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## The Doctrine of Parental Immunity: Rule or Exception?

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### Recommended Citation

DePaul College of Law, *The Doctrine of Parental Immunity: Rule or Exception?*, 10 DePaul L. Rev. 55 (1960)

Available at: <https://via.library.depaul.edu/law-review/vol10/iss1/4>

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## COMMENTS

### THE DOCTRINE OF PARENTAL IMMUNITY: RULE OR EXCEPTION?

There is hardly another question in the law of torts that has produced as many conflicting answers by courts and legal writers as that of the parental immunity from an action by the child for personal injuries suffered at the hands of the parent.<sup>1</sup> One of the reasons for this conflict is the fact that the answers are frequently based on emotions and beliefs, and depend upon the writers'<sup>2</sup> personal convictions as to the rights and obligations growing out of the family relationship.

#### ORIGIN AND EARLY APPLICATIONS OF THE IMMUNITY RULE

Another reason for the contradictions found in the case law is the obscurity as to the origin and history of the immunity doctrine, and there is disagreement as to its first pronouncement. Older decisions held that at early common law a child was without remedy for a personal tort committed by a parent,<sup>3</sup> while more recent cases deny that such a general rule existed.<sup>4</sup> The first group of decisions find the existence of parental immunity by an analogy to the common law forbidding all suits between husband and wife. But they overlook the fact that the marriage relationship was created by the consent of the parties with the result that in the eyes of the law husband and wife became one person, and Married Women's Acts were necessary to change the status of the woman to a separate legal entity. The child-parent relationship, however, is created by natural kinship, and there was never any concept of "legal unity" between parent and child.<sup>5</sup> In fact, there is agreement that the child could always maintain an action against the parent based on injuries to his property rights, while the wife could not do so at common law. Once the fundamental difference between the two relationships is recognized, the law applying to the one cannot be invoked to govern the other.

Whatever the early common-law rule might have been—there are no English cases to support either theory<sup>6</sup>—there is agreement that the first

<sup>1</sup> PROSSER, *TORTS* 670 (2d ed. 1955).

<sup>2</sup> McCurdy, *Torts Between Persons in Domestic Relations*, 43 *HARV. L. REV.* 1030 (1930).

<sup>3</sup> *Elias v. Collins*, 237 *Mich.* 175, 211 *N.W.* 88 (1926); *McKelvey v. McKelvey*, 111 *Tenn.* 388, 77 *S.W.* 664 (1903).

<sup>4</sup> *E.g.*, *Cowgill v. Boock*, 189 *Ore.* 282, 218 *P.* 2d 445 (1950). Consult also 34 *CHI.-KENT L. REV.* 335 n. 8.

<sup>5</sup> PROSSER, *op. cit. supra* note 1, at 675.      <sup>6</sup> McCurdy, *supra* note 2, at 1060.

judicial declaration of the parental immunity rule in the United States is found in *Hewellette v. George*,<sup>7</sup> a Mississippi case decided in 1891 which, without citing any authority, held that where a mother had her unemancipated minor child wrongfully committed to an insane asylum, the child could not maintain an action for false imprisonment against the mother. The court recognized that the child had sustained actual damages, but denied recovery since the injuries were inflicted by the plaintiff's parent. The reason given in this holding—that "the peace of 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"<sup>8</sup>—has remained the principal rationale of later decisions which have applied the immunity doctrine. The strict adherence to this rule led to decisions which completely nullified its very purpose by protecting even a parent who had disrupted the family peace by brutality,<sup>9</sup> or by rape of his daughter<sup>10</sup> and who, upon action by the injured child, used the immunity rule to shield his guilt, contending that such a demand for compensation might create strife in the family. The obvious absurdity of this reasoning led the courts to find exceptions and distinctions which permitted a deviation from the general immunity doctrine in particular situations.

#### DEVELOPMENT OF EXCEPTIONS

Although there is no clear line of demarcation as to the facts which will sway a court to permit a minor child to recover a judgment against his parent for personal injuries inflicted upon the child, there appear two extreme situations in which the courts seem to agree. First, no present-day court would apply the strict immunity doctrine in favor of a parent who was found guilty of intentional, criminal conduct.<sup>11</sup> Secondly, there is agreement that a parent will not be subjected to an action in tort where he acted within his parental authority and control. The privilege of the parent to use reasonable force in restraining his child is based upon our concept of the family unit as the nucleus of our society in which the parent is entrusted with the child's upbringing and educa-

<sup>7</sup> 68 Miss. 703, 9 So. 885 (1891). (Frequently cited as *Hewlett v. George*.)

<sup>8</sup> *Id.* at 705, 9 So. at 887.

<sup>9</sup> *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S.W. 664 (1903).

<sup>10</sup> *Roller v. Roller*, 37 Wash. 242, 79 Pac. 788 (1905).

<sup>11</sup> *Mahnke v. Moore*, 197 Md. 61, 77 A. 2d 923 (1951). In fact, courts have held that the *Hewellette* case which promulgated the rule and applied it to protect a parent who had committed the intentional tort of false imprisonment was incorrectly decided. *Cowgill v. Boock*, 189 Ore. 282, 218 P. 2d 445 (1950) is an example of such holdings.

tion; he must, therefore, be authorized to discipline the child where necessary.<sup>12</sup>

Except for the two extreme situations discussed above, there is great conflict as to the applicability of the immunity rule in cases where the child was injured by activity of the parent which falls outside the scope of typical parental acts but does not reach the other extreme of criminal conduct. Recognition of the injustice resulting from a strict adherence to the doctrine should have led the courts to a re-evaluation of the entire field of parental immunity, which originated with a much criticized case decided nearly seventy years ago, when the concept still prevailed that the parent was the autocratic head of the family who "could do no wrong."<sup>13</sup> But instead of re-examining the validity of the doctrine in the light of changed conditions of the present day, many courts do lip-service to it, while at the same time creating inroads which they deem necessary to protect the child's interest in compensation for a wrong inflicted. There is an ever increasing number of cases which refuse to grant immunity to a parent where special circumstances are present. What these circumstances are is the object of the following discussion, and an attempt at classification will be made.

#### DENIAL OF IMMUNITY

##### *A. Malicious Torts*

In *Cowgill v. Boock*,<sup>14</sup> a father forced his minor child to ride in an automobile which he was driving while drunk, and then caused a collision in which the child was injured. The Oregon Supreme Court granted recovery to the child on the basis that it was absurd to talk about preserving the family peace where the peace was already completely disrupted by the father's *malicious acts*. The father, in stepping outside the bonds of the family relationship was no longer protected by a rule created to prevent strife and litigation based on injuries inflicted "while the parent was discharging his duties as parent."<sup>15</sup>

##### *B. Wanton and Wilful Misconduct*

The Illinois Supreme Court approved of the reasoning in the *Cowgill* case, and went one step further by granting damages to a child for in-

<sup>12</sup> *Emery v. Emery*, 45 Cal. 2d 421, 289 P. 2d 218 (1955). Consult PROSSER, *op. cit. supra* note 1, at 113.

<sup>13</sup> "Today we are not generally afraid of the idea that everybody is governed by law in all his relations. In this age it can hardly be necessary or even desirable that the child be reared in the atmosphere of one under the control of an absolute tyrant." *Dunlap v. Dunlap*, 84 N.H. 352, 363, 150 Atl. 905, 910 (1930).

<sup>14</sup> 189 Ore. 282, 218 P. 2d 445 (1950).

<sup>15</sup> *Id.* at 301, 218 P. 2d at 453.

juries caused by the father's *wilful and wanton misconduct* in the operation of an automobile in which both were riding. In the case of *Nudd v. Matsoukas*<sup>16</sup> the Illinois court joined the modern trend by abandoning the strict adherence to the parental immunity doctrine which it had followed for twenty-three years. In reliance upon the authority of the Mississippi case of *Hewellette v. George*,<sup>17</sup> the Illinois Appellate Court had first enunciated the doctrine in 1895 in the case of *Foley v. Foley*,<sup>18</sup> and had reaffirmed it in *Meece v. Holland Furnace Co.*<sup>19</sup> in 1933. But in *Nudd v. Matsoukas*<sup>20</sup> the Illinois Supreme Court held the reasoning of these decisions insufficient to preclude an examination into the basic policy question involved; nor did the doctrine of *stare decisis* prevent such re-examination "when doubts are raised in the minds of the court as to the correctness of [prior decisions]."<sup>21</sup> Without abrogating the immunity doctrine altogether, the Illinois court refused to apply it under the particular circumstances, emphasizing the wantonness and wilfulness of the parent's acts, which deprived him of the "mantle of non-liability." In the words of the court: "To tolerate such misconduct and deprive a child of relief will not foster family unity but will deprive a person of redress, without any corresponding social benefit. . . ."<sup>22</sup>

### C. Ordinary Negligence

While in the *Nudd* case the Illinois court found the wanton and wilful misconduct of the father destructive of the parental immunity, a recent Missouri case granted recovery where the child's injury was caused by the parent's *simple negligence*. In *Brennecke v. Kilpatrick*<sup>23</sup> the action grew out of an automobile collision resulting in the mother-driver's instant death and the child-passenger's injuries. There was no allegation of wanton or wilful misconduct on the part of the driver in the operation of the automobile, but the court found that the *death* of the parent distinguished this case from an earlier Missouri decision,<sup>24</sup> where recovery by the child for injuries caused by mere negligence of the father-driver was denied. After restating its adherence to the general rule that an unemancipated

<sup>16</sup> 7 Ill. 2d 608, 131 N.E. 2d 525 (1956).

<sup>17</sup> 68 Miss. 703, 9 So. 885 (1891).

<sup>18</sup> 61 Ill. App. 577 (1895).

<sup>19</sup> 269 Ill. App. 164 (1933).

<sup>20</sup> 7 Ill. 2d 608, 131 N.E. 2d 525 (1956).

<sup>21</sup> *Id.* at 615, 131 N.E. 2d at 529.

<sup>22</sup> *Id.* at 619, 131 N.E. 2d at 531.

<sup>23</sup> 336 S.W. 2d 68 (Mo. 1960).

<sup>24</sup> *Baker v. Baker*, 364 Mo. 453, 263 S.W. 2d 29 (1953).

minor child cannot sue his *living* parent for personal injuries by reason of an unintentional tort,<sup>25</sup> the court proceeded to apply the Missouri survival statute. By doing so, in fact, the court recognized that the child acquired a cause of action against his parent based on mere negligence, because unless there was a cause of action in existence at the time the injury was inflicted, none could survive the death of the parent! The court emphasized that immunity from suit is merely a procedural disability which does not extend to the administrator, and that the rationale of the rule, namely, to promote domestic peace, is extinguished for the reason that the death of the parent ends the family relationship.<sup>26</sup>

*D. Ordinary Negligence in "Extra-parental"  
or Business Activities*

While most courts still adhere to the doctrine of strict immunity in cases of injuries caused by the parent's ordinary negligence, there is a growing tendency to look for additional facts which permit the court to disregard the parent-child situation and view the case in the light of a general legal relationship. In *Dunlap v. Dunlap*<sup>27</sup> the court found a master-servant relation which gave rise to a claim by the servant-son against the employer-father for injuries suffered in the *course of the employment*. The Washington Supreme Court in *Borst v. Borst*<sup>28</sup> went even further by granting recovery to a young child who was hit by a truck operated by his father; the court did not require a distinct extra-parental legal relationship, but considered it sufficient that the tort was committed by the parent while dealing with the child in a *non-parental transaction*. Public policy, in the opinion of the court, demands only that parents be given immunity from suits for torts committed "while in the discharge of parental duties."<sup>29</sup> Similarly, in the Ohio case of *Signs v. Signs*,<sup>30</sup> where the child was burnt when a pump exploded while he was playing near his father's gas station, the court denied the protection of immunity to the parent whose negligent *business activity* caused the injury.

The cases which have thus far been considered are representative of the trend towards limiting the application of the parental immunity doctrine to activities growing out of the normal intra-family relation. When the injury occurs under circumstances where the parent-child relation is merely incidental, there would seem to be no reason in law or justice to deny

<sup>25</sup> *Id.* at 70.

<sup>26</sup> The same reasoning is found in *Davis v. Smith*, 126 F. Supp. 497 (E.D. Pa. 1954).

<sup>27</sup> 84 N.H. 352, 150 Atl. 905 (1930).

<sup>28</sup> 41 Wash. 2d 642, 251 P. 2d 149 (1952).

<sup>29</sup> *Id.* at 657, 251 P. 2d at 156.

<sup>30</sup> 156 Ohio St. 566, 103 N.E. 2d 743 (1952).

redress to a child while granting it to a stranger. This thought leads to the consideration of the one single factor which gives significance to the cases here discussed—*i.e.*, the existence of liability insurance.

#### LIABILITY INSURANCE AND THE IMMUNITY RULE

Most courts which permit a child to sue his parent and recover a judgment, assert that the presence of liability insurance had no bearing upon their decision.<sup>31</sup> It is for this reason that no mention of this point has been made thus far in this discussion, although the cases are "pregnant with liability insurance,"<sup>32</sup> and warrant a closer analysis in that regard. It appears that the courts which granted redress to the child were motivated by the presence of insurance, but felt obliged to disregard this fact in their official opinion on the ground that insurance is irrelevant on the issue of liability. On the other hand, these courts made every effort to discover a special—more or less artificial—reason which takes the case out of the realm of normal parent-child relationships, in order to permit recovery. But when courts are unwilling to relax the immunity rule, they are usually "unable to find" any special circumstances, such as wilful and wanton misconduct of the parent, which would justify a limitation of immunity; and in the decisions of these courts the assertion is again found that the presence of liability insurance is irrelevant and has no effect upon the immunity of the parent.<sup>33</sup> The dominant reason usually relied upon is that insurance does not create liability, but only recompenses it, where it otherwise exists.<sup>34</sup>

This argument, however, confuses immunity from suit<sup>35</sup> with lack of responsibility. It overlooks the fact that a wrong was committed which by ordinary tort law would make the wrongdoer liable to the injured. The immunity, being merely a procedural disability, is at best a personal privilege, but does not wipe out the fact that a duty was violated which caused damage to the child's personal integrity. Even the case which first promulgated the immunity rule declared that there was actual damage "in time lost during confinement in the asylum and to this should have been added damages for mental pain and suffering. . . . Surely these injuries were real ones and compensation for these would be an award for actual

<sup>31</sup> *E.g.*, *Signs v. Signs*, 156 Ohio St. 566, 103 N.E. 2d 743 (1952); *Borst v. Borst*, 41 Wash. 2d 642, 251 P. 2d 149 (1952).

<sup>32</sup> *Brennecke v. Kilpatrick*, 336 S.W. 2d 68, 76 (Mo. 1960) (dissenting opinion).

<sup>33</sup> *Parks v. Parks*, 390 Pa. 287, 135 A. 2d 65 (1957).

<sup>34</sup> *Villaret v. Villaret*, 169 F. 2d 677 (D.C. Cir. 1948); *Rambo v. Rambo*, 195 Ark. 832, 114 S.W. 2d 468 (1938).

<sup>35</sup> PROSSER, *op. cit. supra* note 1, at 678.

damage."<sup>36</sup> However, because "no such action as this can be maintained,"<sup>37</sup> the court denied the unemancipated child the right to come into court and assert his claim. In other words, the child is considered to have a cause of action which is unenforceable by reason of public policy. The question, therefore, is not whether insurance can create liability where none existed before, but whether it may affect the parent's suability where a tort was in fact committed.

The existence of liability insurance is peculiarly interwoven into the problem under discussion. If the child be permitted to enforce his just claim<sup>38</sup> and recover a judgment against the parent, the family harmony which was disturbed by the latter's tortious act will—at least to some extent—be restored by the enhancement of the family's resources.<sup>39</sup> And yet courts which are willing to impose limitations on the immunity doctrine in special situations, as previously discussed, refuse to consider the factor of existing liability insurance, which factor removes the principal reason propounded for the application of the rule. Family tranquility is assured, rather than endangered, by a successful action and by a judgment recovered by the child against the parent!<sup>40</sup> The reluctance of the courts to admit evidence of insurance coverage as being irrelevant on the issue of negligence,<sup>41</sup> might be justified where the only reason for the introduction of such evidence is an improper attempt to influence the jury. But the fact of insurance may be relevant upon some other issue, which in the cases under discussion, is the issue of suability of the defendant where the commission of a wrongful act is not disputed. Non-recognition of this peculiar situation has led the courts to deny recovery, with the result that the rule of immunity which was created to protect the family relationship has become completely deprived of its original substance and has become instead a protection for the insurer.<sup>42</sup> This "conspiracy of silence about insurance"<sup>43</sup> led the courts to find other distinguishing facts in or-

<sup>36</sup> *Hewellette v. George*, 68 Miss. 703, 704, 9 So. 885, 886 (1891).

<sup>37</sup> *Ibid.*

<sup>38</sup> The danger of collusion will be considered below. The instant discussion is predicated upon a bona fide claim by the child.

<sup>39</sup> *Lusk v. Lusk*, 113 W.Va. 17, 166 S.E. 538 (1932). In the *Lusk* case the court stated: "This action is not unfriendly as between the daughter and her father. A recovery by her is no loss to him. In fact, their interests unite in favor of her recovery. . . ." *Id.* at 19, 166 S.E. at 539.

<sup>40</sup> *Dunlap v. Dunlap*, 156 Ohio St. 566, 103 N.E. 2d 743 (1952).

<sup>41</sup> *McCORMICK, EVIDENCE*, 355 (1954).

<sup>42</sup> For a similar analysis see Note, 1960 WASH. U.L.Q. 171 (1960).

<sup>43</sup> *McCORMICK, op. cit. supra* note 41, at 356. Even outside the field of child-parent actions the doctrine of non-disclosure of insurance has undergone considerable limita-

der to arrive at the desired result of non-applicability of parental immunity. So, for example, in the *Signs* case,<sup>44</sup> the Ohio court refused to apply the immunity rule in view of the changed conditions of our time, citing especially the "advent of the motor vehicle and the growing complications of business and industry."<sup>45</sup> The court emphasized that the child was injured by the father's business activity, and not by acts connected with the normal parent-child relationship, and that the question of insurance was irrelevant.

Only in *Lusk v. Lusk*<sup>46</sup> and *Dunlap v. Dunlap*<sup>47</sup> did the courts frankly state that the existence of liability insurance made the immunity rule inapplicable. However, they also emphasized the vocational and business relationship of carrier and passenger in the *Lusk* case, and master and servant in the *Dunlap* decision. But if such dual relationship has to be found in order to justify liability based on an extra-parental activity, is not the parent who injures his child while driving an automobile<sup>48</sup> or piloting an airplane<sup>49</sup> acting in a dual capacity just as surely as is a father who happens to run a gasoline station, as in the *Signs* case?<sup>50</sup> In any of these instances, the activity is not typically parental in the narrow sense, and in each of these cases there is inherent a certain risk of injury to third persons. The fact that courts have held<sup>51</sup> that a parent who is driving the family car is acting within his parental authority would not, it would seem, affect his dual status as driver and parent.

The efforts of the courts to find liability of the parent based on some "dual relationship" between parent and child, rather than to admit the "unmentionable" fact of liability insurance and to examine its effect upon the immunity rule, have led to more confusion than clarification. A good example of this is the reasoning in the dissenting opinion of the Missouri case above noted.<sup>52</sup> While arguing that the underlying reason for the im-

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tions: "When the rule against disclosure of insurance originated doubtless the existence of such protection for defendants was exceptional and a "hush, hush" policy could be effective. . . . But since insurance has become usual rather than exceptional, it seems likely today that in nearly all cases the jury will . . . consciously assume that the defendant is so protected. The rule against the introduction of evidence of insurance thus becomes a hollow shell . . ." (McCORMICK, *op. cit. supra* note 41, at 357).

<sup>44</sup> 156 Ohio St. 566, 103 N.E. 2d 743 (1952).

<sup>45</sup> *Id.* at 575, 103 N.E. 2d at 748.

<sup>46</sup> 113 W. Va. 17, 166 S.E. 538 (1932).

<sup>47</sup> 84 N.H. 352, 150 Atl. 905 (1930).

<sup>48</sup> *Parks v. Parks*, 390 Pa. 287, 135 A. 2d 65 (1957).

<sup>49</sup> *Ball v. Ball*, 73 Wyo. 29, 269 P. 2d 302 (1954).

<sup>50</sup> 156 Ohio St. 566, 103 N.E. 2d 743 (1952).

<sup>51</sup> *Baker v. Baker*, 364 Mo. 453, 263 S.W. 2d 29 (1953)

<sup>52</sup> *Brennecke v. Kilpatrick*, 336 S.W. 2d 68 (Mo. 1960).

munity rule is the "protection of the family relationship and interests, social and economic," Judge Eager depicts the "possible effects of such litigation in a family (*disregarding insurance for the moment*), the bitterness engendered . . . the relationships disrupted."<sup>53</sup> Since Judge Eager has to disregard the existence of insurance in this case in order to make his argument appear valid, it is apparent that such reasoning is merely theoretical and not applicable to the situation before the judge, where insurance in fact existed. As a further justification for disallowing the action to the child Judge Eager contends that abrogation of the immunity rule would promote *too much* harmony in the family by fostering collusion to defraud the insurance companies.<sup>54</sup> These two arguments in favor of strict adherence to the immunity doctrine contradict each other, because they are based on a desire to foster family peace and at the same time to discourage too close co-operation between the family members. Although it cannot be denied that the close relationship might lend itself peculiarly to fraudulent claims, the remedy cannot be found in a misapplication of a rule of law developed by the courts for a different purpose. The public policy which gave rise to the immunity rule cannot, without doing violence to its meaning, be invoked to protect another public interest—*i.e.*, that which the community at large has in preventing frauds. The danger of collusion always exists in injury cases where liability insurance is present,<sup>55</sup> but that does not seem to justify the courts in closing their doors to meritorious claims.<sup>56</sup> If the insurance companies' interests are to be protected, other means might be found, such as enactments limiting liability to wanton and wilful misconduct (as in automobile guest statutes<sup>57</sup>), or provisions for criminal penalties in cases where actual insurance fraud is proved. The insurance companies might also protect themselves by increased rates which, though undesirable to the general public, will probably be the natural result of the new-trend cases, whatever reasons the courts may give to justify recovery.<sup>58</sup>

<sup>53</sup> *Id.* at 75. (Emphasis added.)

<sup>54</sup> For similar reasoning, see *Parks v. Parks*, 390 Pa. 287, 135 A. 2d 65 (1957).

<sup>55</sup> PROSSER, *op. cit. supra* note 1, at 677.

<sup>56</sup> McCORMICK, *op. cit. supra* note 41, at 358: "The corrective is not a futile effort at concealment, but an open assumption by the court of its function of explaining to the jury its duty of deciding according to the facts and the substantive law. . . ."

<sup>57</sup> ILL. REV. STAT. ch. 95½, §§ 9-201 (1959), is an example of such statutes.

<sup>58</sup> Thus, in "Extracts from an address by David Green of the Motor Club of America Insurance Companies, before the Federation of Insurance Counsel in Philadelphia, August 25, 1960," reference is made to the "distressing picture" involving parental immunity, by pointing to cases which criticize the immunity rule when applied to a father who carelessly injured his passenger child while driving a fully insured automobile. The speaker, as reported, continued: "With a change in the complexion of our Supreme Court, it is readily conceivable that the present minority may well become part of the

## CONCLUSION

Since public policy does not prevent an action by a child against his parent where property rights are concerned, there appears to be no reasonable basis to close the doors of the courts to a child who has suffered personal injuries at the hand of the parent. The immunity doctrine ought to be applied only to activities which are peculiarly parental and grow out of the domestic relationship, so that suability of the parent will be the rule and immunity the exception. The fact of existing liability insurance should be allowed to be pleaded as an additional circumstance bearing upon the inapplicability of the immunity doctrine. No act of the legislature is necessary to declare that restrictions imposed upon a parent's liability are not applicable to facts not envisaged by a court seventy years ago. The immunity doctrine was created by the courts and it is "especially for them to interpret and modify that doctrine to correspond with prevalent considerations of public policy and social needs."<sup>59</sup> A look at other fields of the law shows that the doctrine of immunity from suits in the area of torts is no longer a favorite of the courts. Immunities which were granted for many years are undergoing constant limitations without the help of the legislature. For instance, the Illinois Supreme Court in *Molitor v. Kaneland Community Unit District*<sup>60</sup> emphasized the basic concept underlying the whole law of torts, *i.e.*, that *liability follows negligence*, and stated:

We are not dealing with property law or other fields of the law where stability and predictability may be of utmost concern. We are dealing with the law of torts where there can be little, if any, justifiable reliance and where the rule of stare decisis is admittedly limited.<sup>61</sup>

In advocating the need for a forthright re-evaluation of a doctrine which appears to be not only obsolete but results in injustice and dis-

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majority of the Court, which could well change this and many other rules of the common law on which *insurance companies have relied in issuing their policies*." United States Investor, September 19, 1960, p. 77. (Emphasis added.)

<sup>59</sup> Nudd v. Matsoukas, 7 Ill. 2d 608, 619, 131 N.E. 2d 525, 530 (1956).

<sup>60</sup> 18 Ill. 2d 11, 163 N.E. 2d 89 (1959). In that case the immunity doctrine previously protecting a quasi-public agency—namely, a school district whose employee had negligently injured a plaintiff—was abolished. Similarly, in *Moore v. Moyle*, 405 Ill. 555, 92 N.E. 2d 81 (1950), the Illinois court deviated from its previously strict adherence to the doctrine of immunity of charities. Here, the existence of liability insurance, which directly affected and limited the immunity, was in fact a necessary part of the allegations to show that non-trust funds were available for the satisfaction of the judgment.

<sup>61</sup> *Molitor v. Kaneland Community Unit District*, 18 Ill. 2d 11, 26, 163 N.E. 2d 89, 96 (1959).

turbance of the very peace of families which it is alleged to protect, a reference to Mr. Justice Holmes' admonition seems in order:

When we find that in large and important branches of the law the various grounds of policy on which the rules have been justified are later inventions to account for what are in fact survivals from more primitive times, we have a right to reconsider the popular reasons and—taking a broader view of the field, to decide anew whether those reasons are satisfactory. . . . If truth were not often suggested by error, if old implements could not be adjusted . . . human progress would be slow. But scrutiny and revision are justified.<sup>62</sup>

<sup>62</sup> HOLMES, *THE COMMON LAW* 37 (1945).

### SOME ASPECTS OF INTERPRETATION AND APPLICATION OF THE BROKERAGE CLAUSE OF THE ROBINSON-PATMAN ACT

The Robinson-Patman Act<sup>1</sup> was enacted by Congress in 1936 to regulate price discrimination in or affecting interstate commerce. The act amended section 2 of the Clayton Act<sup>2</sup> by enlarging it into six subsections numbered 2(a), 2(b), 2(c), 2(d), 2(e) and 2(f). These six subsections embody the core of the federal law on price discrimination. In the twenty-four years since the passage of the Robinson-Patman Act, section 2(c)<sup>3</sup> of the act has engaged the attention of the Federal Trade Commission and several courts of appeals to a far greater extent than any other provisions of the Robinson-Patman Act.<sup>4</sup> Most of the litigation has taken place over the problem of interpretation and application of this section. Though construed by several courts of appeals, the "Brokerage Clause" (as section 2(c) is popularly known) received for the first time Supreme Court review in 1960. It is the purpose of the writer to examine the legislative history, the early court decisions, and the Supreme Court's recent pronouncement in *Federal Trade Commission v. Henry Broch & Co.*,<sup>5</sup> in order to acquaint the reader with the more important aspects of interpretation and application of section 2(c) today.

<sup>1</sup> 15 U.S.C.A. § 13 (Supp. 1959).

<sup>2</sup> 38 Stat. 730 (1914).

<sup>3</sup> 15 U.S.C.A. § 13(c) (Supp. 1959).

<sup>4</sup> Statistics on the number of violations of each section of the Robinson-Patman Act from 1936 to 1957 show that forty-seven per cent of the cease and desist orders (145 out of 311) were issued by the Federal Trade Commission in brokerage cases. See generally EDWARDS, *THE PRICE DISCRIMINATION LAW* 68-72 (1959).

<sup>5</sup> 363 U.S. 166, *rehearing denied*, 29 U.S. L. WEEK 3104 (U.S. Oct. 11, 1960) (No. 61).