that the conduct of the employee was characterized by the court as wanton or gross negligence.[25] As a result, the extent of this exception to parental tort immunity is unclear.

Another potential exception to tort immunity is presented by the Oklahoma wrongful death statute. The statute provides:

> When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter . . . *if the former might have maintained an action had he lived, against the latter . . . . The damages must inure to the exclusive benefit of the surviving spouse and children,* if

18. See PROSSER, *supra* note 1, § 122, at 866-67.

19. *See* Hill v. Graham, 424 P.2d 35 (Okla. 1967) (gross negligence was alleged but the court did not find the case to be one of gross negligence); Patsy Oil & Gas Co. v. Odom, 186 Okla. 116, 96 P.2d 302 (1939) (discussed at notes 24-25 *infra* and accompanying text).

20. While Oklahoma has not confronted the issue of parent-child tort immunity involving an intentional tort, recognizing an exception to the general immunity rule in this situation would be in line with the position taken in the majority of states. *See generally* Annot., 41 A.L.R.3rd 904 (1972).

21. *See* OKLA. STAT. tit. 10, § 10 (1971); Bassett v. Bassett, 521 P.2d 434 (Okla. Ct. App. 1974).

22. *See, e.g.*, Workman v. Workman, 498 P.2d 1384 (Okla. 1972); Tucker v. Tucker, 395 P.2d 67 (Okla. 1964).

23. Workman v. Workman, 498 P.2d 1384 (Okla. 1972); Wooden v. Hale, 426 P.2d 679 (Okla. 1967); Van Wart v. Cook, 557 P.2d 1161 (Okla. Ct. App. 1976). All of these cases involved stepparents.

"The term 'in loco parentis' means in the place of a parent, and a 'person in loco parentis' may be defined as one who has assumed the status and obligations of a parent without a formal adoption." 498 P.2d at 1386 (citation omitted).

24. Patsy Oil & Gas Co. v. Odom, 186 Okla. 116, 96 P.2d 302 (1939).

25. It is questionable whether the same result would occur if only ordinary negligence was involved. It should be noted that if the minor child is successful in his suit, the employer may have an indemnity action against the employee who stands in *loco parentis* to the plaintiff child. PROSSER, *supra* note 1, § 51, at 311. As a result, the child would be recovering damages from the party in *loco parentis* by a circuitous route.

In Shell Petroleum Corp. v. Beers, 185 Okla. 331, 91 P.2d 777 (1939), plaintiff, after reaching majority, sued for personal injuries sustained when she was a minor. The accident had occurred on property which her father operated for the defendant, his employer. Verdict for the plaintiff was reversed on grounds other than parent-child immunity; it appears that this issue was never raised.

> any, or next of kin; to be distributed in the same manner as personal property of the deceased.[26]

To determine if a wrongful death action resulting from negligence can be maintained, a court must decide if the deceased, had he lived, could have maintained an action against the tortfeasor. If the deceased is the child of the defendant, neither the natural parent[27] nor the party in *loco parentis* to that child[28] can maintain a wrongful death action, since the child would have been unable to sue had he lived.[29] Similar reasoning would deny a cause of action if the defendant stood in *loco parentis* to the dead child. Yet if both parents are dead, due to the negligence of one of them, an action for the wrongful death of the innocent parent could be maintained by the child since Oklahoma has eliminated interspousal tort immunity.[30] Likewise, if the tortfeasor parent is still alive, an unemancipated child should be able to maintain an action on behalf of the deceased parent for wrongful death negligently inflicted by the surviving parent, since the deceased parent could have sued the other spouse had he survived.[31]

The hypothetical above clearly presents the dilemma faced by the Oklahoma courts. An action for wrongful death is intended, in part, to compensate the plaintiff for damages *he* has suffered by the wrongful death of the decedent.[32] Thus, if the child maintained an action successfully, he would recover damages from the living parent for injuries caused to the *child* by the parent; yet the purpose of the parent-child tort immunity is to deny the parent or child relief from the other's negligence.[33] In another context, the Oklahoma Supreme Court has attempted to justify its adherence to the rule of immunity in face of legislation which appears to contradict the rule's purpose. It noted that it would be error to "conclude that Oklahoma was legislatively pioneering in the right of a child to sue its parents for injuries sustained as

26. OKLA. STAT. tit. 12, § 1053 (1971) (emphasis added).

27. Hale v. Hale, 426 P.2d 681 (Okla. 1967).

28. *Cf.* Hill v. Graham, 424 P.2d 35 (Okla. 1967) (stepmother attempted to maintain an action against an unemancipated minor for the wrongful death of the child's father).

29. OKLA. STAT. tit. 12, § 1053 (1971). Hale v. Hale, 426 P.2d 681 (Okla. 1967).

30. Stewart v. Harris, 434 P.2d 902 (Okla. 1967).

31. *See id.*

32. PROSSER, *supra* note 1, § 127, at 903-04; 1 S. SPEISER, RECOVERY FOR WRONGFUL DEATH 28-29 (2d ed. 1975) [hereinafter cited as SPEISER]. *See* Woods, *Comparative Negligence in Oklahoma—A New Experience*, 28 OKLA. L. REV. 1, 14-15 (1975); Note, *Wrongful Death and Survival Actions*, 6 OKLA. L. REV. 384 (1953).

33. Speiser believes that allowing the action is the better decision since an opposite approach can only be accomplished by reading a limitation into the statute that is not expressly present. SPEISER, *supra* note 32, at 644-46.

a result of ordinary negligence."[34] However, if the court's observation is applied to the wrongful death statute, further conflicts are created since that statute, according to the court, "is clear and unambiguous and . . . [applies] to actions which could have been maintained by deceased had he lived."[35] Since, in the hypothetical under consideration, the deceased comes within the terms of the statute, the court, if and when the issue is presented, must decide whether to make a statute less "clear and unambigious" in order to further a doctrine which needs drastic reevaluation.

The rationale of *Tucker*,[36] which denies a cause of action for parent-child torts unless expressly created by the legislature, is an inflexible and narrow view of the functions of the judiciary. Besides its inaccuracy,[37] it provides little opportunity for a meaningful reshaping of the nature and extent of parent-child immunity. However, the court has recently fashioned a more flexible tool to reevaluate the current status of the law.

Workman v. Workman: An Opportunity for Meaningful Analysis

In *Workman v. Workman*,[38] plaintiff mother sued defendant husband-stepfather for the wrongful deaths of two of her children and to recover damages for personal injuries that she and her surviving child received as a result of the defendant's negligence. While the Oklahoma court invoked the parent-child immunity shield to dismiss certain aspects of the action,[39] the significance of the opinion lies in the rationale espoused by the court in arriving at this conclusion. It noted that "[t]he reason for the rule of immunity is that public policy and the best interests of society forbids the right of an unemancipated minor child to appear in court and assert a claim for personal injuries suffered at the hands of the parent."[40]

Denying the cause of action because it did not exist at common law was not mentioned by the court. Thus, the court seems to have

34. Tucker v. Tucker, 395 P.2d 67, 69 (Okla. 1964) (discussing the scope of OKLA. CONST. art. 2, § 6; OKLA. STAT. tit. 23 § 3 (1961); and OKLA. STAT. tit. 76, § 1 (1961)). See notes 10-17 *supra* and accompanying text.

35. Stewart v. Harris, 434 P.2d 902, 903-04 (Okla. 1967).

36. See notes 10-17 *supra* and accompanying text.

37. See note 13 *supra* and accompanying text.

38. 498 P.2d 1384 (Okla. 1972).

39. Apparently the mother could recover for the personal injuries that she received as a result of her husband's negligence. See note 30 *supra* and accompanying text.

40. 498 P.2d at 1387.

switched its primary basis for denying the action to the notion of public policy. Unfortunately, however, the court's treatment of public policy was inadequate. Instead of a conclusory approach to the problem, the court should have considered the policies that were promoted by the immunity rule. In addition, attention should have been given to the aspects of public policy which were violated or hampered by the existence of the rule.[41]

Denying a parent-child cause of action on public policy grounds is based on the idea that such a rule will decrease family conflicts, promote discipline and prevent depletion of family funds.[42] In the majority of cases, where liability insurance is presumably present,[43] family harmony will not be disrupted if the action is successful since the child will receive compensation for his injuries from a source not directly connected to the family fund. If the action is not allowed, however, the child may be deprived of the chance to obtain compensation for his injuries from the independent source.[44] Thus, while the rule may prevent disruptions from an intense legal battle over the liability of one family member to another, it completely ignores the potential disruption that may result when the family fund[45] is unnecessarily depleted

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41. [I]t must be recognized that we are not here concerned with a problem of statutory construction but rather with a judge-made rule. The doctrine was advanced by the American courts with no support from the common law. It was formulated, not by legislative enactment propounding an expressed public policy, but by the courts who asserted their conception of what public policy was.

Comment, *Tort Actions Between Members of the Family—Husband & Wife—Parent & Child*, 25 MO. L. REV. 152, 193 (1961) (footnotes omitted).

42. See notes 4-6 *supra* and accompanying text.

43. It should be recalled that all actions between parent and unemancipated minor child in Oklahoma have involved automobile accidents. See note 10 *supra*. Presumably, the parties involved were insured. *See* Special Committee on Automobile Accident Reparations, *Report*, 94 A.B.A. 559, 576 (1969). Since Oklahoma now requires every owner of a motor vehicle to maintain liability insurance, OKLA. STAT. tit. 47, § 7-601 (Supp. 1976), perhaps the court will look more favorably on the view of Judge Fuld:

> New York now requires automobile liability insurance. I recognize that the presence of insurance does not create liability but, since it was fear that domestic peace and tranquility would be destroyed and the family disrupted which gave rise to adoption of the family immunity doctrine, its existence is a factor to be taken into account in considering whether or not the doctrine should be perpetuated . . . . Insurance against accidents, once solely a contract of indemnity, a means of reimbursement for the doer of the wrong, has lost much of its ancient quality and has in effect become insurance for the protection of the sufferer. The vast majority of accidents of this type are now defended by insurance companies in the names of nominal defendants.

Badigian v. Badigian, 9 N.Y.2d 472, —, 174 N.E.2d 718, 722-23, 215 N.Y.S.2d 35, 41 (1961) (dissenting opinion) (citations omitted).

44. *See* Special Committee on Automobile Accident Reparations, *Report*, 94 A.B.A. REP. 559, 616 (1969).

45. Any earnings of an unemancipated child must be considered as part of the

because the proceeds from liability insurance cannot be reached.[46] Moreover, when the parent is injured by the child's negligence, not only must compensation for the injuries come out of the family fund, but the fund is also diminished by an interruption in the earning power of the injured parent.

Of course there are times when the tort committed between parent and unemancipated minor child is not covered by liability insurance. Where the unavailability of insurance forces compensation for the injury out of the family fund, the likelihood of disrupting family harmony obviously increases. However, the danger of disruption of family harmony has never prevented awarding compensation to a stranger injured by the tort of a family member. Liability attaches in such cases without regard to the effect that a lack of insurance will have on the family fund. Consideration must also be given to the exceptions to the rule of parent-child immunity. Since public policy considerations of family harmony do not prevent suits between parent and child where property rights, gross negligence or intentional torts are involved,[47] it seems inconsistent that these same considerations should operate to deny an action when mere negligence is involved.[48]

Finally, an examination must be made of the public policies that are violated by the existence of the immunity rule. The most fundamental policy violated is contained in the Oklahoma Constitution: "The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice."[49] Exceptions to this declaration cannot be justified by the argument that the constitutional provision was drafted at a time when "it apparently had not occurred to any one that a child could sue its parent in . . . tort."[50] The

family fund since his parents are legally entitled to them. *See* OKLA. STAT. tit. 10, § 5 (Supp. 1976). Thus the family fund may also be diminished by the loss of the minor's earnings during the time he is disabled.

46. The American Bar Association has concluded that the desirability of compensating the minor outweighs the danger of fraud and collusion in the family context. Special Committee on Automobile Accident Reparations, *Report*, 94 A.B.A. REP. 559, 616 (1969).

47. See notes 13, 18-23 *supra* and accompanying text.

48. The potential for family disruptions when intentional torts are involved may be greater in instances where the defendant is subject to the sanction of punitive damages. *See* OKLA. STAT. tit. 23, § 9 (1971).

49. OKLA. CONST. art. 2, § 6. *See also* OKLA. STAT. tit. 23, § 3 (1971); OKLA. STAT. tit. 76, § 1 (1971).

50. Tucker v. Tucker, 395 P.2d 67, 69 (Okla. 1964).

existence of exceptions to parent-child tort immunity refutes the basis of this argument.

The final policy violated by the immunity shield occurs in the wrongful death context. To deny an action for wrongful death under the circumstances previously noted would create uncertainty and confusion in the application of a statutory scheme which the court has declared to be "clear and unambiguous" in its application.[51]

The force of these considerations demands that the court seriously evaluate the need for a substantial modification of the immunity rule. The following section offers a solution which protects both the interests of the family unit and its individual members.

REASONABLENESS AS A STANDARD FOR IMMUNITY

The parent rule of parental immunity should be replaced with a rule which has as its basis the concept of the reasonably prudent *parent*. This standard recognizes that parents should have more discretion than third parties regarding their conduct toward their children, yet permits recovery from them when their conduct falls below the standard of care required for the protection of their children. The standard advocated is that adopted by the California Supreme Court in *Gibson v. Gibson*.[52] Overruling the traditional immunity rule for ordinary negligence, the court formulated the following test as a guide: "What would an ordinarily reasonable and prudent *parent* have done in similar circumstances?"[53] In the event that the parent's actions fall below this standard, the action proceeds as any other negligence case "but viewed in light of the parental role."[54] This test respects the discretion and authority of parents, while providing protection to the child when the parent strays from his proper function.

The California rule offers a further advantage in that it is more consistent with the public policy of Oklahoma. This consistency is best demonstrated by focusing on the criminal and civil proceedings available in Oklahoma against parents who do not perform their parental duties. Parents who fail to provide the proper degree of care to their children may face criminal sanctions or the termination of their par-

51. See notes 34-35 *supra* and accompanying text.
52. 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971).
53. *Id.* at 921, 479 P.2d at 653, 92 Cal. Rptr. at 293 (emphasis in original).
54. *Id.*

ental rights.[55] While both criminal and civil remedies can be invoked to insure that children receive maintenance, care and education, sanctions are imposed only if the parent acts unreasonably. The law recognizes, for example, the need to discipline minor children. As a result, the Oklahoma legislature has provided that the exercise of reasonable force against the child is not unlawful

> [w]hen committed by a parent . . . in the exercise of a lawful authority to restrain or correct his child . . . provided restraint or correction has been rendered necessary by the misconduct of such child . . . or by his refusal to obey the lawful command of such parent . . . and the force or violence used is reasonable in manner and moderate in degree.[56]

Thus, Oklahoma has provided that a parent cannot be held criminally liable when disciplining his child if the force used "is reasonable in manner and moderate in degree." The parent is exercising lawful authority and providing proper care if he is reasonable in disciplining his child; he is criminally liable only if he intentionally uses unreasonable force when disciplining his child.

Likewise, the parent's duty to care for the child is subject to a standard of reasonableness. Thus, in determining whether a parent has fulfilled his obligations, the court will consider whether the particular care or conduct involved is of the same quality as that rendered by "an ordinarily prudent person, solicitous for the welfare of his child."[57] This standard is virtually identical to the California standard enunciated in *Gibson*.[58]

The duties imposed upon a parent under Oklahoma law are similar to the areas in which the Wisconsin Supreme Court, in *Goller v. White*,[59] held that the parent has immunity from a suit by his minor unemancipated child. These areas include: "(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."[60]

The California Supreme Court has expressly rejected this test of

55. *See* OKLA. STAT. tit. 21, § 852 (Supp. 1976); OKLA. STAT. tit. 10, §§ 1101, 1130 (Supp. 1976).
56. OKLA. STAT. tit. 21, § 643 (1971).
57. Owens v. State, 6 Okla. Crim. 110, 113-14, 116 P. 345, 346 (1911).
58. See note 53 *supra* and accompanying text.
59. 20 Wis. 2d 402, 122 N.W.2d 193 (1963).
60. *Id.* at —, 122 N.W.2d at 198.

parental immunity because it found "intolerable the notion that if a parent can succeed in bringing himself within the 'safety' of parental immunity, he may act negligently with impunity."[61] For example, if the parent, with adequate financial resources, negligently fails to provide dental services to correct his child's protruding teeth, the parent would presumably be liable to the child under the California test. Under the Wisconsin test, however, the parent would not be liable to his unemancipated minor child for his negligent failure to correct the child's protruding teeth since the act involved an exercise of *ordinary* parental discretion, rather than an exercise of *reasonable* parental discretion. Should an Oklahoma court ever be faced with this hypothetical situation, it presumably would look to see if "an ordinarily prudent person, solicitous for the welfare of his child"[62] would provide dental services to correct the child's protruding teeth. The result should be the same as that reached under the California test.

CONCLUSION

The Oklahoma Supreme Court concluded that no cause of action existed for ordinary negligence between parent and unemancipated child because no such action existed at common law. The supreme court held that only the legislature could give a child the right to sue his parent, and vice versa, since such actions would be in derogation of the common law. The court seems to have abandoned this rationale today, relying solely on social policy to deny a cause of action between parent and child. As a result, the supreme court's conception of social policy is suspect, since the policy is riddled with exceptions. It is time for Oklahoma to consider abandoning the immunity rule and substituting a rule giving the parent immunity only if he has acted as a reasonably prudent parent.

Oklahoma adheres to the reasonableness standard when it considers whether criminal sanctions should be imposed or whether parental rights should be terminated. To avoid inconsistency and to promote the welfare of the child, as well as of the family and society, this standard should govern the minor's right to bring suit against his parents.

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61. 3 Cal. 3d at 922, 479 P.2d at 653, 92 Cal. Rptr. at 293.
62. See note 57 *supra* and accompanying text.