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## Ard v. Ard, 395 So. 2d 586 (Fla. 1st Dist. Ct. App. 1981)

Virginia B. Townes

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**Torts—PARENTAL IMMUNITY—THE FIRST DISTRICT DECLINES TO ADOPT THE DOCTRINE OF PARENTAL IMMUNITY—*Ard v. Ard*, 395 So. 2d 586 (Fla. 1st Dist. Ct. App. 1981)**

Twenty years after the doctrine of parent-child tort immunity was articulated in Florida case law,<sup>1</sup> the First District Court of Appeal in a case of first impression in that district has declined to adopt parental immunity in suits arising from automobile accidents.

In *Ard v. Ard*,<sup>2</sup> the plaintiff sought compensation for injuries suffered by Benji Dwain Clary, a minor, when the child's mother negligently unloaded him from a vehicle and then ran over him.<sup>3</sup> Suit was brought on his behalf by his guardian, Douglas Perry Ard, his mother's husband,<sup>4</sup> naming Sylvia Ard and her two liability insurance carriers as defendants.<sup>5</sup> The trial court granted summary judgment in favor of the defendants on the grounds that such a suit is barred by the doctrine of parental immunity.<sup>6</sup> Plaintiff moved to amend the complaint to show that this particular suit would not violate the policy considerations underlying parental immunity,<sup>7</sup> but the motion was denied; the court did not feel the additional allegations would affect the original decision.<sup>8</sup>

After hearing oral arguments, the First District Court of Appeal reversed the trial court, finding that no mandatory precedent imposed parental immunity on the district<sup>9</sup> and that the policy considerations historically cited as rationales for barring such a suit were inapplicable in the case *sub judice*.<sup>10</sup> The court acknowledged what has heretofore been considered the leading Florida case imposing parental immunity, *Orefice v. Albert*,<sup>11</sup> but argued that since the issue of parental immunity was not central to the holding

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1. *Meehan v. Meehan*, 133 So. 2d 776 (Fla. 2d Dist. Ct. App. 1961).

2. 395 So. 2d 586, 587 (Fla. 1st Dist. Ct. App. 1981).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* Plaintiff alleged in the proposed amended complaint that the action would not disrupt the parent-child relationship; that the uncompensated injury, on the other hand, would have an adverse effect on the family; that there was no collusion between the parties to the suit; and that there were witnesses other than the parties who would substantiate plaintiff's claims. *Id.*

8. *Id.*

9. *Id.* at 587-88.

10. *Id.* at 588-90.

11. 237 So. 2d 142 (Fla. 1970). *Orefice* is the Florida Supreme Court's only pronouncement on interfamilial immunity other than interspousal immunity. It has generally been cited as controlling precedent. *Vinci v. Gensler*, 269 So. 2d 20 (Fla. 2d Dist. Ct. App. 1972). *Withrow v. Woods*, 386 So. 2d 607, 608 (Fla. 5th Dist. Ct. App. 1980).

in *Orefice*, the adoption of parental immunity was dictum.<sup>12</sup> The court also noted that no common law basis exists for the doctrine of parental immunity and therefore refused to analogize parental immunity to interspousal immunity.<sup>13</sup> Instead, the court looked to another judicially created immunity, municipal immunity,<sup>14</sup> to support its rejection of the claim that only legislative action should be allowed to abrogate parental immunity as applied by other courts in Florida.<sup>15</sup>

The dispositive element of this case, however, seemed to be the lack of valid policy behind parental immunity.<sup>16</sup> The court quoted extensively from the recent opinion of the Kansas Supreme Court, *Nocktonick v. Nocktonick*,<sup>17</sup> which examined two of the most frequently advanced rationales supporting parental immunity: 1) disruption of familial peace and harmony and 2) danger of fraud or collusion.<sup>18</sup> The Kansas Supreme Court ruled that family harmony and tranquillity did not require that a minor injured in an automobile accident be denied recovery from his parent.<sup>19</sup> In support of its ruling the court listed nineteen jurisdictions which have either abolished parental immunity altogether or in cases arising out of automobile accidents,<sup>20</sup> and noted that although the abolition had occurred as much as sixteen years earlier<sup>21</sup> "there apparently has been no significant disruption in family relationships as grimly predicted by the prophets of doom."<sup>22</sup> While admitting that the

12. 395 So. 2d at 587, n.1. Heretofore, where the articulation of parental immunity in *Orefice* has been recognized as dictum it has been accorded the greatest possible persuasive weight. See *Horton v. Unigard Ins. Co.*, 355 So. 2d 154, 155 (Fla. 4th Dist. Ct. App. 1978).

13. 395 So. 2d at 588.

14. *Id.*

15. *Id.* "We can see no necessity for insisting on legislative action in a matter which the courts themselves originated." 395 So. 2d at 588 (quoting *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130, 132 (Fla. 1957)).

16. *Id.*

17. 611 P.2d 135 (Kan. 1980). The First District Court of Appeal does no more than reproduce an abridged version of the Kansas opinion. There is no original language from the Florida court pertaining to policy considerations. 395 So. 2d at 588-90.

18. McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1072-73, 1074-76 (1930). See *infra* notes 83-96 and accompanying text. For a discussion of *Nocktonick*, see Note, *Personal Injuries: Parental Liability and Automobile Negligence*, 20 WASHBURN L.J. 460 (1981).

19. 611 P.2d at 140.

20. The states listed were Alaska, Arizona, California, Connecticut, Hawaii, Illinois, Kentucky, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Nevada, North Carolina, North Dakota, Pennsylvania, Virginia, and West Virginia. 611 P.2d at 141.

21. New Hampshire abolished parental immunity, at least insofar as it relates to automobile accidents, in 1966. *Briere v. Briere*, 224 A.2d 588 (N.H. 1966).

22. 611 P.2d at 141.

possibility of collusion between parent and child exists, the Kansas Supreme Court noted that judges and juries daily prove themselves equal to the task of sifting evidence and reaching proper verdicts.<sup>23</sup>

The decision in *Nocktonick*, and therefore presumably the decision in *Ard*,<sup>24</sup> was expressly limited to cases in which suits between parents and children arise from automobile accidents.<sup>25</sup> Nonetheless, the *Ard* holding is contrary to decisions in each of the other Florida districts.<sup>26</sup> On this basis the question was certified to the Florida Supreme Court, but without the automobile-tort limitation.<sup>27</sup>

As noted by the *Ard* court, there exists no common law basis for parental tort immunity.<sup>28</sup> While there are no cases on record in which a child actually sued his parents in English common law,<sup>29</sup> suits involving property (including torts against property) have always been allowed between parent and child,<sup>30</sup> nor was there any indication that tort suits would be disallowed.<sup>31</sup> The doctrine of parental immunity, rather than arising from time-honored traditions of the common law, is a ninety-year-old product of judicial policy-making.<sup>32</sup> In 1891 the Mississippi Supreme Court announced the rule of parental immunity in *Hewellette v. George*.<sup>33</sup> The court's opinion was grounded firmly in the need to preserve family harmony:

The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for

23. *Id.* at 142.

24. *See supra* note 17.

25. 611 P.2d at 142.

26. *See infra* note 70.

27. "The question is certified to the Supreme Court . . . WHETHER AN UNEMANCIPATED MINOR CHILD MAY MAINTAIN A NEGLIGENCE ACTION AGAINST HIS PARENT." 395 So. 2d at 590. The case, Supreme Court # 60,475, will be decided without oral argument.

28. W. PROSSER, LAW OF TORTS § 122, 864-69 (4th ed. 1971).

29. *Id.* *See Comment, Tort Action Between Members of the Family—Husband & Wife—Parent & Child*, 26 MO. L. REV. 152, 180 (1961).

30. PROSSER, *supra* note 28, at 865. McCurdy *supra* note 18, at 1056-59.

31. Berman, *Time to Abolish Parent-Child Tort Immunity: A Call to Repudiate Mississippi's Gift to the American Family*, 4 NOVA L.J. 25, 27 (1980).

32. *Id.* at 29.

33. 9 So. 885 (Miss. 1891). The case involved a suit by a daughter for her wrongful imprisonment in an insane asylum by the mother. The defendant apparently did not advance a parental immunity argument. The Mississippi Supreme Court answered the assignments of error in favor of the daughter/plaintiff but declined to reinstate the original jury verdict in her favor on the grounds of the newly minted parental immunity doctrine.

personal injuries suffered at the hands of the parent.<sup>34</sup>

Twelve years later the supreme court of Tennessee heard a case in which a child sued a parent and a step-parent for tortious conduct. The court affirmed the dismissal of the child's case in *McKelvey v. McKelvey*<sup>35</sup> on the grounds of parental immunity, which the court found to be rooted firmly in the common law, though citing *Hewellette* as the only extant case law on the subject.<sup>36</sup>

The final case making up the "great trilogy"<sup>37</sup> which imposed parental immunity on American law was *Roller v. Roller*.<sup>38</sup> The supreme court of Washington denied the child a cause of action on three grounds which have become common buttresses of parental immunity:<sup>39</sup> preservation of family harmony,<sup>40</sup> preservation of the family exchequer,<sup>41</sup> and danger of the tortfeasor reacquiring the award through inheritance.<sup>42</sup> Recognizing the absurdity of claiming parental immunity as a protector of family harmony in a case which involved rape of a daughter by her father, the court nonetheless feared that allowing recovery for so heinous a tort would allow recovery for even those minor torts which arise in normal domestic relations. An injured child could only look to the criminal law for protection; he was not entitled to compensation.<sup>43</sup>

All three of these cases involved intentional torts. However, because the immunity doctrine was absolute as enunciated in all three cases, it has been extended to negligence actions.<sup>44</sup> Dissatisfaction with the results of the rule was not long in surfacing, giving rise to exceptions which weakened the effect of the doctrine without initiating any reconsideration of the fundamental validity of parental immunity.<sup>45</sup>

34. *Id.* at 887. The court went on to say that a child's only recourse would be the criminal laws of the state.

35. 77 S.W. 664 (Tenn. 1903).

36. *Id.* The court found validation of its assertion of the common law rule in the fact that "this rule of the common law has never been questioned in any of the courts of this country, and certainly no such action as the present has been maintained in these courts." *Id.*

37. Comment, *supra* note 29, at 182.

38. 79 P. 788 (Wash. 1905). The action was brought by a fifteen-year-old girl whose father had been convicted of raping her. She had been awarded \$2,000 in damages and sought to attach the family homestead upon which her minor siblings still resided.

39. McCurdy, *supra* note 18, at 1072-77.

40. 79 P. at 788.

41. *Id.* at 789.

42. *Id.*

43. *Id.*

44. See *Small v. Morrison*, 118 S.E. 12 (N.C. 1923).

45. Comment, *supra* note 29, at 194-209. These exceptions have included situations:

Recently, however, many jurisdictions have shown a willingness to abrogate the parental immunity doctrine in general while retaining certain exceptions to tort liability.<sup>46</sup> The leading case in this approach has been *Goller v. White*<sup>47</sup> in which the supreme court of Wisconsin chose to abrogate parental immunity with two key exceptions: (1) negligent acts involving exercises of parental authority; (2) negligent acts within the scope of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care.<sup>48</sup> The need to protect the parents' right to perform their parental duties without judicial interference is at the heart of these exceptions.

Another approach has been to abrogate parental immunity and to substitute a specialized standard of care.<sup>49</sup> The supreme court of California chose this path in *Gibson v. Gibson*,<sup>50</sup> holding that the parent would be judged by the standards of "an ordinarily reasonable and prudent parent . . . in similar circumstances."<sup>51</sup> New York has added an interesting gloss on parental duty by receding from an absolute abrogation of interfamilial immunity for non-willful torts.<sup>52</sup> In *Holodook v. Spencer*<sup>53</sup> the court ruled that failure to adequately supervise a child is not tortious conduct giving rise to parental liability for resultant injuries.<sup>54</sup>

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- (i) where the minor child is emancipated,
  - (ii) where the defendant has liability insurance,
  - (iii) where the injury arises from parental assumption of some role other than parent (e.g. employer),
  - (iv) where the defendant is not the natural parent,
  - (v) where the child is illegitimate,
  - (vi) where death has dissolved the family unit,
  - (vii) where the injury is caused by conduct other than simple negligence.

Note, *The Unsupervised Child: Parental Negligence or Necessity?* 15 VAL. U.L. REV. 167, 177-81 (1980).

46. Comment, *The "Reasonable Parent" Standard: An Alternative to Parent-Child Tort Immunity*, 47 U. COLO. L. REV. 795, 804 (1976).

47. 122 N.W.2d 193 (Wis. 1963).

48. *Id.* at 198. On the facts of the case the injury could easily have been brought within one of the recognized exceptions. See *supra* note 45. The child, while working for his foster father, fell from the drawbar of a tractor on which he was riding. The court elected to abolish the general rule.

49. Comment, *supra* note 46, at 795, 803-04.

50. 92 Cal. Rptr. 288 (1971).

51. *Id.* (emphasis in original). One commentator feels that this standard of care is too burdensome for parents and would prefer that the courts adopt "reckless disregard of the child's safety" as the standard for imposing liability. Comment, *Negligent Parental Supervision as Grounds for Contribution in Tort: The Case for Minimal Parental Liability*, 12 U.C. DAVIS L. REV. 828, 843-48 (1979).

52. *Gelbman v. Gelbman*, 297 N.Y.S.2d 529 (1969).

53. 364 N.Y.S.2d 859 (1974).

54. This ruling has caused the New York courts difficulty in later cases. See *Nolechek v.*

The history of parent-child tort immunity in Florida is short. It was first articulated in *Meehan v. Meehan*,<sup>55</sup> an action brought by a father against a minor son for negligence resulting in the death of another minor son. The Second District Court of Appeal acknowledged the lack of a common law foundation for the immunity but held that public policy required that the action be barred.<sup>56</sup> The Second District Court of Appeal also heard the first Florida case in which a child brought suit against his parents for injuries arising from their alleged negligence.<sup>57</sup> The suit was brought on behalf of the injured child by his father and next friend, Cecil Ray Rickard, against the child's father and mother, Cecil Ray and Elnora Rickard. The trial court granted a motion to dismiss the complaint for failure to state a cause of action on the grounds that a party is not able to sue himself.<sup>58</sup> The court of appeal affirmed the decision, analogizing *Rickard* to *Meehan* and stating "[w]e see no reason why the rule should not be the same where a minor child, acting through his natural parent, seeks to sue his parents for damages for their alleged negligence in not properly protecting the person of the minor child."<sup>59</sup>

The Fourth District Court of Appeal was sufficiently impressed by *Meehan* and *Rickard* to defer to the Second District's rule in deciding *Denault v. Denault*,<sup>60</sup> a negligence action arising out of an automobile accident. In a per curiam opinion distinguished more for terseness than for analytical insight, the court, after reviewing the facts, set forth its holding in four sentences:

A great deal has been written, pro and con, on the subject of tort actions by unemancipated minors against their parents. We doubt that we can add anything to it. Suffice it to say that the issue has been previously determined in Florida and we are in nowise persuaded that Florida's rule is wrong or that it should be abrogated. We affirm upon the authority of *Meehan v. Meehan* [and] *Rick-*

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Gesuale, 396 N.Y.S.2d 881 (1977). A father gave his legally blind son a motorbike and brought a wrongful death action against the owner of property on which his son was killed when he struck a chain closing off a gravel road. The court ruled that the father was not bound to protect his son but was bound to protect third parties from harm arising from the son's use of a dangerous instrumentality (i.e. the motorbike). The harm to the third party here was potential liability for the boy's wrongful death.

55. 133 So. 2d 776 (Fla. 2d Dist. Ct. App. 1961).

56. *Id.* at 777.

57. *Rickard v. Rickard*, 203 So. 2d 7 (Fla. 2d Dist. Ct. App. 1967).

58. *Id.* at 8.

59. *Id.*

60. 220 So. 2d 27 (Fla. 4th Dist. Ct. App. 1969).

ard v. Rickard.<sup>61</sup>

The following year the Florida Supreme Court decided *Orefice*, in which the court was called upon to determine whether a wife was barred from bringing suit on her own behalf and that of her son's estate against the co-owner of the plane in which her husband and son perished as a result of her husband's negligence.<sup>62</sup> Before addressing the liability of the co-owner-defendant, the court stated:

It is established policy, evidenced by many decisions, that suits will not be allowed in this state among members of a family unit for tort. Spouses may not sue each other, nor children their parents. The purpose of this policy is to protect family harmony and resources. . . . Thus, the estate or survivor of Michael Betz would be barred from bringing suit against the estate of his negligent father.<sup>63</sup>

Two years later, *Orefice* was cited by the Third District Court of Appeal in a case of first impression in that district as authority for the proposition that a minor child could not maintain a suit against his father for negligence.<sup>64</sup> That same year the Second District Court of Appeal, in *Vinci v. Gensler*,<sup>65</sup> affirmed the dismissal of a suit on behalf of the estates of the minor children against the estate of their father. The entire family had perished in a plane crash allegedly caused by the father's negligence. In a one sentence per curiam opinion the court found it necessary to cite only *Orefice* and *Webb*. However, Judge Liles dissented strongly, attacking both interspousal and parental immunity on the grounds that both had outlived their usefulness.<sup>66</sup> He pointed out that any policy to preserve family peace and harmony was absurd in the case before the court since the family unit had been dissolved in death.<sup>67</sup> He sum-

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61. *Id.* (citations omitted).

62. 237 So. 2d 142 (Fla. 1970).

63. *Id.* at 145. The court apparently considered three cases sufficient to establish the "policy evidenced by many decisions" in Florida law. The supreme court itself had had an earlier opportunity to acknowledge the doctrine of parental immunity in *Shiver v. Sessions*, 80 So. 2d 905 (Fla. 1955). In that case, minor children brought a wrongful death action against their stepfather's estate after he killed their mother and committed suicide. The issue before the court was whether the mother's incapacity to sue because of interspousal immunity would bar the children's action. There was no discussion of any bar arising from parental immunity.

64. *Webb v. Allstate Ins. Co.*, 258 So. 2d 840 (Fla. 3d Dist. Ct. App. 1972).

65. 269 So. 2d 20 (Fla. 2d Dist. Ct. App. 1972).

66. *Id.* (Liles, J., dissenting).

67. *Id.*



marized his position by attacking the policy considerations underlying immunity and focusing on the effect of liability insurance.<sup>68</sup>

[I]n the society in which we live the greater weight of logic is on the side of reversing and abrogating the ill-founded doctrine of interspousal and parental tort immunity. They are supported by mistaken axioms and ill-founded reasons and in this particular case even those ill-founded reasons are absent. I further believe that the courts are capable of distinguishing between a fraudulent raid on a treasury of an insurance company and legitimate claims of a wife or child where the benefit of liability protection has been purchased by the husband and father. I cannot believe that the father purchased this insurance policy to protect all other wives and children but not his own.<sup>69</sup>

Judge Liles' vigorous dissent notwithstanding, every district except the first has adopted or affirmed parental immunity on the authority of *Orefice*.<sup>70</sup> As one court noted, "Appellant says the quoted statement from *Orefice* . . . is obiter dictum and we concede that it is. However, it is obiter dictum from the highest court in this State and that is no ordinary dictum!"<sup>71</sup>

Since the supreme court's acknowledgement of interfamilial tort immunity in 1970, tort law in Florida has changed greatly.<sup>72</sup> The abrogation of the contributory negligence doctrine and substitution of the doctrine of comparative negligence,<sup>73</sup> the enactment of the Uniform Contribution Among Tortfeasors Act (UCATA),<sup>74</sup> and the Florida Automobile Reparations Reform Act<sup>75</sup> have caused courts to reexamine the effects of absolute immunity. Until recently, where a child recovered a judgment against a third party for an

68. Judge Liles also raises an interesting and unusual constitutional argument, asserting that such immunity violates the fourteenth amendment of the United States Constitution and §§ 2, 9, and 21 of the Florida Constitution. "Tort immunity is too imperfect a tool for the attainment of the laudable goals its advocates espouse to justify denial of these constitutional rights." *Id.* at 22.

69. *Id.*

70. Second District: *Vinci v. Gensler*, 269 So. 2d 20 (Fla. 2d Dist. Ct. App. 1972)

Third District: *Wright v. Farmers' Reliance Ins. Co.*, 314 So. 2d 641 (Fla. 3d Dist. Ct. App. 1975); *Webb v. Allstate Ins. Co.*, 258 So. 2d 840 (Fla. 3d Dist. Ct. App. 1972)

Fourth District: *Horton v. Unigard Ins. Co.*, 355 So. 2d 154 (Fla. 4th Dist. Ct. App. 1978)

Fifth District: *Withrow v. Woods*, 386 So. 2d 607 (Fla. 5th Dist. Ct. App. 1980).

71. *Horton v. Unigard Ins. Co.*, 355 So. 2d at 155.

72. *Berman supra* note 31, at 52.

73. *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

74. FLA. STAT. § 768.31 (1981).

75. FLA. STAT. §§ 627.730-741 (1981). This act requires proof of either personal injury insurance or of financial responsibility by anyone seeking to register a motor vehicle. Its effect has been to introduce insurance carriers into virtually all automobile tort litigation.

injury caused by the joint negligence of the parents and the defendant, parental immunity blocked the third party's suit against the parents for contribution.<sup>76</sup> In an interspousal immunity case, *Shor v. Paoli*,<sup>77</sup> the Florida Supreme Court recognized the potential windfall such a holding represented. The court ruled that interspousal immunity was not a bar to a claim for contribution under the UCATA.<sup>78</sup>

The Third District Court of Appeal recently applied the reasoning of *Shor* to parental immunity, ruling in *Quest v. Joseph*<sup>79</sup> that a third party may seek contribution from a negligent parent whose child he has compensated for injuries. The Third District Court of Appeal stood firmly behind the doctrine of parental immunity,<sup>80</sup> congratulating itself on avoiding the problems New York courts have faced as a result of the partial abrogation of parental immunity there.<sup>81</sup> Nonetheless, the court acknowledged:

that the result makes Florida the worst of all possible jurisdictions for an injured child. He may not sue his parent directly; and any action against a negligent third-party may be inhibited or compromised by the fact that the third-party defendant can. . . . [It has been suggested] that the rule should be just the opposite, that is, one which permits neither immunity nor contribution. Perhaps this state of affairs will lead the supreme court to a modification of *Raisen-Orefice*, of *Shor-Florida Farm Bureau*, or both.<sup>82</sup>

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76. See, e.g., *3-M Electric Corp. v. Vigoa*, 369 So. 2d 405 (Fla. 3d Dist. Ct. App. 1979), questioned in *Quest v. Joseph*, 392 So. 2d 256 (Fla. 3d Dist. Ct. App. 1981); *Mieure v. Moore*, 330 So. 2d 546 (Fla. 1st Dist. Ct. App. 1976), overruled in *Quest v. Joseph*. See *infra* notes 79-88 and accompanying text.

77. 353 So. 2d 825 (Fla. 1977).

78. *Id.* at 826. The court accepted the appellate court's reasoning that the purpose of the immunity was the "preservation of the family unit." A suit between joint tortfeasors was not a threat to family unity even though the facts of the situation would involve the same parties as an interfamilial suit. This decision was held to invalidate family exclusion clauses in automobile insurance policies, allowing the negligent family member to shift the loss from the family exchequer to the insurance carrier. *Florida Farm Bureau Ins. Co. v. Government Employees Ins. Co.*, 387 So. 2d 932 (Fla. 1980); *New Hampshire Ins. Co. v. Petrik*, 343 So. 2d 48 (Fla. 1st Dist. Ct. App. 1977). See also *Stuyvesant Ins. Co. v. Bournazian*, 342 So. 2d 471 (Fla. 1977). The rule against allowing insurance companies to set off awards serves to protect the family exchequer.

79. 392 So. 2d 256 (Fla. 3d Dist. Ct. App. 1981). See also *Orlando Sports Stadium, Inc. v. Gerzel*, 397 So. 2d 370 (Fla. 5th Dist. Ct. App. 1981). *Mantilla v. Hassanien*, 396 So. 2d 1135 (Fla. 3d Dist. Ct. App. 1981). But see *Selke v. Smith*, 397 So. 2d 348 (Fla. 1st Dist. Ct. App. 1981).

80. 392 So. 2d at 258.

81. *Id.* at 259-60. See *supra* note 54 and accompanying text.

82. *Id.* at 262, n.11.

The *Ard* court, bound by no earlier decisions and unpersuaded by *Orefice*, has taken this step itself. To understand the impact of *Ard* and the validity of the court's action it is helpful to reconsider the policies which have traditionally been advanced for parental immunity. They are, in broad terms, (1) preservation of domestic tranquillity, (2) preservation of parental discipline and control, (3) protection of the family exchequer, and (4) the danger of fraud and collusion between parent and child.<sup>83</sup>

The notion that parental immunity preserves domestic harmony and tranquillity has arisen from a faulty analogy to interspousal immunity.<sup>84</sup> The roots of interspousal immunity lie not in any societal concern for happy marriages but in the common law identity of husband and wife and the husband's assumption of all his wife's choses in action.<sup>85</sup> Such identity has never existed between parent and child,<sup>86</sup> nor can any lofty desire to promote family peace be defended logically in the face of the ability of a child to sue a parent over property, contracts or wills.<sup>87</sup> This rationale is particularly weak in the fact situation of *Ard*. There is no dispute of the circumstances which caused the child's injuries; rather, the parent's inability to compensate the child without recourse to her liability insurance can only increase disharmony and tension. To paraphrase Judge Liles,<sup>88</sup> it is hard to believe this mother purchased insurance to protect all other children, but not her own.

The second policy concern, parental discipline and control, would be unaffected by allowing recovery in the *Ard* case. Indeed, there is some question as to whether it is a valid concern in any case. It has been argued that allowing a parent to injure a child with impunity might be more destructive of the trust and respect upon which meaningful discipline and control are based.<sup>89</sup>

83. Berman, *supra* note 31, at 33-38. See also McCurdy, *supra* note 18, at 1072-77.

84. McCurdy, *supra* note 18, at 1074. The *Ard* court recognized this fault and draws a more logically correct analogy to another judicially created immunity, that of municipalities, which the Florida courts have modified as the policies underlying it have changed. 395 So. 2d at 588.

85. PROSSER, *supra* note 28, at 859.

86. *Id.* at 865.

87. Comment, *supra* note 29, at 187-88.

88. See *supra* notes 65-67 and accompanying text.

89. Comment, *supra* note 29, at 190:

Query whether it is really sound public policy to put prospectively the stamp of benign judicial approval on intentionally excessive punishment, willful neglect, and the like by a parent, who by such conduct has placed serious doubt on the desirability and wisdom of allowing him to exercise the normal parental functions in the first place? It might be that the protection of the parental functions could be just as effectively accomplished by scrutinizing the conduct of the parent on a

The protection of the family exchequer is most clearly accomplished by allowing a child a cause of action under the facts of *Ard*. The child has been injured; the resultant costs and disabilities must be borne by the parents. Since Florida law in effect requires all motorists to carry personal injury insurance,<sup>90</sup> the child's compensation would come from the insurance funds rather than from those funds available for general family maintenance.<sup>91</sup> Although it may be argued that liability insurance should never create liability where none existed previously, such an argument distorts the nature of parental immunity. The immunity does not destroy any parental duty toward offspring. Rather, it serves as a bar to prevent a child from demanding compensation for any lapse of duty. Thus, abrogation of the immunity does not create a new duty; it removes a disability to sue by destroying the policy which justified the disability in the first place.<sup>92</sup> Any protection of the family exchequer is weakened in a jurisdiction such as Florida which allows contribution from parents to third parties. The presence of liability insurance was considered carefully in the decisions to allow such contribution.<sup>93</sup>

Finally, the possibility of fraud or collusion between parent and child admittedly is present. However, to allow this consideration to bar all suits between parent and child, no matter how meritorious, would imply a lack of faith in the entire judicial system.<sup>94</sup> Judges and juries regularly weigh the credibility and significance of evidence in suits of far greater complexity than the typical negligence action. In interfamilial matters they would be aware of the increased possibility of such collusion and would guard against it. Furthermore, if a lawyer had knowledge of the collusion, he should not bring suit. Lawyers are "officers of the court and practice pursuant to an oath against bringing such suits and a canon of ethics which prohibits such action."<sup>95</sup> In *Ard* the plaintiff was able to present witnesses other than family members to testify to the circum-

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case to case basis, applying normal tort concepts of reasonable care and recognizing parental privilege to apply reasonable sanctions, coupled with somewhat extended versions of the orthodox defenses of assumption of risk and contributory negligence.

90. FLA. STAT. §§ 627.730-741 (1981).

91. Comment, *supra* note 46, at 801.

92. Comment, *supra* note 29, at 191.

93. See, e.g., *Quest v. Joseph*, 392 So. 2d 256 (Fla. 3d Dist. Ct. App. 1981); *Shor v. Paoli*, 353 So. 2d 825 (Fla. 1977); *Berman*, *supra* note 31, at 38. Perhaps the actuarial significance of allowing such suits would increase premiums. Such an argument has not been persuasively urged in the case against familial contribution to third parties.

94. *Nocktonick v. Nocktonick*, 611 P.2d at 142.

95. *Vinci v. Gensler*, 269 So. 2d 20, 21 (Fla. 2d Dist. Ct. App. 1972) (Liles, J., dissenting).

stances of the injury.<sup>96</sup> To deny a cause of action in such a situation is to ignore reality for fear of a hypothetical.

The Florida Supreme Court has its first opportunity to address in depth the doctrine of parental tort immunity and to reexamine the policies underlying that immunity in light of changes in society and in the law itself. The time has come to abolish this immunity in Florida. As the court itself said in the context of abolishing municipal immunity:

In doing this we are thoroughly cognizant that some may contend that we are failing to remain blindly loyal to the doctrine of stare decisis. However, we must recognize that the law is not static. The great body of our laws is the product of progressive thinking which attunes traditional concepts to the needs and demands of changing times. . . . Judicial consistency loses its virtue when it is degraded by the vice of injustice.<sup>97</sup>

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96. 395 So. 2d at 587.

97. *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130, 133 (Fla. 1957).