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Note

FRYE V. FRYE: MARYLAND SACRIFICES THE CHILD FOR THE SAKE OF THE FAMILY

I. THE CASE

In *Frye v. Frye*¹ the Court of Appeals of Maryland held that parental immunity prohibits a child from suing a parent in tort negligence.² By so holding, the court reaffirmed the rule of parental immunity for unintentional torts despite its recent decision permitting one spouse to sue the other in negligence.³ The court grounded its holding on the differences between parental and interspousal immunities and on policy considerations.⁴

George L. Frye, III, infant son of Barbara and George L. Frye, Jr., was injured in an automobile accident caused by his father's negligent driving.⁵ His mother Mrs. Frye, who was also injured, sued the child's father (her husband) for damages both on her own behalf and as George III's next friend.⁶ The trial court dismissed the action as to Mrs. Frye because of interspousal immunity,⁷ and as to George III because of parental immunity.⁸ Mrs. Frye subsequently appealed to the Court of Special Appeals, but asked the Court of Appeals to certify the case.⁹ The Court of Appeals granted her petition.¹⁰

Between the time of the accident and the appeal, the Court of Appeals completely abrogated interspousal immunity in *Boblitz v. Boblitz*,¹¹ reasoning that changes in the spousal relationship abol-

1. 305 Md. 542, 505 A.2d 826 (1986).

2. *Id.* at 567, 505 A.2d at 839.

3. *Boblitz v. Boblitz*, 296 Md. 242, 462 A.2d 506 (1983).

4. 305 Md. at 557-58, 567, 505 A.2d at 834, 839. The court declined to abrogate the immunity in part for automobile accidents. Such action, it stated, should come from the General Assembly, not the judiciary. *Id.* at 567, 505 A.2d at 839.

5. *Id.* at 554, 505 A.2d at 827.

6. *Id.* Because a minor child is usually incapable of undertaking a suit alone, a guardian is appointed to appear on the child's behalf. Generally, this function is performed by a parent. See *Schneider v. Schneider*, 160 Md. 18, 23, 152 A. 498, 500 (1930); 2 F. HARPER, F. JAMES & O. GRAY, *THE LAW OF TORTS* § 8.11 (2d ed. 1986).

7. 305 Md. at 544, 505 A.2d at 827.

8. *Id.* Mrs. Frye also sued George Jr.'s insurer for breach of contract on George Jr.'s uninsured motorist policy. This action was dismissed and is an insignificant issue in the court's reasoning. *Id.* at 567-68, 505 A.2d at 839-40.

9. *Id.*

10. *Id.*

11. 296 Md. 242, 462 A.2d 506 (1983).

ished the common law rationale for the rule.¹² Mrs. Frye was unable to use *Boblitz* to her advantage since the court had specified that *Boblitz* was to be applied prospectively.¹³ Nevertheless, she based her appeal on George III's behalf on the *Boblitz* reasoning.¹⁴ Mrs. Frye argued that the analogy between interspousal and parental immunity required that if the former were abrogated, the latter must be also.¹⁵

After considering the common law history of both interspousal and parental immunities, the court rejected Mrs. Frye's argument, holding that the two immunities are based on separate grounds and have distinct legal histories;¹⁶ the abrogation of one, therefore, does not necessitate abrogation of the other.¹⁷ With regard to parental immunity, the court stressed the policies of fostering family harmony and supporting parental authority.¹⁸ Interspousal immunity, on the other hand, rests on the common law idea of the unity of husband and wife whereby the wife was legally merged into her husband.¹⁹ While each type of immunity in fact rests on additional grounds, by thus reducing the bases for the immunities to their essence, the court stressed the distinctions between the two immunities rather than their similarities.²⁰ In addition, the court asserted that even if parental immunity should be abrogated, the action should come from the legislature, not the judiciary, since matters of statutory public policy are at issue.²¹ In Maryland, the common law emphasis on the unity of the family has been codified.²² Furthermore, the existence of compulsory automobile insurance is mandated by statute; therefore, the legislature should make any changes in policies affecting the insurance program.²³ Based on this reason-

12. *See id.* at 273, 462 A.2d at 521.

13. *Id.* at 275, 462 A.2d at 522.

14. *See* 305 Md. at 544, 505 A.2d at 827.

15. *See id.*

16. *Id.* at 557-58, 505 A.2d at 834.

17. *Id.* at 557, 505 A.2d at 834.

18. *Id.* at 561, 505 A.2d at 836.

19. *Id.* at 553, 505 A.2d at 832.

20. *See infra* notes 37 and 69 and accompanying text.

21. 305 Md. at 566-67, 505 A.2d at 839.

22. MD. FAM. LAW CODE ANN. § 4-401 (1984). The statute reads in part: "The General Assembly declares: (1) that it is the policy of this State to promote family stability, to preserve family unity, and to help families achieve and maintain self-reliance." *Id.* This is not a naked declaration of policy. Rather, it serves as the preface to the subtitle that sets forth the duties of the Department of Human Resources to families with children.

23. 305 Md. at 567, 505 A.2d at 839; *see* MD. ANN. CODE art. 48A, §§ 539, 541 (1979 & Supp. 1985).

ing, the court affirmed the dismissal.²⁴

II. BACKGROUND LAW

A. Parental Immunity

There is no indication that parental immunity existed at English common law.²⁵ A child was considered separate from the parents, with individual legal rights and responsibilities,²⁶ and thus could be held liable for torts, could own property, and could enter into contracts.²⁷ A child was free to sue a parent concerning property rights, but no English cases clearly state that a minor could sue a parent for personal torts.²⁸ Early American common law was also unclear as to the existence of parental immunity, with some commentators asserting that a child could sue a parent and others claiming that immunity existed.²⁹

In 1891, however, the Supreme Court of Mississippi held in the case of *Hewlett v. George*³⁰ that a minor child could not sue a parent.³¹ In *Hewlett*, a daughter alleged that her mother had imprisoned her in a mental asylum in order to gain control of the girl's property.³² Citing no authority, the court held that the daughter

24. 305 Md. at 568, 505 A.2d at 840.

25. *Dunlap v. Dunlap*, 84 N.H. 352, 354, 150 A. 905, 907 (1930). It is important to remember that the general rule in tort is liability for unreasonable acts causing harm. Any immunity is an exception to the rule and exists because the justification for the immunity is supreme. *Gibson v. Gibson*, 3 Cal. 3d 914, 922, 479 P.2d 648, 653, 92 Cal. Rptr. 288, 293 (1971); see *Boblitz v. Boblitz*, 296 Md. 242, 260, 462 A.2d 506, 514 (1983) (quoting *Lewis v. Lewis*, 370 Mass. 619, 629, 351 N.E.2d 526, 532 (1976)).

26. See 2 F. HARPER, F. JAMES & O. GRAY, *supra* note 6, § 8.11; see also *Waltzinger v. Birsner*, 212 Md. 107, 126, 128 A.2d 617, 627 (1956) ("[T]he common law conception of unity of legal identity of husband and wife had no similar conception of unity of legal identity in the case of parent and minor child").

27. 2 F. HARPER, F. JAMES, & O. GRAY, *supra* note 6, § 8.11. Although many of a minor's contracts were voidable at the minor's option, the minor did have the power to enter into a contract. *Id.*

28. See *id.* The Court of Appeals has stated that "there is nothing in the English decisions to suggest that at common law a child could not sue a parent for a personal tort." *Mahnke v. Moore*, 197 Md. 61, 64-65, 77 A.2d 923, 924 (1951).

29. See *Dunlap v. Dunlap*, 84 N.H. 352, 357-58, 150 A. 905, 907-08 (1930); *Mahnke v. Moore*, 197 Md. 61, 64-65, 77 A.2d 923, 924-25 (1951).

30. 68 Miss. 703, 9 So. 885 (1891).

31. *Id.* at 711, 9 So. at 887.

32. *Id.* at 704. (Editor's note: The regional reporter does not contain the court's statement of facts in which this proposition appears.) The minor daughter had been married but was separated from her husband. The court treated her as still under parental control, while at the same time pointing out that her marriage might have dissolved the bonds of parental authority so that she could maintain the suit. *Id.* at 711, 9 So. at 887.

could not maintain the suit; permitting the suit would disrupt the peace and harmony of the home.³³ Furthermore, the court reasoned that the criminal laws would afford the daughter a means of redress.³⁴

Despite the lack of authority for the holding in *Hewlett*, other courts quickly adopted parental immunity as the common law rule.³⁵ Courts following *Hewlett* stressed the policy of supporting family unity and harmony.³⁶ Furthermore, the courts emphasized the need for parental authority and discretion in rearing children, reasoning that if parent-child suits were permitted, parents would face limitless liability.³⁷

33. The court held:

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 personal injuries suffered at the hands of the parent.

Id.

34. *Id.* Thus relying on *Hewlett*, the Supreme Court of Washington extended the immunity to a man convicted of raping his minor daughter. *Roller v. Roller*, 37 Wash. 242, 244, 79 P. 788, 788-89 (1905); *see also* *McKelvey v. McKelvey*, 111 Tenn. 388, 390-91, 77 S.W. 664, 664 (1905) (immunity extended to parent who allegedly committed cruel and inhuman assault upon a child). This view has met with harsh criticism:

To deny a recovery in damages to a daughter against a father who has been convicted of raping her on the ground that it would tend to disturb the beauty, tranquillity, and sanctity of that home is nothing short of absurdity. To deny it in a case in which the peacefulness of the home has been so rudely broken because of the tranquillity in some other homes or because of the abstract peace in the abstract home seems hardly consistent with sound policy. To deny the action in the interest of domestic discipline is equally untenable as the father was hardly acting in his capacity of parent in committing the assault.

2 F. HARPER, F. JAMES & O. GRAY, *supra* note 6, § 8.11 (footnote omitted).

35. *See* 305 Md. at 545, 505 A.2d at 828.

36. *See* *Gibson v. Gibson*, 3 Cal. 3d 914, 917, 479 P.2d 648, 649-50, 92 Cal. Rptr. 288, 289 (1971); RESTATEMENT (SECOND) OF TORTS § 895G comment c (1979) (criticizing the rationale).

37. *Cf.* *Dunlap v. Dunlap*, 84 N.H. 352, 361, 150 A. 905, 909-10 (1930); RESTATEMENT (SECOND) OF TORTS § 895G comments c, k (1979). Courts have offered a number of other arguments in defense of the immunity: the risk of fraud and collusion among family members; the threat to family finances; the distinction between personal torts and torts against property; the line between commonplace accidents in the home and negligent acts for which liability is imposed; and, finally, the possibility that the parent would become the child's heir and successor to any damages recovered. *Id.*

In the comments to the RESTATEMENT, Prosser set forth what is probably the definitive critique of these justifications for the immunity:

As in the case of husband and wife, the chief reason usually advanced today for the immunity is that domestic peace and parental discipline and control would be disturbed by permitting an action for a personal tort. Again the theory apparently has been that an uncompensated tort makes for family peace and harmony, and that there is somehow a distinction in this respect between personal torts and those affecting only property. Another reason sometimes given is

Maryland followed the trend of other courts in recognizing and extending the doctrine of parental immunity. In *Schneider v. Schneider*³⁸ the court held that a parent could not sue a minor child.³⁹ The court stressed the paradoxical dual role of parent as adversary which would exist if the suit were permitted, since the child would rely on the parent to hire the child's attorney and pay the cost of litigation.⁴⁰ In *Yost v. Yost*⁴¹ the Maryland court held that a child could

that to allow one child to recover from a parent would deplete the family funds in his favor at the expense of other children. Neither of these reasons would appear to outweigh the more urgent desirability of compensating the injured person, and particularly a child, for genuine harm that may cripple him for life and ruin his entire future. The development of liability insurance, especially in the area of automobile accidents, has removed to a considerable extent whatever theoretical justification this reasoning may once have afforded. In turn the insurance has given rise to an additional argument, that of the danger of collusion against liability insurance companies—which again would appear not to be beyond the power of the courts to deal with and in any case not to outweigh the desirability of compensating the injured person.

Id. at comment c. For further criticism of these rationales for the immunity, see Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930).

38. 160 Md. 18, 152 A. 498 (1930).

39. *Id.* at 23-24, 152 A. at 500.

40. The court stated:

The ordinary position of parent and guardian of a minor, and that of plaintiff seeking to recover from the minor, are positions which cannot both be occupied by one person at one and the same time. Maintenance of the suit is inconsistent with the parent's status or office, and the dependence of the minor upon her, and also with the dependence of the law upon her for the fulfillment of necessary legal and social functions.

Id. at 21-22, 150 A. at 499. Furthermore:

A minor is even more dependent upon a parent to provide for him the judgment and care which he, and any property of his, may need during his immaturity. In a suit against him he would ordinarily depend upon his parents to procure him an attorney, for he cannot appoint one There would be a question whether the parent would not be obliged to pay the expenses of litigation of the child.

Id. at 23, 150 A. at 500 (citations omitted).

More recently, courts have come to see the fallacy of this argument. Recognizing that the child's adversary is not in fact the parent, but rather the parent's insurance carrier, the Supreme Judicial Court of Massachusetts wrote:

When insurance is involved, the action between parent and child is not truly adversary; both parties seek recovery from the insurance carrier to create a fund for the child's medical care and support without depleting the family's other assets. Far from being a potential source of disharmony, the action is more likely to preserve the family unit in pursuit of a common goal — the easing of family financial difficulties stemming from the child's injuries.

Sorensen v. Sorensen, 369 Mass. 350, 363, 339 N.E.2d 907, 914 (1975); *see also* *Streenz v. Streenz*, 106 Ariz. 86, 88, 471 P.2d 282, 284 (1970).

The *Sorensen* court stated elsewhere:

When an action is brought against a parent, frequently it will be brought at the

not sue a parent in equity for non-support.⁴² The court explained that the voluntary payment of support was a moral duty, not a legal one, since the child had no legal right to demand that the parent spend a given amount on support.⁴³

While at first courts eagerly embraced the *Hewlett* rule, exceptions to the immunity quickly began to appear. In each situation, the rationale for the exception was that permitting immunity would not promote the aim of family harmony.⁴⁴ Thus, the immunity did not apply in the case of an emancipated child, since the child was beyond the reach of parental authority.⁴⁵ Likewise, if an employer-employee relationship existed between parent and child,⁴⁶ or if the injury occurred in the course of the parent's business,⁴⁷ some courts argued that harmony was not at stake.

The Maryland case of *Mahnke v. Moore*⁴⁸ established a significant exception to the parental immunity rule. In *Mahnke*, a father forced his young daughter⁴⁹ to witness his murder of her mother

instance of, or with the approval of, the parent with an eye toward recovery from the parent's already purchased liability insurance. When there is no insurance coverage it is unlikely that suit will be brought against the parent.

369 Mass. at 361, 339 N.E.2d at 913.

41. 172 Md. 128, 190 A. 753 (1937).

42. *Id.* at 134, 190 A. at 756. Under the terms of a divorce settlement, the father's legal duty to support his child financially ended when the child reached the age of three. *Id.* at 131, 190 A. at 754.

43. *See id.* at 133-34, 190 A. at 755-56.

44. *See* RESTATEMENT (SECOND) OF TORTS § 895G comments d - i (1979); 2 F. HARPER, F. JAMES & O. GRAY, *supra* note 6, § 8.11.

45. *See, e.g.,* *Waltzinger v. Birsner*, 212 Md. 107, 126, 128 A.2d 617, 627 (1956). The court also mentioned that the son's lack of ill will towards his mother for bringing suit provided additional justification for allowing the suit. *Id.*

46. *See, e.g.,* *Dunlap v. Dunlap*, 84 N.H. 352, 150 A. 905 (1930) (parent employed son at regular wage, and insurer providing liability insurance was aware of son's employment). *Compare* *Sherby v. Weather Bros. Transfer Co.*, 421 F.2d 1243, 1246 (4th Cir. 1970) (federal court, purporting to apply Maryland law, held that parent-child immunity barred child's recovery from father's employer).

47. *Worrell v. Worrell*, 174 Va. 11, 28, 4 S.E.2d 343, 350 (1939) (child injured while a passenger on her father's bus was allowed to recover). Two additional exceptions should be noted. First, the common law right of the child to sue the parent for torts against property has been maintained. Second, there is no immunity if the liability is not based directly on the parent-child relationship. Thus, one standing merely *in loco parentis* does not enjoy the immunity. Furthermore, a third person vicariously or jointly liable for the parent's tort may not escape liability for the child's injury merely because the child's parent is also a tortfeasor. Finally, if the parent-child relationship has been terminated by death, the suit may be permitted since the relationship no longer exists. Thus, a child's estate may sue the parent in a wrongful death action. RESTATEMENT (SECOND) OF TORTS § 895G comments d - i (1979).

48. 197 Md. 61, 77 A.2d 923 (1951).

49. The child was illegitimate, but the court indicated that under these circumstances

and his subsequent suicide.⁵⁰ The court held that parental immunity did not apply to intentional torts such as this because the father had abandoned his parental authority and destroyed the domestic tranquillity that the immunity seeks to preserve.⁵¹

As a result of the erosion of the immunity by the numerous exceptions, some courts sought to abrogate the still-remaining immunity in whole or in part. A number of courts abolished the immunity for automobile accidents, citing the widespread use of liability insurance as a protection against disruption of family harmony.⁵² Other courts went further, abrogating parental immunity virtually completely, and allowing flexibility for parental discipline and everyday family activities. In *Goller v. White*⁵³ the Wisconsin Supreme Court held that no immunity existed except in situations involving an exercise of parental authority or discretion.⁵⁴ The California Supreme Court went one step further in *Gibson v. Gibson*⁵⁵ when it rejected the *Goller* formulation and held that the standard should be that of a "reasonable and prudent parent."⁵⁶ Despite these moves by other courts to abrogate parental immunity in negligence, Maryland has not done the same.⁵⁷ Thus, the state of the law prior to *Frye* was

her legitimacy was not an issue in determining the liability of her father. *Id.* at 69, 77 A.2d at 926.

50. *Id.* at 63, 77 A.2d at 924. The father blew the mother's brains out with a shotgun, kept the child with the corpse for a week, and then killed himself with a shotgun, spraying the child with his blood. Not surprisingly, the daughter suffered "shock, mental anguish and permanent nervous and physical injuries." *Id.*

51. *Id.* at 67-68, 77 A.2d at 926. The court stated:

[T]here can be no basis for the contention that the daughter's suit against her father's estate would be contrary to public policy, for the simple reason that there is no home at all in which discipline and tranquillity are to be preserved [W]hen, as in this case, the parent is guilty of acts which show complete abandonment of the parental relation, the rule giving him immunity from suit by the child, on the ground that discipline should be maintained in the home, cannot logically be applied, for when he is guilty of such acts he forfeits his parental authority and privileges, including his immunity from suit.

Id. at 68, 77 A.2d at 926.

52. *See, e.g., Smith v. Kaufman*, 212 Va. 177, 183 S.E.2d 190 (1971); *Sorensen v. Sorensen*, 369 Mass. 350, 339 N.E.2d 907 (1975).

53. 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

54. *Id.* at 413, 122 N.W.2d at 198. The RESTATEMENT cites *Goller* with approval. RESTATEMENT (SECOND) OF TORTS § 895G comment j (1979).

55. 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971).

56. *Id.* at 921, 479 P.2d at 653, 92 Cal. Rptr. at 293. The court wrote: "The standard to be applied is the traditional one of reasonableness, but viewed in light of the parental role. Thus, we think the proper test of a parent's conduct is this: what would an ordinarily reasonable and prudent parent have done in similar circumstances?" *Id.* This same view is espoused in 2 F. HARPER, F. JAMES & O. GRAY, *supra* note 6, § 8.11.

57. On three occasions between *Waltzinger* in 1957 and *Frye* in 1986, the Court of Special Appeals declined to modify the contours of the rule. *See Shell Oil Co. v. Ryck-*

that while no immunity existed for intentional torts under *Mahnke*, immunity for negligence was still the rule according to *Schneider*.

B. Interspousal Immunity

The origins of interspousal immunity are much older than those of parental immunity. At English common law, husband and wife were considered "one flesh."⁵⁸ The practical effect of this metaphysical theory was that the wife was considered legally "merged" into her husband so that she could not bring suit against anyone for any reason unless her husband was joined as a party.⁵⁹ As a result, a wife was unable to sue her husband since to allow her to do so would in a sense mean that he would be suing himself.⁶⁰

Within the last century this doctrine has come under serious attack as a result of the changing role of women in society. During the late 1800's, most states passed some version of the Married Women's Acts giving the wife a right to sue in her own name.⁶¹ While on the surface the wording of the acts abrogated interspousal immunity,⁶² an early federal case held that the intent was only to allow a woman to sue a third party without joining her husband; the intent was not to give her a cause of action against her husband.⁶³

Despite this narrow interpretation of the statutes, other courts

man, 43 Md. App. 1, 403 A.2d 379 (1979); *Sanford v. Sanford*, 15 Md. App. 390, 290 A.2d 812 (1972); *Latz v. Latz*, 10 Md. App. 720, 272 A.2d 435 (1971).

58. *Surratt v. Thompson*, 212 Va. 191, 192, 183 S.E.2d 200, 201 (1971) (citing *Keister's Adm'r v. Keister's Ex'rs*, 123 Va. 157, 176-77, 96 S.E. 315, 321-22 (1918) (Burks, J. concurring)).

59. RESTATEMENT (SECOND) OF TORTS § 895F comment b (1979).

60. *Frye v. Frye*, 305 Md. 542, 553, 505 A.2d 826, 832 (1986).

61. RESTATEMENT (SECOND) OF TORTS § 895F comment c.

62. See, e.g., MD. FAM. LAW CODE ANN. § 4-204 (1984). For a detailed history of the Married Women's Act in Maryland, see *Lusby v. Lusby*, 283 Md. 334, 390 A.2d 77, 79-82 (1978).

63. *Thompson v. Thompson*, 218 U.S. 611 (1910). The Supreme Court construed the District of Columbia statute in question very narrowly, explaining that a broader interpretation permitting suits between husband and wife might jeopardize the harmony of the home and of society. The Court reasoned that had the legislature intended to permit a wife to sue her husband, it could have done so explicitly in the statute. *Id.* at 618-19.

The statute provided in part: " 'Married women shall have the power . . . to sue separately for the recovery, security, or protection of their property, and for torts committed against them, as fully and freely as if they were unmarried.' " *Id.* at 616. Commentators have pointed out that the language of the statute did, in fact, seem inclusive enough to permit suits by a woman against her husband. Nevertheless, many courts interpreted similar statutes as the Supreme Court did, thus adopting the threat to domestic harmony as a new rationale for maintaining interspousal immunity. 2 F. HARPER, F. JAMES & O. GRAY, *supra* note 6, § 8.10.

began to dismantle interspousal immunity.⁶⁴ In Maryland, the adoption of the Equal Rights Amendment into the Maryland Declaration of Rights⁶⁵ signalled the beginning of the end of interspousal immunity. In *Lusby v. Lusby*,⁶⁶ after tracing the history of the immunity and the Married Women's Acts, the court held that no interspousal immunity existed for intentional torts, since, as in *Mahnke*, there was no domestic harmony left to disrupt.⁶⁷ The final blow to interspousal immunity came in *Boblitz*, the case on which Mrs. Frye based her appeal on George III's behalf. The court in *Boblitz* completely abrogated interspousal immunity, so that the wife in *Boblitz* was able to sue her husband in negligence for an automobile accident.⁶⁸ After explaining the history of the immunity, the court considered the effect such suits might have on the harmony of the home,⁶⁹ and held that the immunity was an anachronism that should be abolished.⁷⁰

64. One of the first steps was to construe the Married Women's Acts as permitting a woman to sue her husband concerning her *property* interests even though the immunity still protected him from suit in *personal* torts. RESTATEMENT (SECOND) OF TORTS § 895F comment c (1979). See 2 F. HARPER, F. JAMES & O. GRAY, *supra* note 6, § 8.10 n. 17 and authorities cited therein.

65. "Equality of rights under the law shall not be abridged or denied because of sex." MD. CONST. DECL. OF RTS., art. 46 (1972).

66. 283 Md. 334, 390 A.2d 77 (1978).

67. *Id.* at 357, 390 A.2d at 88. The husband forced his wife's car off the road, held her at gunpoint, and forced her to submit to rape by two other men, threatening to kill her if she told what had happened. *Id.* at 335-36, 390 A.2d at 77.

68. 296 Md. 242, 275, 462 A.2d 506, 522 (1983). Until *Frye* the court had focused on the similarities between interspousal and parental immunities. Thus, *Lusby* used the abolition of immunity for intentional *parental* torts in *Mahnke* as a basis for abrogating immunity for intentional *interspousal* torts. *Lusby v. Lusby*, 283 Md. 334, 351, 390 A.2d 77, 85 (1978). Had the court continued this pattern by comparing *Boblitz*' abrogation of interspousal immunity in negligence with the question of parental immunity in *Frye*, the result in *Frye* should have been different.

69. The court also dispensed with several other arguments in favor of interspousal immunity: the risk of fraud and collusion between husband and wife; the danger of an increase in trivial claims; the adequacy of the redress afforded by divorce and criminal courts; and the need for legislative action to abrogate immunity. *Boblitz v. Boblitz*, 296 Md. 242, 256-57, 462 A.2d 506, 513 (1983). After analyzing these arguments as applied by the courts of other states, the *Boblitz* court concluded: "We are persuaded that the reasons asserted for [the immunity's] retention do not survive careful scrutiny." *Id.* at 273, 462 A.2d at 521. See also RESTATEMENT (SECOND) OF TORTS § 895F comment d (1979) (listing the arguments offered in support of the immunity and concluding that they are "poor justification for denying all remedy for a serious and genuine wrong"). For a comparison with the rationales given in support of parental immunity, see *supra* note 37 and accompanying text.

70. 296 Md. 242, 273, 462 A.2d 506, 521.

III. ANALYSIS

In *Frye v. Frye*⁷¹ the Maryland Court of Appeals held that parental immunity is still the law in negligence cases.⁷² A careful analysis of the court's reasoning reveals that the court interpreted the bases for the parental and interspousal immunities very narrowly, contrasting rather than comparing the two immunities. A broader view should have resulted in at least partial abrogation of parental immunity.

In tracing the history of parental immunity, the court stressed the "common theme" of "the relation in which the parent and the unemancipated minor child stand to each other" and "[t]he reciprocal dependence and entitlement of that relationship."⁷³ The court emphasized "its belief in the importance of keeping the family relationship free and unfettered," asserting that the "primary concern . . . was the protection of family integrity and harmony and the protection of parental discretion in the discipline and care of the child."⁷⁴ Support of family unity and parental authority is also a matter of statutory law in Maryland. The General Assembly has codified the common law duties of the parent to support the child and the common law rights of the parent to the services and earnings of the child.⁷⁵ Because tranquillity of the family is both a matter of common law and statutory public policy, the court emphasized that nothing should be done to jeopardize the stability of the home.⁷⁶ According to the court, parental immunity has served an important function by helping to preserve that harmony.⁷⁷ Despite the asserted importance of family unity, the court was willing to reevaluate the status of the parent-child relationship

71. 305 Md. 542, 505 A.2d 826 (1986).

72. *See id.* at 567, 505 A.2d at 839.

73. *Id.* at 548, 505 A.2d at 829.

74. *Id.* at 551, 505 A.2d at 831.

75. *Id.* at 559, 505 A.2d at 835; MD. FAM. LAW CODE ANN. § 5-203 (1984).

76. 305 Md. at 551, 505 A.2d at 831. The court declared:

The parental status should be held inviolate so that there be no undue interference with the dependence of the minor unemancipated child on the parents for such judgment and care needed during the child's minority or with the dependence of the law on the parent for fulfillment of the necessary legal and social functions associated with the office of parent. This court has declared it to be the public policy that discipline in the family not be impaired and that tranquillity of the home be preserved. Matters which tend to disrupt or destroy the peace and harmony of family or home are not to be condoned.

Id. at 551-52, 505 A.2d at 831.

77. *Id.* at 552, 505 A.2d at 831.

in light of *Boblitz* and the abrogation of interspousal immunity.⁷⁸

In assessing the logic used in *Boblitz* to abrogate interspousal immunity, the court dwelt heavily on the changed status of women.⁷⁹ By the time *Boblitz* was decided, a majority of states had already abrogated interspousal immunity, many doing so by judicial decision.⁸⁰ Because the legal unity of husband and wife no longer was recognized, the rationale for interspousal immunity has been substantially weakened.⁸¹ However, the court reasoned that since parent and child have always been separate entities in the eyes of the law, no such change has occurred in the parent-child relationship, and the rationale for the parental immunity remains valid.⁸²

So far as it goes, the logic of the court in *Frye* is valid. However, whereas the court in *Boblitz* listed several arguments supporting interspousal immunity,⁸³ the court in *Frye* relied only on those relating to the common law unity of husband and wife.⁸⁴ *Boblitz* stressed that as the idea of unity lost favor, other rationales, which the *Frye* court did not address, had been offered in support of interspousal immunity, including the risk of harm to family harmony.⁸⁵ In dispensing with this argument, *Boblitz* cited cases which stated that not allowing the suit could cause more disruption than permitting it,⁸⁶ and that suits involving property, which were permitted between spouses,⁸⁷ posed no less risk to harmony than suits for personal torts.⁸⁸

Indeed, these are the arguments courts and critics often ad-

78. *Id.*

79. *Id.* at 553-58, 505 A.2d at 832-84. For a discussion of the history of the status of women, see *supra* notes 58-70 and accompanying text.

80. *Id.* at 555-56, 505 A.2d at 833.

81. See *id.* at 556-57, 505 A.2d at 833-34.

82. *Id.* at 557-58, 505 A.2d at 834.

83. See *supra* note 69 and accompanying text.

84. 305 Md. at 556-57, 505 A.2d at 833-34. According to the *Frye* court, the "principal considerations leading to the decision in *Boblitz*" concerned the changed status of women: the rejected concept of unity, the passage of the Married Women's Acts, and the great number of cases criticizing immunity. *Id.* While these considerations were of great importance in *Boblitz*, they were not the only hurdles that the *Boblitz* court succeeded in overcoming. See *supra* note 69 and accompanying text.

85. On numerous occasions in *Boblitz* alone the Court of Appeals recognized family harmony as a justification for interspousal immunity. See 296 Md. at 252-71, 462 A.2d at 510-20. In earlier cases as well, the court criticized the family harmony argument. See, e.g., *Lusby v. Lusby*, 283 Md. 334, 357, 390 A.2d 77, 88 (1978); *Gregg v. Gregg*, 199 Md. 662, 666-67, 87 A.2d 581, 582-83 (1952).

86. 296 Md. 242, 266, 462 A.2d 506, 517-18, (citing *Merenoff v. Merenoff*, 76 N.J. 535, 551, 388 A.2d 951, 959 (1978)).

87. See *supra* note 64 and accompanying text.

88. *Boblitz v. Boblitz*, 296 Md. 242, 264, 462 A.2d 506, 516-17 (1983) (citing *Brown v. Gosser*, 262 S.W.2d 480, 484 (Ky. 1953)).

vance in support of abrogating or limiting parental immunity.⁸⁹ If the threat to family harmony is not a serious concern in interspousal immunity, it should not be so in parental immunity. The policy promoting family harmony clearly protects the spousal relationship as well as the parental one, since the spousal relationship is the bedrock of family unity.⁹⁰ Therefore, the main argument used by the court to defend parental immunity and to distinguish it from interspousal immunity evaporates when viewed in light of *Boblitz*.

A further weakness in the court's logic in *Frye* is its reluctance to distinguish between actions that arise out of the parental relationship and those that do not. The court stressed that public policy demands that the parent's authority be upheld in discharging the parental duty.⁹¹ Certainly, the parent needs to be able to exercise authority and judgment in deciding how to rear a child, provide for support, and conduct a household. However, outside of the home, a parent may engage in many activities that affect a child but that do not arise from the parental relationship. As explained above, some courts have held that if a parent employs a child, or if a child is injured in the course of the parent's business, the child may sue, since the activity causing the harm does not arise out of the parental function.⁹² The same logic has been applied in automobile accident cases, since the duty to use reasonable care in driving extends to the general public and not to the child alone.⁹³ Even if the threat to parental authority is a valid reason for maintaining parental immunity, it should not be extended beyond its logical bounds.⁹⁴ Therefore, the more logical approach is to follow the general rule of

89. See, e.g., *Wood v. Wood*, 135 Vt. 119, 122, 370 A.2d 191, 193 (1977); *Gibson v. Gibson*, 3 Cal. 3d 914, 919, 479 P.2d 648, 651, 92 Cal. Rptr. 288, 291 (1971); *Goller v. White*, 20 Wis. 2d 402, 410, 122 N.W.2d 193, 197 (1963); RESTATEMENT (SECOND) OF TORTS § 895G comment d (1979).

90. See, e.g., MD. FAM. LAW CODE ANN. § 4-402(b)(2)(i) (1984) (providing for state-supported marital counseling).

91. 305 Md. at 551-52, 505 A.2d at 831. See *supra* note 76 and accompanying text.

92. See *supra* notes 46-47 and accompanying text.

93. *Sorenson v. Sorenson*, 369 Mass. 350, 365-66, 339 N.E.2d 907, 916 (1975); RESTATEMENT (SECOND) OF TORTS § 895G comment k (1979).

94. In *Dunlap v. Dunlap*, 84 N.H. 352, 361, 150 A. 905, 909 (1930), the court declared:

On its face, the rule is a harsh one. It denies protection to the weak upon the ground that in this relation the administration of justice has been committed to the strong, and that authority must be maintained. It should not be tolerated at all except for very strong reasons; and it should never be extended beyond the bounds compelled by those reasons.

This statement forms part of the basis for the holding in *Mahnke v. Moore*, 197 Md. 61, 67, 77 A.2d 923, 925 (1951), and is cited with approval in *Frye v. Frye*, 305 Md. at 547, 505 A.2d at 828.

liability for unreasonable acts, but allow for parental discretion and authority in discharging purely parental functions.⁹⁵

In considering the status of parental immunity today, the court surveyed the law of other states. Although only nine states other than Maryland now retain complete parental immunity in negligence,⁹⁶ the court noted that of those states partially abrogating the immunity, at least twenty have done so specifically in auto tort cases.⁹⁷ In addition to asserting that driving is outside the realm of parental authority, courts have used the availability of automobile liability insurance as a basis for this partial abrogation.⁹⁸ The court in *Frye* stressed the issue of insurance, arguing that the existence of insurance should not determine liability.⁹⁹ Furthermore, the court noted that since automobile liability insurance is mandated by Maryland statute, to abrogate the immunity could alter the scope of insurance beyond the legislative intent by permitting recovery where none was allowed before.¹⁰⁰ Thus, the court stated that the legislature, not the judiciary, should address the question of parental immunity.¹⁰¹

There are two weaknesses in the court's reasoning. First, the court argued as if its only options were to abrogate the immunity for automobile cases, or not to abrogate at all.¹⁰² Since the court rejected insurance as a sufficient rationale for partially abrogating the immunity, the only option the court left for itself was to retain com-

95. See *supra* notes 54-56 and accompanying text.

96. 305 Md. at 561, 505 A.2d at 836. The nine other states are Alabama, Arkansas, Georgia, Indiana, Louisiana, Mississippi, Missouri, Nebraska, and Tennessee. Louisiana has codified the immunity, while Alabama, Nebraska, and Tennessee require that any change come from the legislature. Arkansas stresses the family harmony rationale, while Georgia and Indiana emphasize parental authority and control. Mississippi still follows the *Hewlett* rule. Missouri, however, determines the immunity on a case-by-case basis. If an evidentiary hearing determines that a suit will not threaten family harmony, then the suit is permitted. *Id.* at 568-70, 505 A.2d at 840 (appendix to opinion).

97. *Id.* at 562, 505 A.2d at 836-37.

98. *Id.* at 562-63, 505 A.2d at 837. See, e.g., *Sorensen v. Sorensen*, 369 Mass. 350, 362, 339 N.E.2d 907, 914 (1975); *Ard v. Ard*, 414 So. 2d 1066, 1068-70 (Fla. 1982) (immunity waived to extent of insurance coverage).

99. See 305 Md. at 564, 505 A.2d at 838. In taking this position, the court held steadfastly to the view announced in *Schneider v. Schneider*, 160 Md. 18, 152 A. 498 (1930), which was decided before the advent of compulsory liability insurance. Compare *Sorensen v. Sorensen*, 369 Mass. 350, 362-63, 339 N.E.2d 907, 914 (1975) (widespread availability of compulsory automobile liability insurance an important factor in decision to partially abrogate immunity for motor torts).

100. 305 Md. at 566, 505 A.2d at 838. See MD. ANN. CODE art. 48A, §§ 539, 541 (1979 & Supp. 1985).

101. 305 Md. at 566, 505 A.2d at 838.

102. *Id.* at 562-67, 505 A.2d at 836-39.

plete immunity. However, while many courts have specifically excluded automobile torts, the court was certainly able to go further and abrogate the immunity with respect to all activities falling outside the parent-child relationship.¹⁰³

The second flaw concerns the court's approach to insurance. The court correctly noted that the existence of insurance should not create liability where none existed before.¹⁰⁴ However, parental immunity is itself an exception to the general rule of tort liability and exists because the importance of maintaining the stability of the home outweighs the considerations behind the general rule.¹⁰⁵ If, for whatever reason, there is no threat to parental authority or family harmony, then the immunity is not necessary.¹⁰⁶ In this situation, insurance does not create liability; instead, it removes an artificial barrier to liability by removing the reasons for the immunity.¹⁰⁷

In addition, the court stressed that the legislature, not the judiciary, should act regarding parental immunity, since the existence of liability insurance is a matter of public policy and any alteration of the immunity would interfere with that policy.¹⁰⁸ However, while the purpose of insurance is to afford a means of redress for injuries, parental immunity strips the injured child of the only effective remedy.¹⁰⁹ Thus, retaining parental immunity does not promote legislative intent but rather thwarts it. Furthermore, while mandatory insurance is indeed "exclusively a creature of the legislature,"¹¹⁰ and therefore should be addressed by that body, parental immunity arose through judicial decision and could clearly be abrogated in the same way, as was interspousal immunity in *Boblitz*.¹¹¹ Finally, since the Maryland insurance statutes were in effect at the time of the automobile accident in *Boblitz*,¹¹² abrogation of interspousal immunity had the same potential for affecting the legislatively pre-

103. See *supra* note 97 and accompanying text.

104. See 305 Md. at 564, 505 A.2d at 838.

105. See *supra* note 25.

106. *Dunlap v. Dunlap*, 84 N.H. 352, 367, 150 A. 905, 912 (1930); 2 F. HARPER, F. JAMES & O. GRAY, *supra* note 6, § 8.11.

107. 2 F. HARPER, F. JAMES & O. GRAY, *supra* note 6, § 8.11.

108. 305 Md. at 566-67, 505 A.2d at 838-39.

109. See *supra* note 34 and accompanying text.

110. 305 Md. at 567, 505 A.2d at 839.

111. *Id.* at 566, 505 A.2d at 839.

112. Maryland's compulsory insurance statute took effect on January 1, 1973, while the uninsured motorist coverage became law on July 1, 1975. MD. ANN. CODE art. 48A, §§ 539, 541 (1979 & Supp. 1985). The accident in *Boblitz* occurred on August 26, 1978. *Boblitz v. Boblitz*, 296 Md. 242, 243, 462 A.2d 506, 506 (1982).

scribed insurance scheme as the possibility of the abrogation of parental immunity did in *Frye*. Since the existence of mandatory liability insurance did not prevent the court from abrogating interspousal immunity, the argument should not have been used to justify retention of parental immunity.

IV. CONCLUSION

While the court's analysis of the basis for parental immunity was correct, its comparison of parental and interspousal immunities is one-sided, stressing only the differences but not the similarities between the two doctrines. Furthermore, the court abdicated its authority to act on a matter of judicial creation by insisting that the legislature act regarding the subsidiary issue of insurance.¹¹³ By thus retaining parental immunity in negligence, the court has hesitated to take the final step in abrogating familial exceptions to the general rule of liability for unreasonable actions,¹¹⁴ and has failed to follow the guidance of leading authorities which suggest that these immunities should be abrogated.¹¹⁵ Thus, the court has chosen to hover timidly in the shadows of the past rather than step confidently into the light of the future.

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113. The court recognized that it had the authority to act. 305 Md. at 566, 505 A.2d at 839. See also *Harrison v. Montgomery Co. Bd. of Educ.*, 295 Md. 442, 460, 456 A.2d 894, 903 (1983) ("[T]he common law is not static; its life and heart is its dynamism—its ability to keep pace with the world while constantly searching for just and fair solutions to pressing societal problems").

114. The court has gone three-fourths of the way already. *Mahnke v. Moore*, 197 Md. 61, 77 A.2d 923 (1951), abrogated parental immunity for intentional torts. *Lusby v. Lusby*, 283 Md. 334, 390 A.2d 77 (1978), and *Boblitz v. Boblitz*, 296 Md. 292, 462 A.2d 506 (1983), abolished interspousal immunity for intentional torts and negligence, respectively. The only familial immunity left is the parental immunity for negligence which the court here opted to retain. 305 Md. at 567, 505 A.2d at 839.

115. See, e.g., RESTATEMENT (SECOND) OF TORTS § 895C(1) (1979) ("A parent or child is not immune from tort liability to the other solely by reason of that relationship."); 2 F. HARPER, F. JAMES & O. GRAY, *supra* note 6, § 8.11 ("[I]t seems likely that the trend toward abrogation of the parent-child immunity will continue, and that such abrogation will become the dominant doctrine in the United States.").