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Torts: The Abolishment of the Parental Immunity Doctrine—Children May Recover Damages from Parents in Personal Injury Actions

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CASENOTE

TORTS: THE ABOLISHMENT OF THE PARENTAL IMMUNITY DOCTRINE—CHILDREN MAY RECOVER DAMAGES FROM PARENTS IN PERSONAL INJURY ACTIONS—*Kirchner v. Crystal*, 15 Ohio St. 3d 326, 474 N.E.2d 275 (1984); *Shearer v. Shearer*, 18 Ohio St. 3d 94, 480 N.E.2d 388 (1985).

I. INTRODUCTION

The Ohio Supreme Court has unleashed an assault on tort immunity doctrines in an attempt to provide a recourse for injured tort victims. This assault began in 1983 when the court abolished the doctrine of sovereign immunity.[1] One year later, the Ohio Supreme Court proceeded to strike down the doctrine of charitable immunity.[2] These two cases exemplified a change in the supreme court's policy toward antiquated doctrines.

This change in policy regarding immunities was further established in the 1984 case of *Kirchner v. Crystal*,[3] wherein the Ohio Supreme Court held that the doctrine of parental immunity was "abolished without reservation."[4] With this abolition, the court finally eliminated a doctrine that had stood for thirty-three years "as an impervious obstacle for almost all children who have attempted to insti-

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1. Enghauser Mfg. Co. v. Eriksson Eng'g Ltd., 6 Ohio St. 3d 31, 451 N.E.2d 228 (1983). The plaintiff in *Enghauser* brought an action against the city of Lebanon, Ohio, alleging that the city's negligent construction of a new bridge and roadway resulted in the flooding of the plaintiff's neighboring industrial property. The city raised the defense of governmental (sovereign) immunity from tort liability. The court rejected the defense, holding that "so far as municipal governmental responsibility for torts is concerned, the rule is liability—the exception is immunity." *Id.* at 33, 451 N.E.2d at 230. The Ohio legislature has since brought back governmental immunity, albeit in a limited form. *See* Act of Nov. 20, 1985, 1985 Ohio Legis. Serv. 5-670 (Baldwin) (to be codified in scattered sections of tits. 1, 3, 5, 7, 33, 44, and 47 OHIO REV. CODE ANN. (Page Supp. 1985)).

2. Albritton v. Neighborhood Centers Ass'n for Child Dev., 12 Ohio St. 3d 210, 466 N.E.2d 867 (1984). In *Albritton*, the mother of a minor child brought suit for the injuries her child received while at a Head-Start day care program operated by two nonprofit organizations. The court rejected the defendants' argument that the action was barred by the doctrine of charitable immunity, holding that "a charitable organization is subject to liability in tort to the same extent as individuals and corporations." *Id.* at 214, 466 N.E.2d at 871. *See* Note, *Torts: Another Citadel Crumbles—Ohio Abolishes the Doctrine of Charitable Immunity—Albritton v. Neighborhood Centers Association for Child Development, 12 Ohio St. 3d 210, 466 N.E.2d 867 (1984)*, 11 U. DAYTON L. REV. 103 (1985).

3. 15 Ohio St. 3d 326, 474 N.E.2d 275 (1984).

4. *Id.* at 327, 474 N.E.2d at 276.

tute legal proceedings against their parents, in order to recover damages for injuries sustained as a result of the parent's tortious actions."[5] The *Kirchner* decision was the first of two cases that eliminated intrafamilial immunities. In *Shearer v. Shearer*,[6] a 1985 Ohio Supreme Court decision, the court reaffirmed the *Kirchner* decision,[7] while also abolishing the doctrine of interspousal immunity.[8] In reaffirming *Kirchner*, the *Shearer* court stated: "The *Kirchner* case used an historical analysis, *i.e.*, a consideration of the history of the doctrine and the traditional arguments offered to support it. Our analysis will be more empirical than historical . . . ."[9] Thus, the *Shearer* decision strengthened the *Kirchner* decision by taking a different approach, yet it reached the same result. As a result of these decisions, injured children have a higher probability of obtaining a recovery for their injuries.

This casenote will review the developments that led to the establishment and ultimate destruction of the doctrine of parental immunity. It will then combine the reasoning of the *Kirchner* and *Shearer* decisions and it will focus on the effects these decisions are likely to have in Ohio.

II. FACTS AND HOLDING

Kirchner v. Crystal[10] was a personal injury action brought by three children and their mother against their father/husband. The defendant-father, Larry Crystal, was the operator of a motor vehicle that was involved in an accident.[11] The plaintiffs were the injured passengers of the Crystal automobile.[12] They alleged that their injuries were the result of the defendant's negligent driving.[13]

The case was tried in the Ohio Court of Common Pleas for Cuyahoga County.[14] That court granted the defendant's motion for summary judgment based on his defense that the doctrines of parental immunity and interspousal immunity barred the plaintiffs' action.[15]

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5. *Id.*

6. 18 Ohio St. 3d 94, 480 N.E.2d 388 (1985).

7. *Id.* at 96, 480 N.E.2d at 392.

8. *Id.* at 99, 480 N.E.2d at 394 (1985). Using an empiricist approach, based on evidence that no state that had abolished the doctrines was suffering any ill-effects, the court held that the doctrines of parental and interspousal immunity were anachronistic and invalid. *Id.* at 95–96, 480 N.E.2d at 391.

9. *Id.* at 95, 480 N.E.2d at 391.

10. 15 Ohio St. 3d 326, 474 N.E.2d 275 (1984).

11. *Id.* at 326, 474 N.E.2d at 275.

12. *Id.*, 474 N.E.2d at 276.

13. *Id.*

14. *Id.*

15. *Id.*

The court's decision was appealed by one of the injured children.[16] The court of appeals affirmed the lower court's decision, and the case went to the Ohio Supreme Court pursuant to an allowance of a motion to certify the record.[17] Because the mother/wife chose not to appeal the trial court's decision, the Ohio Supreme Court was faced with the sole issue of whether to uphold the doctrine of parental immunity. The court reversed both the court of appeals and the trial court, holding that the doctrine of parental immunity and its corollary, the child immunity doctrine, were abolished.[18]

The *Kirchner* decision was quickly and resoundingly reaffirmed by the Ohio Supreme Court in *Shearer v. Shearer*.[19] In *Shearer*, both the spouse and the child of the defendant initiated tort actions, seeking damages for the injuries they received as a result of an automobile accident.[20] The plaintiffs contended that the defendant's negligent driving caused the accident.[21] The defendant raised the doctrines of parental immunity and interspousal immunity as defenses.[22] Both causes of action were summarily dismissed by the trial court;[23] the appellate court affirmed.[24] The Ohio Supreme Court reversed the court of appeals and the trial court, holding that both the doctrines of parental immunity and interspousal immunity were abolished.[25]

III. BACKGROUND

The parental immunity doctrine was judicially created in the 1891 case of *Hewellette v. George*.[26] The doctrine, however, is generally rec-

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16. *Id.* It can be inferred from the Ohio Supreme Court's opinion that the appellant appealed alone because he believed that, as a stepson, he could create an exception to the parental immunity doctrine; that is, the traditional need to preserve family harmony and parental control are not present in a suit between a stepparent and a stepchild. The supreme court, however, stated that "creating such an exception [to the parental immunity doctrine] would inevitably produce another meaningless distinction without any real differences." *Id.* at 327, 474 N.E.2d at 276. Instead, the court chose to abolish the doctrine completely, "without reservation." *Id.*

17. *Id.*

18. *Id.* at 330, 474 N.E.2d at 278–79.

19. 18 Ohio St. 3d 94, 480 N.E.2d 388 (1985).

20. *Id.* at 94, 480 N.E.2d at 390.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 95–96, 98–99, 480 N.E.2d at 390–94.

26. 68 Miss. 703, 9 So. 885 (1891). The plaintiff-daughter in *Hewellette* sued her mother for wrongful confinement in an insane asylum. The Mississippi Supreme 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. at ___, 9 So. at 887.

ognized as having its origin in what is commonly referred to as the "great trilogy" of cases:[27] *Hewellette*, *McKelvey v. McKelvey*,[28] and *Roller v. Roller*.[29] These cases are credited with establishing the major rationales which most courts rely on to support their application of the parental immunity doctrine.[30] The rationales are: (1) maintenance of family harmony,[31] (2) protection of parental authority and control,[32] (3) protection of the "family exchequer,"[33] (4) analogy of interspousal immunity doctrine to parental immunity doctrine,[34] and (5) prevention of the parent held liable from receiving, through inheritance, any of the funds he or she paid to the child.[35] Another rationale advanced by several courts in supporting the parental immunity doctrine was the fear of fraudulent or collusive claims.[36]

The Ohio Supreme Court did not rule on the validity of the parental immunity doctrine until it decided the 1952 case of *Signs v. Signs*.[37] The *Signs* decision created an exception to the doctrine of parental immunity, starting the doctrine on a roller coaster ride that ended with its destruction in *Kirchner v. Crystal*.[38] In *Signs*, the seven-year-old son of the defendant was burned when a gasoline pump, owned by a partnership in which the defendant was a partner, caught fire.[39] The plaintiff-son brought a tort action against his father. On a motion to certify the record, the Ohio Supreme Court held that "an unemancipated child should have . . . a right to maintain an action in tort against his parent in the latter's business or vocational capacity."[40] The court's rationale was that the justifications for the doctrine of parental immunity disappear when the negligent parent is acting in a business capacity.[41] Al-

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27. Hollister, *Parent-Child Immunity: A Doctrine In Search of Justification*, 50 FORDHAM L. REV. 489, 495 (1982).

28. 111 Tenn. 388, 77 S.W. 664 (1903) (child prohibited from suing her father or stepmother for cruel and inhuman treatment inflicted upon her by the stepmother).

29. 37 Wash. 242, 79 P. 788 (1905) (child who was raped by her father could not sue him for the pain and suffering she endured).

30. Hollister, *supra* note 27, at 495.

31. *Hewellette*, 68 Miss. at ____, 9 So. at 887.

32. *McKelvey*, 111 Tenn. at 389, 77 S.W. at 664.

33. *Roller*, 37 Wash. at 244, 79 P. at 789 ("family exchequer" is synonymous with "family finances").

34. *Id.* at 245, 79 P. at 789.

35. *Id.*

36. *See, e.g.*, Denis v. Walker, 284 F. Supp. 413, 417 (D.D.C. 1968); Coleman v. Coleman, 157 Ga. App. 533, 278 S.E.2d 114 (1981).

37. 156 Ohio St. 566, 103 N.E.2d 743 (1952).

38. 15 Ohio St. 3d 326, 474 N.E.2d 275 (1984).

39. *Signs*, 156 Ohio St. at 566, 103 N.E.2d at 744.

40. *Id.* at 577, 103 N.E.2d at 748–49. At trial, the common pleas court ruled for the defendant following a motion for judgment on the pleadings. *Id.* at 567, 103 N.E.2d at 744. This decision was reversed by the appellate court. *Id.*

41. *Id.* at 577, 103 N.E.2d at 748–49. The court rejected all of the traditional rationales

though the court never expressly stated that the parental immunity doctrine had been adopted in Ohio, its creation of an exception to the doctrine implied that the doctrine was valid.

Fourteen years after *Signs*, in *Teramano v. Teramano*,[42] the Ohio Supreme Court removed any doubt concerning its position on the parental immunity doctrine by upholding its validity. *Teramano* involved an automobile accident in which the defendant-father, while under the influence of intoxicants, allegedly drove into his own driveway at a high rate of speed, striking his son.[43] The son was severely injured and brought an action against his father alleging negligence and willful misconduct.[44] The Ohio Supreme Court held that absent malicious intent, the doctrine of parental immunity barred the plaintiff's action.[45] The court stated that *Signs* merely created one exception to the parental immunity doctrine—any time the "parental relationship is abandoned," the immunity will not apply.[46] The court noted that the relationship was abandoned under circumstances like *Signs* when the tort occured while the parent was engaged in his or her occupation.[47] If there was no abandonment, as in the *Teramano* case, the parental immunity defense would be recognized.[48]

In *Karam v. Allstate Insurance Co.*,[49] the Ohio Supreme Court formulated a very narrow definition of the "abandonment of the parental relationship" test that had been established in *Teramano*.[50] The *Teramano* court stated that the parental immunity doctrine would not apply when the parental relationship was abandoned.[51] In *Karam*, however, the court held that the parental immunity doctrine applied when the alleged negligent parent was deceased.[52] If the death of the parent did not result in the "abandonment of the parental relationship," it is difficult to perceive when the court would consider the parental relationship to be abandoned.

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supporting the doctrine of parental immunity. *See id.* at 573–77, 103 N.E.2d at 747–49. For a listing of the rationales supporting the parental immunity doctrine, see *supra* text accompanying notes 31–36.

42. 6 Ohio St. 2d 117, 216 N.E.2d 375 (1966), *overruled*, Kirchner v. Crystal, 15 Ohio St. 3d 326, 474 N.E.2d 275 (1985).

43. *See id.* at 117, 216 N.E.2d at 376.

44. *Id.*

45. *Id.* at 119, 216 N.E.2d at 377.

46. *Id.*

47. *Id.*

48. *Id.*

49. 70 Ohio St. 2d 227, 436 N.E.2d 1014 (1982), *overruled*, Dorsey v. State Farm Mut. Auto. Ins. Co., 9 Ohio St. 3d 27, 457 N.E.2d 1169 (1984).

50. *See Teramano*, 6 Ohio St. 2d at 119, 216 N.E.2d at 377.

51. *Id.*

52. *Karam*, 70 Ohio St. 2d at 234, 436 N.E.2d at 1019.

The *Karam* case involved an automobile accident in which a mother was killed and her child was injured.[53] The child sued the mother's estate, alleging that the mother's negligent driving caused the accident and the resulting injury.[54] The court relied on two rationales in reaching its decision that the parental immunity doctrine barred the child's cause of action. First, the court applied the "abandonment of the parental relationship" test, but found there was "no abandonment in the sense of volitional action by [the deceased parent] in the termination of her relationship with the [child] . . . ."[55] Second, the court held there was a need to prevent fraudulent and collusive claims.[56]

The *Karam* court reasoned that these two considerations justified its reaffirmation of *Teramano*.[57] The effect of this decision was to restrict application of the *Teramano* decision by limiting the "abandonment of parental relationship" test to circumstances where the parent acted willfully or while in the scope of his or her occupation.[58] This resulted in a broader use of the parental immunity doctrine, and seemed to assure the continued adherence of the court to this doctrine. Two years later, however, the Ohio Supreme Court retreated from this liberal stance.

In *Dorsey v. State Farm Mutual Automobile Insurance Co.*,[59] the Ohio Supreme Court overruled *Karam* and held that the doctrine of parental immunity did not apply when the negligent parent was deceased.[60] As in *Karam*, the cause of action in *Dorsey* arose from the alleged negligent driving of the plaintiffs' mother.[61] The accident resulted in Mrs. Dorsey's death and injuries to her four children, the plaintiffs in the case. The court reasoned that "[w]hen the parent-tortfeasor dies, the parent-child relationship terminates insofar as parental immunity is concerned."[62] The court, therefore, returned to the position it adopted in *Signs*—the parental immunity doctrine would not apply when the parent-child relationship was abandoned. Thus, after *Dorsey*, the pendulum had apparently swung back toward a narrow ap-

53. *Id.* at 227, 436 N.E.2d at 1015.

54. *Id.*

55. *Id.* at 232, 436 N.E.2d at 1018.

56. *Id.* at 233–34, 436 N.E.2d at 1018–19.

57. *Id.* at 234, 436 N.E.2d at 1019.

58. *Id.* at 232, 436 N.E.2d at 1018.

59. 9 Ohio St. 3d 27, 457 N.E.2d 1169 (1984).

60. *Id.* at 29–30, 457 N.E.2d at 1171. The court relied on a previous decision which had held that the doctrine of interspousal immunity did not bar a spouse's wrongful death action. *Id.* at 29, 457 N.E.2d at 1170–71 (citing Prem v. Cox, 2 Ohio St. 3d 149, 443 N.E.2d 511 (1983)). The *Dorsey* court stated that the rationales used in justifying the *Prem* decision were also applicable to the parent-child situation. *Id.*, 457 N.E.2d at 1171.

61. *Id.* at 28, 457 N.E.2d at 1169–70.

62. *Id.* at 30, 457 N.E.2d at 1171.

plication of the doctrine of parental immunity, and a broader interpretation of the "abandonment of the parental relationship" exception.

The movement toward abolishing the doctrine, however, was quickly halted when the doctrine's viability was reaffirmed in *Mauk v. Mauk*.[63] A distinguishing characteristic of the *Mauk* case was that both parents were attempting to sue a child,[64] whereas the aforementioned cases involved suits initiated by children against their parents. The *Mauk* court stated that "a recognized corollary rule to parental immunity is that a parent may not prosecute a tort action against his or her unemancipated minor child."[65] In reaching its decision, the Ohio Supreme Court relied on two rationales commonly offered to support the parental immunity doctrine: "(1) the preservation of the peace and harmony of the family, and (2) the prevention of fraud and collusion made possible by the widespread existence of liability insurance."[66] The court concluded that the plaintiffs' cause of action was barred by the child immunity doctrine.[67] Because the court stated that the child immunity doctrine was the corollary of the parental immunity doctrine,[68] the decision in *Mauk* appeared to strengthen the doctrine of parental immunity.

It took only five months, however, for the Ohio Supreme Court, in *Kirchner v. Crystal*,[69] to abruptly change its position and abolish the doctrine of parental immunity.[70] In a four to three decision, the supreme court declared that the "rationalizations underlying the doctrine of parental immunity . . . [are] outdated, highly questionable and unpersuasive."[71] Thus, thirty-three years after the doctrine's "official" birth in Ohio, the Ohio Supreme Court joined the nationwide trend of abolishing the parental immunity doctrine.[72] By increasing the likelihood of a familial tort victim receiving compensation, the court also reached a decision that was "in the interests of justice and fairness."[73]

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63. 12 Ohio St. 3d 156, 466 N.E.2d 166, *overruled*, Kirchner v. Crystal, 15 Ohio St. 3d 326, 474 N.E.2d 275 (1984).

64. *Id.* at 156, 466 N.E.2d at 166.

65. *Id.* at 157, 466 N.E.2d at 167. The corollary to the parental immunity doctrine has been referred to as the child immunity doctrine. *See id.* at 160, 466 N.E.2d at 169 (Brown, J., dissenting).

66. *Id.* at 159, 466 N.E.2d at 168.

67. *Id.*, 466 N.E.2d at 169.

68. *Id.* at 157, 466 N.E.2d at 167.

69. 15 Ohio St. 3d 326, 474 N.E.2d 275 (1984).

70. *Id.* at 327, 474 N.E.2d at 276.

71. *Id.*

72. For an indepth analysis of how each state has ruled on the validity of the parental immunity doctrine, see Hollister, *supra* note 27, at 528–32.

73. Kirchner, 15 Ohio St. 3d at 327, 474 N.E.2d at 276.

In *Shearer v. Shearer*,[74] the Ohio Supreme Court was confronted with another opportunity to rule on the parental immunity doctrine. The court reaffirmed its *Kirchner* decision by again stating that the parental immunity doctrine was abolished in Ohio.[75] The *Shearer* decision assured that the parental immunity roller coaster ride was finished. The *Shearer* decision also provided a new reason for abolishing the doctrine of parental immunity. The supreme court looked to those states that had abolished the parental immunity doctrine and discovered that the abolition of the doctrine did not result in the realization of any of the fears, such as fraudulent and collusive suits, that were used to support the doctrine.[76] This empirical approach, combined with the historical approach relied on in *Kirchner*,[77] justified the court's holding that the doctrine of parental immunity should be abolished.

IV. ANALYSIS

A. Repudiation of the Four Justifications Supporting the Parental Immunity Doctrine

The Ohio Supreme Court's decisions in *Kirchner v. Crystal*[78] and *Shearer v. Shearer*[79] were consistent with the national trend of abrogating the doctrine of parental immunity.[80] The court's rationale also reflected the opinions of many legal scholars who have addressed the doctrine of parental immunity.[81] Thus, the Ohio Supreme Court had ample authority to review and rely on in support of its conclusion.

In both *Kirchner* and *Shearer*, the court identified four traditional justifications for the doctrine of parental immunity: (1) preserving the domestic peace, harmony, and tranquility of the family unit; (2)

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74. 18 Ohio St. 3d 94, 480 N.E.2d 388 (1985).

75. *Id.* at 95–96, 480 N.E.2d at 391. The *Shearer* court, in addition to affirming *Kirchner's* abolition of parental immunity, also abolished the interspousal immunity doctrine. *Id.* at 96–99, 480 N.E.2d at 392–94.

76. *See id.* at 99–101, 480 N.E.2d at 394–95.

77. *Id.* at 95, 480 N.E.2d at 391. "The *Kirchner* case used an historical analysis, *i.e.*, a consideration of the history of the doctrine and the traditional arguments offered to support it." *Id. See Kirchner*, 15 Ohio St. 3d at 327–30, 474 N.E.2d at 276–79.

78. 15 Ohio St. 3d 326, 474 N.E.2d 275 (1984).

79. 18 Ohio St. 3d 94, 480 N.E.2d 388 (1985).

80. *See Family Exclusion Clause Renders Vehicle Uninsured for Purposes of Uninsured Motorist Coverage*, 28 ATLA L. REP. 54, 55 (1985) [hereinafter cited as *Family Exclusion Clause*]. The Ohio Supreme Court's determination that the doctrine of parental immunity is archaic is consistent with many recent decisions from other jurisdictions, as "the archaic doctrine of family immunity is nearly everywhere in full retreat." *Id. See, e.g.*, Rousey v. Rousey, 499 A.2d 1199 (D.C. 1985); Nocktonick v. Nocktonick, 227 Kan. 758, 611 P.2d 135 (1980); Transamerica Ins. Co. v. Royle, ____ Mont. ____, 656 P.2d 820 (1983); Winn v. Gilroy, 296 Or. 718, 681 P.2d 776 (1984).

81. *See, e.g.*, W. KEETON, D. DOBBS, R. KEETON & D. OWENS, PROSSER AND KEETON ON THE LAW OF TORTS § 122, at 907–10 (5th ed. 1984); Hollister, *supra* note 27, at 496.

preventing possible interference with parental discipline and control; (3) hindering the potential depletion of the family funds or exchequer; and (4) preventing the possibility of fraud and collusion.[82] The court did not consider other justifications based on the similarity of the parental immunity doctrine to the interspousal immunity doctrine, or the possibility that the negligent parent may inherit the injured child's recovery,[83] obviously believing that these two arguments were unmerited.[84] The court then repudiated the four principle rationales supporting the continued use of the parental immunity doctrine.[85]

The *Kirchner* court relied on its holding in *Signs v. Signs*,[86] to demonstrate "the folly of the domestic tranquility rationale," stating:[87] " 'It seems absurd to say that it is legal and proper for an unemancipated child to bring an action against his parent concerning the child's property rights yet to be utterly without redress with reference to injury to his person.' "[88] The court found no logical reason to conclude that domestic harmony would be subject to greater disruption in a personal injury case than in a property rights case and consequently held that the domestic tranquility rationale was not sufficient to justify the use of the parental immunity doctrine.[89]

The Ohio Supreme Court also noted that several other courts have rejected the domestic harmony rationale, holding that it is the negligent act itself, rather than the lawsuit, that disturbs the tranquility of the household.[90] The parental immunity doctrine merely increases family dissension by preventing the child or family from receiving liability insurance benefits.[91] For example, without access to insurance benefits,

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82. *Kirchner*, 15 Ohio St. 3d at 327, 474 N.E.2d at 276; *Shearer*, 18 Ohio St. 3d at 95, 480 N.E.2d at 390.

83. *See Kirchner*, 15 Ohio St. 3d at 327, 474 N.E.2d at 276. For a case that did rely on these two justifications, see Roller v. Roller, 37 Wash. 242, 79 P.2d 788 (1905).

84. That the court did not consider the analogy between parental and interspousal immunity meritworthy is evident by its decision to abolish interspousal immunity in *Shearer*. *See Shearer*, 18 Ohio St. 3d at 98, 480 N.E.2d at 394.

85. *See Kirchner*, 15 Ohio St. 3d at 327–29, 474 N.E.2d at 276–78; *Shearer*, 18 Ohio St. 3d at 95, 480 N.E.2d at 390.

86. 156 Ohio St. 566, 103 N.E.2d 743 (1952).

87. *Kirchner*, 15 Ohio St. 3d at 328, 474 N.E.2d at 277.

88. *Id.* (quoting *Signs*, 156 Ohio St. at 576, 103 N.E.2d at 748). Implicit in this quotation is the notion that the parental immunity doctrine only reaches and bars tort-based claims but has no impact on contractual claims against the parent. *See id.*

89. *Id.*

90. *Id. See, e.g.*, Falco v. Pados, 444 Pa. 372, 380, 282 A.2d 351, 355 (1971); Elam v. Elam, 275 S.C. 132, 136, 268 S.E.2d 109, 111 (1980).

91. *See Falco*, 444 Pa. at 380, 282 A.2d at 355. In *Falco*, an action was instituted by a daughter and her father against the child's mother because of the mother's alleged negligent driving. *Id.* at 373, 282 A.2d at 352. While the court abolished the doctrine of parental immunity, it upheld the interspousal immunity doctrine because it was created by statute. *Id.* at 380–84, 282 A.2d at 355–57.

the child may never be able to pay for and consequently may not receive the proper medical treatment, or the family may become indebted as a result of having to make medical payments. In either event, there would probably be family disharmony rather than harmony caused by the parental immunity doctrine.

The final and most convincing argument used to establish that the family harmony rationale is defective, was put forth by the Ohio Supreme Court in *Shearer*:

> If the elimination of parental immunity were a bad legal position, one would reasonably expect to find that those states [that have abolished the doctrine] were experiencing problems with the abrogation. A review of the literature finds no law review articles entitled "Disintegration of the Family in Wisconsin" or "Family Problems in New York Resulting from Abrogation of Parental Immunity."[92]

The court relied on empirical data[93] to conclude that family harmony would not be disrupted by the abolishment of the parental immunity doctrine. Accordingly, justice required that the doctrine of parental immunity be abolished.[94]

In discarding the second alleged justification—possible interference with parental discipline—the *Kirchner* court relied[95] totally on a California Supreme Court decision, *Gibson v. Gibson*.[96] The *Gibson* court noted that there were many instances where the issue of parental discipline and control would not be involved.[97] For example, in an automobile accident caused by a parent's negligent driving, a parent's ability to control and discipline his or her children is irrelevant to the ability to drive.[98] While the California Supreme Court recognized that in some situations parental authority might be affected, it reasoned that it would be unjust to deny recovery to an injured child merely because of the possibility that under *some* circumstances parental control may be jeopardized.[99] Thus, the *Gibson* court recognized that parental control did "not justify continuation of [the] blanket rule of immunity."[100]

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92. *Id.* at 95–96, 480 N.E.2d at 391.

93. The *Shearer* court stated, "Our analysis will be more empirical than historical . . . ." *Id.* at 95, 480 N.E.2d at 391. Then, after discussing the effects of abolishing the parental immunity doctrine in New York, Pennsylvania, and Wisconsin, the court concluded that "there is no evidence or persuasive material that any of these states ever suffered adverse consequences for the lack of such a rule." *Id.* at 96, 480 N.E.2d at 391.

94. *Id.* at 96, 480 N.E.2d at 391–92.

95. *See Kirchner*, 15 Ohio St. 3d at 328–29, 474 N.E.2d at 277.

96. 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971).

97. *See id.* at 920–21, 479 P.2d at 652, 92 Cal. Rptr. at 292.

98. *See id.*

99. *Id.*

The *Kirchner* court also relied on the *Gibson* court's reasoning when it repudiated the third justification for the parental immunity doctrine—preventing the depletion of the family exchequer.[101] In *Gibson*, the California Supreme Court acknowledged the fact that liability insurance would protect the parents from suffering financial disaster, and that " 'virtually no such suits [between parent and child] are brought except where there is insurance.' "[102] Because it is unlikely that a child would bring suit if he or she believed that such legal action could financially destroy his or her family, the family exchequer argument is too weak to support the parental immunity doctrine.[103]

Another reason for finding the family exchequer justification unmerited was presented in the concurring opinion in the Oregon case of *Winn v. Gilroy*.[104] In *Winn*, the Oregon Court of Appeals held that the parental immunity doctrine barred a wrongful death action by the decedent's mother against the decedent's father.[105] In a concurring opinion, however, Judge George A. Van Hoomissen presented a well-reasoned argument for abolishing the parental immunity doctrine,[106] stating:

> The family exchequer theory also lacks merit when examined against the realities of modern life. Children may sue their parents in actions based on contract or property, where no insurance likely exists, without fear of depletion of family resources. If insurance exists, denial of a cause of action is a more severe drain on family resources than would be recognition of a claim for relief.[107]

By preventing the parent from relying on liability insurance, and consequently forcing the parent to pay out of his or her own pocket, the family exchequer theory would actually do the opposite of what it pur-

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101. *See Kirchner*, 15 Ohio St. 3d at 328–29, 474 N.E.2d at 277.

102. *Gibson*, 3 Cal. 3d at 922, 479 P.2d at 653, 92 Cal. Rptr. at 293 (quoting James, *Accidental Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L. J. 549, 553 (1948)).

103. *See id.*

104. Winn v. Gilroy (Winn I), 61 Or. App. 243, 656 P.2d 386 (1983), *rev'd*, 296 Or. 718, 681 P.2d 776 (1984).

105. *Id.* at 245, 656 P.2d at 389.

106. *Id.* (Van Hoomissen, J., concurring). Although Judge Van Hoomissen concurred with the majority he did so because of the binding precedent established by the Oregon Supreme Court. *Id.* (citing Chaffin v. Chaffin, 239 Or. 374, 397 P.2d 771 (1964)); Cowgill v. Boock, 189 Or. 282, 218 P.2d 445 (1950). Judge Van Hoomissen stated, however, that the "precedent should be reexamined." *Id.*

A re-examination by the Oregon Supreme Court was quickly forthcoming. The court, in a lengthy opinion, abrogated the broad doctrine of parental immunity, and remanded the case to the circuit court for further proceedings. *See* Winn v. Gilroy (Winn II), 296 Or. 718, 681 P.2d 776 (1984).

107. *Winn I*, 61 Or. App. at 249, 656 P.2d at 389 (Van Hoomissen, J., concurring).

ports to achieve. It would actually cause a draining of family funds rather than preventing a depletion of the family exchequer.

In dealing with the final justification for the parental immunity doctrine, the *Kirchner* court ruled that the fear of fraudulent or collusive suits was not a valid reason to uphold the doctrine of parental immunity.[108] The court noted that the potential for fraud and collusion existed in every case, but there has always been reliance on the judicial system to detect and prevent fraudulent actions.[109] Therefore, the court concluded that the need to compensate the injured party outweighed the possible risks of fraud and collusion.[110]

The desire to compensate the tort victim led the *Kirchner* court to draw an analogy between *Primes v. Tyler*,[111] a case dealing with the Ohio Guest Statute,[112] and the facts of *Kirchner*, to conclude that the fear-of-fraud theory did not warrant upholding the parental immunity doctrine.[113] In *Primes*, the Ohio Supreme Court held that the Ohio Guest Statute violated the due process and equal protection clauses of the fourteenth amendment to the United States Constitution and section 16, article I, of the Ohio Constitution.[114] The *Primes* court stated that the statute violated these provisions because it failed to afford a special class of people, non-paying passengers, the right to compensation for tortious acts against them, while paying passengers were provided this right.[115] Following the reasoning of *Primes*, the *Kirchner* court held that it was unjust "to deny an injured party a redressable claim for injuries sustained simply because fraud and collusion may occur in the exceptional case . . . ."[116]

The due process rationale was also relied on by the *Shearer* court when it reaffirmed the *Kirchner* court's decision to abolish the parental immunity doctrine: "To continue to deny access to the courts on the grounds of what may be in the face of overwhelming experience to the contrary in the many other states, is nothing more than a denial of due process."[117] Therefore, a fear of fraudulent cases is unmeritorious and should be rejected because it denies people their right to due process

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108. *Kirchner*, 15 Ohio St. 3d at 329, 474 N.E.2d at 278.

109. *Id.*

110. *Id.*

111. 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975).

112. *See* OHIO REV. CODE ANN. § 4515.02 (Page 1982). Although declared unconstitutional in the *Primes* decision, see *infra* text accompanying notes 114–15, the Ohio Guest Statute is still part of Ohio's statutory law.

113. *Kirchner*, 15 Ohio St. 3d at 329, 474 N.E.2d at 278.

114. *Primes*, 43 Ohio St. 2d at 204–05, 331 N.E.2d at 729.

115. *Id.*

116. *Kirchner*, 15 Ohio St. 3d at 329, 474 N.E.2d at 278.

117. *Shearer*, 19 Ohio St. 3d at 96, 480 N.E.2d at 391.

under the law. Because of the importance of this constitutional right, it is surprising that this argument had not been raised more often.

The guarantee of due process under the law is a fundamental right accorded citizens of our country and residents of the state of Ohio.[118] Section 16, article 1, of the Ohio Constitution states: "All courts shall be open, and *every person*, for an *injury done him* in his land, goods, person, or reputation, shall have *remedy* by due course of law, and shall have justice administered without denial or delay."[119] The right to due process under Ohio law was reiterated in *Armstrong v. Duffy*,[120] wherein the appellate court stated that "every citizen of this state [has the right] to seek remedy by court action for any injuries done to him in his person or property and . . . to have justice administered according to law without denial or delay . . . ."[121] To deny a child a right to sue his or her parent for the injuries the child received as a result of the parent's tortious conduct is a direct violation of due process. Therefore, the doctrine of parental immunity is very likely unconstitutional,[122] and was properly abolished by the Ohio Supreme Court.

B. The Impact of the Abrogation

One effect that the *Kirchner* and *Shearer* decisions are likely to have is an increase in the use of family exclusion clauses in insurance policies. A family exclusion clause is a provision in an insurance contract that denies liability coverage to an insured for torts committed against another family member or person living in the same household as the insured.[123] The ramification of such clauses is likely to leave a child in the same position he or she was in when the parental immunity doctrine was recognized—unable to recover for the tortious injury inflicted by a parent. The likelihood and validity of the use of such clauses in Ohio were discussed by the supreme court in *Shearer* when it reviewed the possible effects its decision would have on liability insurance companies.[124] The court stated that "[i]nsurance is inextricably involved with the issue of intrafamilial immunity, because as noted by most of the writers on this issue, unless there is liability insurance in-

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118. *See* State *ex rel.* Hoel v. Brown, 105 Ohio St. 479, 138 N.E. 230 (1922).

119. OHIO CONST., art. I, § 16 (emphasis added).

120. 90 Ohio App. 233, 103 N.E.2d 760 (1951).

121. *Id.* at 251, 103 N.E.2d at 768.

122. *Shearer*, 18 Ohio St. 3d at 96, 480 N.E.2d at 391–92. Although the *Shearer* court did not explicitly state that the parental immunity doctrine was unconstitutional, it implied the same as the court stated that the operation of the doctrine was "nothing more than a denial of due process." *Id.*

123. Ashdown, *Intrafamily Immunity, Pure Compensation, and the Family Exclusion Clause*, 60 IOWA L. REV. 239, 254 (1974).

124. *Shearer*, 18 Ohio St. 3d at 101, 480 N.E.2d at 395.

trafamilial lawsuits do not occur."[125]

The court noted that a liability insurer, when extending liability coverage, has three alternative methods for dealing with intrafamily liability claims and potential problems of fraud and collusion: the insurer can "refuse to write . . . policies [covering intrafamily claims]; it can take precautions to eliminate the potential for fraud; or it can charge a premium so prohibitively expensive that coverage is unmarketable."[126] It is the second option that is most troublesome, because it invites the most common response, the use of a family exclusion clause.[127]

Family exclusion clauses became popular as a result of insurers' fear of collusive suits between parents and their children.[128] By denying an insured liability insurance coverage in a tort action by a family member, a family exclusion clause has the effect of rendering an insured person, "uninsured," in intra-family tort actions. Thus, the existence of a family exclusion clause forces the child into a no-win situation—the child either sues the "uninsured" parent or accepts his or her losses and does not sue. Because the vast majority of children would not take the drastic measure of suing an "uninsured" parent,[129] their injuries would go uncompensated.

In the dictum of the *Shearer* decision, the Ohio Supreme Court stated that it should not get involved with the question of whether family exclusionary clauses are valid.[130] The court stated: "Perhaps such coverage [for family members] should be sold; perhaps it should not. This is not for this court to decide; it is for the marketplace, and for the buyers and sellers of insurance to decide."[131] This statement displays the court's inclination toward freedom of contract, a judicial laissez-faire policy. Although widespread use of such insurance provisions would undermine the court's policy of compensating a tort victim for injuries suffered, the court's position reflects that taken by the majority of the courts which have dealt with this question.[132]

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125. *Id.* at 99, 480 N.E.2d at 394.

126. *Id.* at 100, 480 N.E.2d at 395.

127. *See id.*

128. *See Family Exclusion Clause*, *supra* note 80, at 55.

129. *See* Lambert, *Family Law*, 35 ATLA L.J. 247, 267–68 (1964). Children would be told by their parents that the negligent parent would be forced to pay the damages out of his or her own pocket because the child was excluded from liability coverage under the exclusionary clause. Because the child would not want to financially destroy his or her parent, the child would not initiate a suit against the negligent parent. *See id.* at 268.

130. *See Shearer*, 18 Ohio St. 3d at 101, 480 N.E.2d at 395.

131. *Id.*

132. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Cartnel, 250 Ark. 77, 463 S.W.2d 648 (1971); State Farm Mut. Auto. Ins. Co. v. Ward, 340 S.W.2d 635 (Mo. 1960); State Farm Mut. Auto. Ins. Co. v. Kay, 26 Utah 2d 195, 487 P.2d 852 (1971); State Farm Gen. Ins. Co. v. Emerson, 102 Wash. 2d 477, 687 P.2d 1139 (1984). *See also* Ashdown, *supra* note 125, at 254, 254

In *American Family Mutual Insurance Co. v. Ryan*,[133] the Minnesota Supreme Court analyzed the effect that the abrogation of the parental immunity doctrine would have on family exclusion clauses, stating:

> The well-settled general rule in the construction of insurance contracts, however, provides that parties are free to contract as they desire, and so long as coverage required by law is not omitted and policy provisions do not contravene applicable statutes, the extent of the insurer's liability is governed by the contract entered into.[134]

Most courts have extended this contract principle to family exclusion clauses and have held that such clauses are valid if they do not contravene any law or public policy.[135] By emphasizing that parties to a contract should be free to determine the terms of the contract,[136] the *Shearer* court appears to be content with following the approach of the majority of jurisdictions in upholding family exclusion clauses based on the freedom of contract principle.[137] In addition, the *Shearer* court's opinion also displays the court's apparent belief that family exclusionary clauses do not violate public policy. This belief, however, is contrary to the *Shearer* court's rationale for abolishing the parental immunity doctrine.

In both *Kirchner* and *Shearer*, the Ohio Supreme Court based its decision to abolish the parental immunity doctrine on the belief that a victim should be compensated for injuries suffered as a result of another's negligent act.[138] Yet, the *Shearer* court simultaneously stated that it would not address the issue of the validity of a family exclusion clause that would leave a tort victim uncompensated.[139] These positions are inconsistent. As one commentator has observed: "The anomaly of making a significant judicial policy decision and then allowing a relatively small group of financially concerned entities [i.e., insurance companies] to substantially alter the factual context within which that de-

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n.98.

133. 330 N.W.2d 113 (Minn. 1983).

134. *Id.* at 115.

135. *See, e.g.*, State Farm Gen. Ins. Co. v. Emerson, 102 Wash. 2d 477, 687 P.2d 1139 (1984) (family exclusion clause in homeowner's policy not violative of public policy). *But see, e.g.*, Mutual of Enumclaw Ins. Co. v. Wiscomb, 97 Wash. 2d 203, 643 P.2d 441 (1982) (family exclusion clause in automobile insurance contract violative of public policy based on legislative policy behind financial responsibility act).

136. *See Shearer*, 18 Ohio St. 3d at 101, 480 N.E.2d at 395. *See also supra* text accompanying note 131.

137. *See supra* note 132 and accompanying text.

138. *Kirchner*, 15 Ohio St. 3d at 330, 474 N.E.2d at 278; *Shearer*, 18 Ohio St. 3d at 96, 480 N.E.2d at 391.

139. *Shearer*, 18 Ohio St. 3d at 101, 480 N.E.2d at 395.

cision was originally made seems apparent."[140] The *Shearer* court, however, left the impression that it would do just that. It appears that the court will now allow insurance companies to evade the public policy rationale supporting the decision of the court. The *Shearer* court relied on the need to compensate the victim of a tort when it abolished the intrafamilial immunity doctrines, but it appears unwilling to use the same policy consideration to hold family exclusion clauses invalid.

The position of the *Shearer* court is supported by many courts which have upheld the use of exclusionary clauses based on the following rationales: (1) no state statute prohibits such clauses;[141] (2) the exclusion clause protects the insurer from fraudulent or collusive lawsuits between family members;[142] and (3) when the state abides by the interspousal immunity doctrine, it should allow the validity of such family exclusion clauses because neither spouse can recover.[143]

The first justification for the use of family exclusion clauses, the absence of a state statute which prohibits these clauses, is applicable to Ohio because Ohio does not have a statute which considers the validity of a family exclusion clause.[144] The Ohio Supreme Court, nevertheless, impliedly accepted their validity in *Edmondson v. Motorists Mutual Insurance Co.*[145] By holding that the exclusion of relatives from death benefit coverage had to be expressly stated, without ambiguity, in the insurance contract,[146] the court seemingly held that family exclusion clauses would also be valid if they were clearly expressed.[147] Thus, in at least one instance, the court displayed an inclination to uphold family exclusion clauses. Hopefully, the Ohio Supreme Court will reconsider

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140. *See* Ashdown, *supra* note 123, at 256.

141. *See, e.g., Ryan*, 330 N.W.2d 113 (Minn. 1983).

142. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Traycik, 86 Mich. App. 285, 272 N.W.2d 629 (1979).

143. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Leary, 168 Mont. 482, 488, 544 P.2d 444, 448 (1975) ("If this Court had found the doctrine of interfamily tort immunity to be void, the validity of the policy provision would require further examination. Since we have held that the doctrine remains valid in Montana, the underlying basis for the household exclusion remains valid.").

144. Ohio does not have a statute either permitting or prohibiting family exclusion clauses, but it does have a statute permitting some exclusions in automobile liability insurance policies. *See* OHIO REV. CODE ANN. § 4509.54 (Page 1982). Section 4509.54 provides:

> A motor-vehicle liability policy need not insure any liability under any workers' compensation law, or any liability on account of bodily injury to or death of an employee of the insured while engaged in the employment, other than domestic, of the insured, or while engaged in the operation, maintenance, or repair of any such motor vehicle, or any liability for damage to property owned by, rented to, in charge of, or transported by the insured.

Id.

145. 48 Ohio St. 2d 52, 356 N.E.2d 722 (1976).

146. *Id.* at 53, 356 N.E.2d at 723.

147. *See id.*

its apparent stance on family exclusion clauses, and will rely on the public policy considerations it used to abrogate intrafamilial tort immunities to declare family exclusion clauses invalid.

The argument that family exclusion clauses are required to protect insurance companies from fraud and collusion should fail for the same reason enunciated by the *Shearer* court when it held that such an argument did not support the continuation of intrafamilial immunities.[148] The *Shearer* court quoted *Primes v. Tyler*,[149] wherein the Ohio Supreme Court stated:

> "In all other cases, we rely upon the standard remedies of perjury, the efficacy of cross-examination, the availability of pretrial discovery, and the good sense of juries to detect false testimony if it should occur. We do not withdraw the remedy from all injured persons in order to avoid a rare recovery based upon false testimony."[150]

Insurers will be protected, as are defendants, by the safeguards built into our legal system. The risk of fraudulent or collusive actions is not great enough to outweigh the need to compensate tort victims.[151] These same fears were raised to support the doctrine of interspousal immunity, but "a flood of fraudulent claims has [not] been noted in those states with a long history of abrogating interspousal tort immunity."[152] Therefore, the courts should not hold family exclusion clauses to be valid merely because of the possible occurrence of a few fraudulent cases.

Finally, the third justification for permitting the use of family exclusion clauses, the existence of the interspousal immunity doctrine, is not viable because the Ohio Supreme Court, in *Shearer*, abolished the interspousal immunity doctrine.[153] Accordingly, a family member should be able to collect under a liability insurance policy if either a family exclusion clause does not exist or such clause is invalidated. In *Haines v. Mid-Century Insurance Co.*,[154] the Wisconsin Supreme Court invalidated a family exclusion clause, stating: "We think the rule protecting the injured party's right to collect damages from the person or persons responsible for his injuries (even if a member of his family) and his insurer, is to be preferred over the rule of preventing that re-

148. *See Shearer*, 18 Ohio St. 3d at 98, 480 N.E.2d at 393.

149. 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975) (citations omitted).

150. *Shearer*, 18 Ohio St. 3d at 98, 480 N.E.2d at 393 (quoting *Primes*, 43 Ohio St. 2d at 201, 331 N.E.2d at 727).

151. *See* Comment, *Family Exclusion Clauses: Whatever Happened to the Abrogation of Intrafamily Immunity?*, 21 SAN DIEGO L. REV. 415, 423 (1984).

152. *Shearer*, 18 Ohio St. 3d at 98, 480 N.E.2d at 393.

153. *Id.* at 99, 480 N.E.2d at 394.

154. 47 Wis. 2d 442, 177 N.W.2d 328 (1970).

covery."[155] Because the *Shearer* court relied on the belief that a victim should be compensated even if the negligent party is a parent or spouse, the Ohio Supreme Court should follow the Wisconsin Supreme Court's determination that the use of a family exclusion clause is inequitable and invalid.

In *Shearer*, the court stated that the harmony of the marital unit would be better protected if the negligently injured spouse was compensated because the negligent spouse has "more likely than not purchased liability insurance to compensate those whom he [or she] injures . . . ."[156] Because the spouse, or any family member, is most likely to sue only if liability coverage exists, and if the court truly wants to compensate the victims of negligent acts, then it would be illogical for the Ohio Supreme Court to uphold the continued use of family exclusion clauses. This is especially true in light of the fact that the court has several arguments at its disposal to justify holding such clauses invalid.

The foremost public policy consideration against the use of family exclusion clauses is the inequitable treatment between family members, who are excluded from recovering under the insurance policy, and non-family members, who are not so excluded. This disparity in treatment is analogous to the unfair treatment children received under the parental immunity doctrine. The Ohio Supreme Court should rely on the same grounds of due process and equal protection to hold family exclusion clauses unconstitutional as it did in abolishing the parental immunity doctrine.[157] A family exclusion clause "prevents a specific class of innocent victims, those persons related to and living with the negligent [individual], from receiving financial protection under an insurance policy containing such a clause [while providing protection for others]. In essence, this clause excludes from protection an entire class of innocent victims for no good reason."[158] Children are at an extreme disadvantage because they have no control over the policies their parents purchase. Thus, they have no means of protecting their financial status.[159] It also is inconsistent to allow a child to recover from an insurer when the child is involved in an accident with a neighbor, but to prevent the child from recovering when his or her injuries are caused by a parent. The most troublesome aspect of a family exclusion clause is that it denies liability insurance recovery to the individuals who are most likely to be injured as a result of a parent's negli-

155. *Id.* at 451, 177 N.W.2d at 333.
156. *Shearer*, 18 Ohio St. 3d at 98, 480 N.E.2d at 393.
157. *See supra* text accompanying notes 111–22.
158. *Wiscomb*, 97 Wash. 2d at 208, 643 P.2d at 444.
159. *See id.* at 211, 643 P.2d at 445–46.

gence—children.[160] Therefore, the person who is in the most need of the financial assistance that an insurance policy provides is denied that aid when a family exclusion clause is invoked.

Family exclusion provisions in insurance contracts can also be considered violative of public policy on the grounds of unconscionability.[161] Although there is no evidence of a tremendous increase in family exclusion clauses in Ohio insurance policies since the *Kirchner* and *Shearer* decisions, these decisions are likely to cause such a reaction on the part of insurers.[162] Once these clauses become popular, the insured will be forced to accept such policies if he or she wants to purchase liability insurance, or the insured will be forced to pay a prohibitive premium for a policy that does not contain such a clause.[163] This will most likely leave the insured in the untenable position of having to purchase a policy with exclusionary provisions or purchase no policy at all.

Furthermore, the possibility of overreaching arises in the context of an insured's lack of knowledge of the inclusion of a family exclusion clause in the policy.[164] Some insurance companies may not inform their clients of the existence of a family exclusion clause or the company may leave unknowledgeable customers to read and comprehend the contract on their own. This results in what has been labeled a "failure to 'honor the reasonable expectations' of the purchaser."[165] Under such circumstances, an insured who is expecting to receive liability coverage is shocked when he or she learns that the policy does not protect him or her in intrafamilial tort cases. Under these circumstances, the insurer has clearly gained an unfair bargaining position over the prospective insured, and such clauses should accordingly be held invalid as violating public policy.

V. CONCLUSION

In *Kirchner v. Crystal*[166] and *Shearer v. Shearer*,[167] the Ohio Su-

160. *See id.* at 208, 643 P.2d at 444.

161. *See* Comment, *supra* note 151, at 424. *See also Wiscomb*, 97 Wash. 2d at 209, 643 P.2d at 444.

162. *See Family Exclusion Clause*, *supra* note 80, at 55. "Once the courts gained momentum in curbing or abrogating family immunity rules, it was predictable that the carriers would counter by inserting family or household exclusion clauses in liability insurance policies." *Id.* The abolishment of intrafamilial tort immunities causes insurers to fear that family members will bring fraudulent or collusive actions. To prevent such suits, the insurance companies rely on family exclusion clauses to prevent recovery against insurers in intrafamilial lawsuits. If the legislature and judiciary allow such clauses in insurance policies to stand, it is only logical that an insurer will create such clauses to protect itself against possible fraudulent or collusive suits.

163. *See Wiscomb*, 97 Wash. 2d at 212, 643 P.2d at 445–46.

164. *See id.*, 643 P.2d at 446.

165. Transamerica Ins. Co. v. Royle, ___ Mont. ___, ___, 656 P.2d 820, 824 (1983).

166. 15 Ohio St. 3d 96, 474 N.E.2d 275 (1984).

167. 18 Ohio St. 3d 94, 480 N.E.2d 388 (1985).

preme Court finally abolished the nonsensible and outdated doctrine of parental immunity. The court's enlightened decision will assure that children who are injured as a result of their parent's tortious conduct will receive their right to due process under the Ohio Constitution. Children will no longer be unjustly denied a right to recovery for personal injuries merely because of their familial ties with the tortfeasor.

The Ohio Supreme Court's decision to allow a child to recover in a tort action against his or her parent, however, will become ineffective if the court allows the use of family exclusion clauses in insurance policies. The effect of such clauses is to force a child to sue an "uninsured" parent. Because a child is unlikely to sue a parent under these circumstances, the child is left uncompensated and without any realistic remedy. Thus, the underlying policy consideration of the *Kirchner* court's decision—the assurance that tort victims will be able to recover for their injuries—will be defeated if insurance companies are permitted to use family exclusion clauses.

The Ohio Supreme Court has two justifications to draw upon to declare family exclusion clauses invalid. First, the court can rely on the public policy of prohibiting unconscionable contracts. The court may rule that insurers have unconscionably forced people seeking liability insurance to accept family exclusion clauses. An insurer can accomplish this by placing extremely high premiums on policies that do not contain family exclusion clauses. This leaves the purchaser in a position where there is no choice, financially, but to accept the exclusion provision in the policy. This is an obvious violation of public policy, and such contracts should be held invalid on the grounds of unconscionability.

The second principle the court can rely on is the due process clause of the Ohio Constitution. Family exclusion clauses violate due process guarantees by denying a person the opportunity to be compensated for his or her injuries.[168] When a child is confronted with a family exclusion clause, the injured child is left with the option to sue an uninsured parent, which for all practical purposes is no option at all. The uninsured parent, most likely, would be unable to pay the child's judgment. Therefore, the child is left with no viable legal recourse whatsoever. For these reasons, the Ohio Supreme Court should now

168. The due process argument is analogous to the one partially relied on by the Ohio Supreme Court when it abolished the parental immunity doctrine. *See supra* text accompanying notes 111–22.

follow through on the groundwork laid in *Kirchner* and *Shearer*, and prohibit the future use of family exclusion clauses by insurance companies.

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