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Liner v. Brown: Where Should We Go from Here - Two Different Approaches for North Carolina

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LINER V. BROWN: WHERE SHOULD WE GO FROM HERE—TWO DIFFERENT APPROACHES FOR NORTH CAROLINA

I. INTRODUCTION

In 1994, the North Carolina Court of Appeals limited the doctrine of parental immunity in Liner v. Brown by refusing to extend the doctrine to foster parents. The doctrine, which declares that an unemancipated minor child cannot maintain an action against his parent for personal injuries, was created by the North Carolina Supreme Court in 1923 in the seminal case of Small v. Morrison. Numerous attempts to limit or abrogate the doctrine in North Carolina have been rejected by the courts. And, although the North Carolina General Assembly limited the doctrine in 1975 by abolishing its application in cases involving the negligent operation of a motor vehicle, the Liner case stands as the first attempt by the courts to limit the application of the doctrine without legislative intervention.

As one would expect, this decision caused concern on both sides. For those who are against the doctrine, and who advocate its complete abrogation, the ruling did not go far enough. And, for advocates of the doctrine, it was an illogical and unfair restriction of the doctrine to foster parents who stand in loco parentis to their foster children.

This note examines both sides of the heated issue. Following a brief recitation of the facts of the case, A. John Hoomani will urge the North Carolina courts to go farther than they did in Liner and completely abrogate the doctrine in favor of a more flexible standard. Then, Kimberly Sieredzki Woodell will argue that the Liner court made an incorrect decision by refusing to extend the doctrine to foster parents.

3. Id. at 616, 118 S.E. at 16.
4. See infra note 55.
Finally, the two authors provide separate conclusions urging the North Carolina courts to reform the parental immunity doctrine by adopting one of the two alternatives they advanced.

Mr. Hoomani concludes that North Carolina should adopt the approach advocated by the Restatement (Second) of Torts § 895G. By completely abolishing the doctrine of parental immunity, but not holding parents liable in limited situations, the Restatement balances the parent's interest in preserving parental authority with the interests of the child in being compensated for tortious acts committed by the parent.

Mrs. Sieredzki concludes that North Carolina courts should, in the name of equity and fairness, allow foster parents to "receive all the benefits associated with one standing as a natural parent to a child," including the protection of the parental immunity doctrine. Or, in the alternative, the North Carolina General Assembly should shield foster parents from liability by providing state-funded insurance for non-intentional torts.

II. THE CASE

Dennis and Veronica Richardson are the divorced parents of Ambra D. Richardson, born 7 June 1987. Ambra lived primarily with her mother until she was judged to be a dependent and neglected juvenile and was placed in the legal and physical custody of the Forsyth County Department of Social Services ("DSS") on 27 April 1990. In March of 1990, DSS placed Ambra in the temporary custody of her paternal aunt and uncle, defendants Ronald and Linetta Brown, where she remained for approximately three and one-half months. Prior to March of 1990, Ambra had spent weekends with the defendants for approximately eighteen months. The defendants essentially functioned as Ambra's parents from March of 1990 until 21 June 1990, when Ambra drowned in the defendant's backyard swimming pool.

David Liner, administrator of Ambra's estate, and Ambra's mother commenced this action on 19 June 1992, alleging wrongful death and negligent infliction of emotional distress, respectively.

7. Id. at 46, 449 S.E.2d at 906.
8. Id.
9. Id.
10. Id.
11. Id. at 47, 449 S.E.2d at 906.
12. Id.
Defendants filed an answer and defenses in which they stated "[o]n the occasion referred to in the complaint the defendants stood in loco parentis to Ambra D. Richardson . . . so that the doctrine of parental immunity [was] applicable to any claims against the defendants . . . ." 

All parties filed motions for summary judgment as to both causes of action. By an order dated 21 July 1993, the trial court granted defendants' motion for summary judgment for the wrongful death claim based upon a finding that defendants were in loco parentis to Ambra and therefore were entitled to enforce the parental immunity doctrine. The order also denied defendants' motion for summary judgment as to the claim by Ms. Richardson for negligent infliction of emotional distress. Both parties appealed from the adverse judgments. The North Carolina Court of Appeals dismissed defendants' appeal because the denial of a summary judgment is not appealable.

In addressing plaintiff's appeal, the court considered: "(I) whether defendants stood in loco parentis to Ambra; and (II) if so, whether they are entitled to parental immunity as to the wrongful death claim." Writing for a unanimous panel, Judge Greene concluded that defendants did not stand in loco parentis to Ambra. In support of this ruling the court found, among other things, that DSS still retained both legal and physical custody of Ambra pursuant to the 27 April 1990 order, and the issue of reuniting Ambra with Ms. Richardson was to be considered at a review hearing in ninety days. The court stated that defendants' obligation to provide, and actual provision of, a stable environment for Ambra for a two month period did not transform the

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13. The term "in loco parentis" has been defined to mean "in the place of a parent," and a "person in loco parentis" has been defined as "one who has assumed the status and obligations of a parent without a formal adoption." Id. at 48, 449 S.E.2d at 907.
14. Id. at 47, 449 S.E.2d at 906.
15. Id. at 48, 449 S.E.2d at 907.
16. Id.
17. Id.
18. Id.
19. Id.
20. For a discussion of Judge John's concurring opinion, see infra notes 32-43 and accompanying text.
22. Id.
23. Id.
relationship into one of parent and child. The court ruled the defendants were unable to enforce the parental immunity doctrine and reversed their summary judgment.

Moreover, the court went on to state that even if defendants stood in loco parentis with Ambra, they would not be entitled to claim immunity under the parental immunity doctrine. In reaching this conclusion, the court noted that the policy reasons underlying the doctrine seek to “preserve parental authority and security of the home and protect the financial resources of the family.” Further, the court distinguished the cases in which North Carolina courts have applied the doctrine to stepparents standing in loco parentis, stating that the stepparent situation is more permanent in nature than that of persons having temporary custody and control, and thus furthers the public policies underlying the doctrine. However, the court explained that where the interests of the child and natural parent are united, and the child is only in the custody of others on a temporary basis, “it is difficult to see how the policies of avoiding ‘potential strife between parent and child,’ of protecting the family’s financial resources, and of preserving parental authority and security of the home apply.” The court then concluded that “[b]ecause extension of the parental immunity doctrine to one having temporary custody and control of a child would not further the policies underlying the doctrine,” foster parents standing in loco parentis are precluded from enforcing the parent-child immunity doctrine.

However, the court was not unanimous in this respect. Judge John concurred in the result reached, but did not concur with the

24. Id. at 50, 449 S.E.2d at 908. The court also stated “[d]efendants, like foster parents, ‘must strive to provide a stable environment and at the same time, encourage, rather than discourage, the relationship of the foster child and natural parent and ease the return of the child to the natural parent.’” Id. (citations omitted).

25. Id.

26. Id.

27. Id. (citations omitted).


29. Liner, 117 N.C. App. at 51, 449 S.E.2d at 908.

30. Id.; See also Gulledge v. Gulledge, 367 N.E.2d 429, 431 (Ill. Ct. App. 1977) (the “rationale behind the rule loses its persuasive force as one considers situations involving other than the actual parent”).

31. Id. at 51, 449 S.E.2d at 909 (citations omitted).
majority's conclusion that the doctrine was inappropriate for persons standing in loco parentis.\textsuperscript{32} Whereas the majority relied on the temporary nature of foster parent status to deny parental immunity, Judge John noted that the very nature of an in loco parentis relationship affixes “rights and duties temporary as opposed to permanent in nature.”\textsuperscript{33}

Despite the temporary nature of most in loco parentis relationships, Judge John stated that the rights and duties inherent to such relationships are substantially the same as between parent and child.\textsuperscript{34} In support of his argument, Judge John cited numerous cases from other jurisdictions which have held that foster parents could, in certain circumstances, stand in loco parentis and thus be entitled to enforce the parent-child immunity doctrine.\textsuperscript{35}

He also listed several factors which have been recognized as necessary to a determination of whether a party stands in loco parentis: \textsuperscript{36} the child’s age; \textsuperscript{37} “the degree to which the child is dependent on the person claiming to be standing in loco parentis;” \textsuperscript{38} “the amount of support, if any, provided” \textsuperscript{39}; “the extent to

\begin{itemize}
\item \textsuperscript{32} \textit{Id.} at 52, 449 S.E.2d at 909. Judge McCrodden concurred with Judge Green's opinion.
\item \textsuperscript{33} \textit{Id.} at 52 (quoting Miller v. Miller, 478 A.2d 351, 355 (N.J. 1984)).
\item \textsuperscript{34} \textit{Id.}
\item \textsuperscript{35} \textit{Id.; See also} In re Diana P., 424 A.2d 178, 181 (N.H. 1980), cert. denied, 452 U.S. 964 (1981) (“To conclude that foster parents can never stand in loco parentis to a child in their care would be unrealistic”); Mathis v. Ammons, 453 F. Supp. 1033, 1035 (E.D. Tenn. 1978) (uncle stood in loco parentis to child who resided with and was cared for by him; to rule otherwise “might have the effect of discouraging the . . . voluntary and unselfish . . . caring for a child in need of parental support and guidance . . . ”); Brown v. Phillips, 342 S.E.2d 786, 788 (Ga. Ct. App. 1986) (where natural parents' custodial rights had been “severed” by the juvenile court and child was placed in custody of county department of family and children services, to allow parents to sue foster parents standing in loco parentis for alleged negligence would violate state public policy favoring parental immunity); Hush v. Devilbliss Co., 259 N.W.2d 170, 173 (Mich. Ct. App. 1977) (one “who voluntarily assumes parental responsibility and attempts to create a home-like environment for a child should be granted immunity from judicial interference to the same extent as a natural parent”); Mitchell v. Davis, 598 So. 2d 801, 804 (Ala. 1992) (“foster parents should be afforded some protection by the parental immunity doctrine”); Rutkowski v. Wasko, 143 N.Y.S.2d 1, 4 (N.Y. App. Div. 1955) (“[n]o good reason” exists why parent-child immunity should be applied to a natural parent and not in the case of one standing in loco parentis).
\item \textsuperscript{36} \textit{Id.} at 54, 449 S.E.2d at 911.
\item \textsuperscript{37} \textit{Hush}, 259 N.W.2d at 174.
\item \textsuperscript{38} \textit{Id.} at 174-75.
\end{itemize}
which duties commonly associated with parenthood are exercised"; 40 "the amount of time the child has lived with the person" 41; and, "the degree to which a ‘psychological family’ has developed." 42 After considering these factors in relation to this case, Judge John refused to accept the majority’s conclusion that a foster parent could never enforce the parental immunity doctrine, submitting that “under our existing law foster parents and those similarly situated may stand in loco parentis to a minor child and avail themselves of the parental immunity doctrine during the duration of that relationship.” 43

III. IT’S TIME TO ABOLISH PARENTAL IMMUNITY IN NORTH CAROLINA

A. Introduction

In youth the currents of life are prodigal in their racing course, and we should be slow to encourage or to permit a minor, in the household of its parents, unemancipated and who has not yet arrived at the age of discretion, acting only upon the advice of a “next friend,” to run the risk of losing a priceless birthright and a rich inheritance in an effort to gain for the moment a mere mess of pottage, or a few pieces of silver. 44

Justice W.P. Stacy uttered these immortal words in 1923 when he brought North Carolina into the mainstream of American legal thought by judicially adopting the parental immunity doctrine. 45 Invented by the American legal system in the nineteenth century, 46 the parental immunity doctrine is a legal fiction with no roots in English Common Law 47 because, unlike the relation between husband and wife, that of parent and child did not involve at any stage of the common law any conception of legal

39. Id. at 175.
40. Id.
41. In re Diana P., 424 A.2d at 180.
42. Id. at 181.
43. Liner, 117 N.C. App. at 55, 449 S.E.2d at 911.
44. Small, 185 N.C. at 616, 118 S.E. at 16.
45. Id. The doctrine declares that an unemancipated minor child cannot maintain an action against his parent for personal injuries. Id. at 610, 118 S.E. at 13.
46. The following cases compromise the “Great Trilogy”: Hewlett v. George, 9 So. 885 (Miss. 1891); McKelvey v. McKelvey, 77 S.W. 664 (Tenn. 1903); Roller v. Roller, 79 P. 788 (Wash. 1905).
identity of the two parties. As a result, the common law never developed any immunity from liability between the two.

The justifications offered for the doctrine have included: (1) preservation of family harmony and tranquility, (2) preservation of parental care, discipline and control; (3) the analogy of parent-child immunity to interspousal immunity; (4) the possibility that the parent might reacquire the child's tort damages through inheritance; (5) payment to the injured child would deplete the parents' assets to the detriment of the plaintiff's siblings; and (6) the possibility of fraud and collusion in the presence of liability insurance.

Over the years the justifications offered for the doctrine have been soundly criticized as not being relevant to today's society. In fact, only a few jurisdictions still steadfastly apply the doctrine. However, although many jurisdictions have decided to either limit its application or abandon it altogether, North

49. Id.
53. Twenty-six States have partially abrogated the parental immunity doctrine: Alaska, Arkansas, Connecticut, Delaware, Florida, Illinois, Indiana,
Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Missouri, Montana, New Jersey, New Mexico, North Carolina, Oklahoma, Rhode Island, Texas, Vermont, Virginia, Washington, West Virginia and Wisconsin. See, e.g., Attwood v. Estate of Attwood, 633 S.W.2d 366, 371 (Ark. 1982) (unemancipated minor may sue his parent for a willful tort); Dzenutis v. Dzenutis, 512 A.2d 130, 136 (Conn. 1986) (allowing children to sue parents where the parent commits a tort while engaging in business activities); Conn. Gen. Stat. Ann. § 52-572 (West 1991); Buffalo v. Buffalo, 441 N.E.2d 711, 714 (Ind. Ct. App. 1982); Fugate v. Fugate, 582 S.W.2d 663, 669 (Mo. 1979); Felderhoff v. Felderhoff, 473 S.W.2d 928, 933 (Tex. 1971) (abrogating the rule of parental immunity for negligence which occurred in the conduct of business activities which were wholly outside the sphere of parental duties and responsibilities); Wood v. Wood, 370 A.2d 191, 192 (Vt. 1977).


Other States have followed the lead of the Wisconsin Supreme Court and totally abrogated the doctrine of parental immunity except in cases where the alleged negligent act involves (1) an exercise of parental authority over the child, or (2) an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care. See, e.g., Turner v. Turner, 304 N.W.2d 786, 789 (Iowa 1981); Rigdon v. Rigdon, 465 S.W.2d 921, 923 (Ky. 1971); Plumley v. Klein, 199 N.W.2d 169,172-73 (Mich. 1972); Small v. Rockfeld, 330 A.2d 335, 343 (N.J. 1974); Goller v. White, 122 N.W.2d 193, 198 (Wis. 1963).

Carolina courts have consistently refused to abolish the doctrine of parental immunity, instead bowing to the legislature to take such action.\textsuperscript{55} In \textit{Liner v. Brown},\textsuperscript{56} the North Carolina Court of Appeals limited the application of the doctrine of parental immunity by refusing to extend the doctrine to a foster parent situation.\textsuperscript{57} In its reasoning, the court noted that the temporary nature of the custody and control of the child by the foster parent did not warrant extension of the doctrine.\textsuperscript{58} However, the court's ruling served merely as an additional limit on the doctrine's applicability and failed to totally abrogate the doctrine.

My analysis has two objectives. First, it will discuss how the parental immunity doctrine has evolved in North Carolina, as well as in the rest of the country. And second, it will suggest that the North Carolina courts follow the growing trend in the rest of the country and abandon the doctrine in suits between parents and children, in favor of the more flexible standard advocated by the Restatement (Second) of Torts § 895G.

\textbf{B. History of the Parental Immunity Doctrine}

1. \textit{Evolution of the Parental Immunity Doctrine in the United States}

The general rule that a parent is not liable for personal injuries negligently inflicted upon a minor child is of comparatively recent origin.\textsuperscript{59} Prior to the Mississippi Supreme Court case of

\textsuperscript{55} See, e.g., Evans v. Evans, 12 N.C. App. 17, 18, 182 S.E.2d 227, 228 (1971); Mabry v. Bowen, 14 N.C. App. 646, 647, 188 S.E.2d 651, 652 (1972); Skinner v. Whitley, 281 N.C. 476, 484, 189 S.E.2d 230, 235 (1972) ("If the immunity rule in ordinary negligence cases is no longer suited to the times...we think innovations upon the established law in this field should be accomplished prospectively by legislation rather than retroactively by judicial decree."); Lee v. Mowett Sales Co, Inc., 316 N.C. 489, 494, 342 S.E.2d 882, 885 (1986) ("If the doctrine is to be abolished at this late date, it should be done by legislation and not by the Court."); Coffey v. Coffey, 94 N.C. App. 717, 721, 342 S.E.2d 467, 470 (1989); See also Dean supra note 50.


\textsuperscript{57} Id.

\textsuperscript{58} Id.

\textsuperscript{59} LEE, supra note 51, § 248, at 293.
Hewellette v. George\textsuperscript{60} in 1891, no appellate case, either in England or the United States, had ever considered the question of the tort liability of a parent for personal injuries to a minor child.\textsuperscript{61} However, despite the lack of adjudicated cases upon which to rely, the Mississippi court ruled that a daughter could not sue her mother for illegal imprisonment in an insane asylum\textsuperscript{62}, citing that:

[T]he peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interest 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. The State, through its criminal laws, will give the minor child protection from parental violence and wrong doing, and this is all the child can be heard to demand.\textsuperscript{63}

The Hewellette decision was the first in a sweeping trend of cases termed the "Great Trilogy."

In the second case of the triumvirate, McKelvey v. McKelvey\textsuperscript{64} the Tennessee Supreme Court ruled that a minor child was barred from bringing a claim against her father and stepmother for cruel and inhuman treatment inflicted upon her by the stepmother with the consent of the father.\textsuperscript{65} The court asserted that at common law the duty of the father to maintain, protect and educate his children carried with it a corresponding right to restrain and inflict moderate chastisement upon the child.\textsuperscript{66}

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  \item \textsuperscript{60} 9 So. 885 (Miss. 1891).
  \item \textsuperscript{61}  Lee, supra note 51, § 248, at 293; See also supra note 48 and accompanying text.
  \item \textsuperscript{62}  Hewlett, 9 So. at 887.
  \item \textsuperscript{63}  Id.
  \item \textsuperscript{64}  77 S.W. 664 (Tenn. 1903).
  \item \textsuperscript{65}  Id. at 664.
  \item \textsuperscript{66}  Id. North Carolina courts have long recognized this most fundamental principle, that parents should be allowed to bring up their children in the best way they see fit, so long as the method is reasonable. In fact, the North Carolina Supreme Court announced in 1837 that:

  \begin{quote}
  [o]ne of the most sacred duties of parents, is to train up and qualify their children, for becoming useful and virtuous members of society; this duty cannot be effectually performed without the ability to command obedience, to control stubbornness, to quicken diligence, and to reform bad habits; and to enable him to exercise this salutary sway, he is armed with the power to administer moderate correction, when he shall believe it to be just and necessary.
  \end{quote}

\end{itemize}
The final case of the "Great Trilogy", Roller v. Roller\textsuperscript{67}, was decided by the Washington Supreme Court in the early part of the Twentieth Century. The defendant in Roller was convicted of raping his minor daughter and sentenced to a term of imprisonment.\textsuperscript{68} The minor daughter, fifteen years old at the time, then attempted to recover $2,000 in damages from her father for injuries resulting from the rape.\textsuperscript{69} The Washington court, relying on the rationale set forth in Hewellette, and carrying the doctrine to its extreme, denied recovery, based upon society's interest in preserving harmony within the family.\textsuperscript{70} In so ruling, the court stated:

The rule of law prohibiting suits between parent and child is based upon the interest that has been manifested since the earliest organization of civilized government, an interest inspired by the universally recognized fact that the maintenance of harmonious and proper family relations is conducive to good citizenship, and therefore works to the welfare of the state.\textsuperscript{71}

However, one can hardly imagine how preventing a minor daughter from bringing an action against her father for sexually assaulting her can preserve any family harmony, if there ever was any to begin with.\textsuperscript{72}

\begin{itemize}
\item \textsuperscript{67} 79 P. 788 (Wash. 1905).
\item \textsuperscript{68} Id. at 788.
\item \textsuperscript{69} Id.
\item \textsuperscript{70} Id.
\item \textsuperscript{71} Id.
\item \textsuperscript{72} Numerous commentators have addressed this very situation. See, e.g., Caroline E. Johnson, A Cry For Help: An Argument For Abrogation of the Parent-Child Tort Immunity Doctrine in Child Abuse and Incest Cases, 21 FLA. ST. U.L. Rev. 617 (1993) (commenting on Richards v. Richards, 599 So. 2d 135 (Fla. Dist. Ct. App. 1992), in which the Florida District Court of Appeals upheld the circuit court's ruling that the parent-child immunity doctrine barred a daughter from suing her father for damages for an intentional tort, the sexual assault of the daughter by her father. The court held that if the doctrine "is to be abrogated to allow a child to bring an intentional tort action against a parent, it should be done by statute." Id. at 137); Samuel Mark Pipina, In Whose Best Interest? Exploring the Continuing Viability of the Parental Immunity Doctrine, 53 OHIO St. L.J. 1111 (1992) (commenting on Barnes v. Barnes, 566 N.E.2d 1042 (Ind. Ct. App. 1991), in which the Indiana Court of Appeals overturned a verdict for a daughter awarding compensatory and punitive damages resulting from the sexual assault by her father. In dissent, Judge Conover stated that "there is not one compelling reason for imposing [the parent-child immunity] doctrine to the child's detriment in sexual battery cases. Nothing is lost and deterrent value is gained by the doctrine's abolition." Id. at 1046-1047).
\end{itemize}
2. Evolution of the Parental Immunity Doctrine in North Carolina

Nearly thirty years after its initial inception, the parental immunity doctrine was judicially adopted in North Carolina in 1923. Justice Stacy, writing for his colleagues on the North Carolina Supreme Court, followed the trend which was emerging across the nation when he accepted the doctrine into the annals of North Carolina jurisprudence.

In *Small v. Morrison*, a nine-year old child brought an action against her father and her father's insurance carrier for personal injuries she allegedly suffered as a result of the negligent operation of an automobile owned and driven by the father. In sustaining the father's demurrer, the court pronounced:

> It is well established that a minor child cannot sue his parent for a tort... [a]nd this rule has been applied not only in cases of excessive punishment, or other assault and battery, but to the most extreme case possible, that of the ravishment of a minor daughter by her father.

In defense of its decision to adopt the doctrine, despite the fact that there was no support for the doctrine in North Carolina case law, the Court decreed that the doctrine was "unmistakably and indelibly carved upon the tablets of Mount Sinai." As the doctrine evolved in North Carolina, numerous attempts by plaintiffs to limit its application were rejected by the North Carolina courts. In *Skinner v. Whitley* the North Carolina Supreme Court was presented with the question of whether the estate of an unemancipated minor child may bring an action against the father's estate for the wrongful death of the child caused by the ordinary negligence of the deceased father. The

74. *Id.*
75. *Id.* At 610, 118 S.E. at 13; *See also Roller, supra* notes 67-72 and accompanying text. In their holding, the *Small* court further proclaimed that "there are some things that are worth more than money. One of these is the peace of the fireside and the contentment of the home; for of such is the kingdom of righteousness. While the family relation of parent and child exists, with its reciprocal rights and obligations, the latter should not be taught to "bite the hand that feeds it," and no such action as the present should be entertained by the courts." *Id.* at 616, 118 S.E. at 16.
76. *Id.*
77. *See supra* note 55.
79. *Id.* at 477, 189 S.E.2d at 230.
case involved an accident which occurred when a motor vehicle driven by the father, in which his two daughters were passengers, collided with an oncoming car, killing the father and both daughters. The administrator of the girls' estate brought a wrongful death claim against the father's estate, alleging that the father's ordinary negligence proximately caused the girls' deaths. The plaintiff urged the court to abandon the parental immunity doctrine and allow the minor children of the State to "plead their wrongs at her altar of justice." Plaintiff further contended that the rationale for the rule could not be applied to the facts of this case, since by reason of the death of the daughters and their father, there no longer existed a familial relationship that could be disturbed by this action. In considering this argument, the court noted that "the course plaintiff urges would create more problems and inequities than it cures." Further, the court stated that a total abrogation of the doctrine would lead to judicial supervision of the household which is inconsistent with a parent's duty and obligation to support, control, and discipline his children. Ultimately, the court refused "piecemeal abrogation of established law by judicial decree," and instead deferred to the wisdom of the legislature to make such a change.

In response to the Supreme Court's refusal to modify the doctrine, the North Carolina Legislature limited the doctrine's application in 1975 by abolishing the immunity in cases involving the negligent operation of a motor vehicle.

80. Id. at 476-77, 189 S.E.2d at 230.
81. Id. at 477, 189 S.E.2d at 230.
82. Id. at 479, 189 S.E.2d at 232.
83. Id.
84. Id. at 484, 189 S.E.2d at 234. For example, the court questioned "[i]f suit is allowed only in motor vehicle cases, by what logic is the right to sue denied for injury to the child incurred by the parent's negligence in operating a golf cart or a motor boat or a lawn mower or a power saw?" Id. Further, the court wondered whether it would be logical to require the death of either the parent or child, or both, in order to allow a child to bring a suit against the parent. Id. Moreover, the court stated that conditioning the right to sue upon the existence of liability insurance would "not only extend existing insurance contracts to coverage not contemplated when the policies were written but also would create a preferred class of minor unemancipated children—those injured in a motor vehicle accident by a negligent father who carried liability insurance." Id.
85. Id. at 484, 189 S.E.2d at 235.
86. Id.
87. Id.
When next confronted with this issue, in *Lee v. Mowett Sales Co., Inc.*[^89] the court again refused to abrogate the doctrine.[^90] In *Lee*, father ran over his daughter's feet with a lawn mower, causing the amputation of her left foot and three toes of her right foot.[^91] The child brought a complaint against the manufacturer of the lawn mower, alleging that her injuries were the result of defects in the lawn mower.[^92] The manufacturer then filed a third-party complaint against the father seeking contribution.[^93] Pursuant to the father's motion, the trial court dismissed the suit on the grounds that the father was entitled to enforce the parental immunity doctrine, and the Court of Appeals affirmed.[^94] The manufacturer urged the N.C. Supreme Court to abolish the doctrine of parent-child immunity, arguing that "the doctrine is riddled with exceptions and is no longer backed by sound public policy reasons."[^95] Nonetheless, the court refused to do so, noting that "to judicially abolish the parent-child immunity doctrine after the legislature has considered and retained the doctrine would be to engage in impermissible judicial legislation."[^96]

In *Coffey v. Coffey*,[^97] the N.C. Court of Appeals addressed a somewhat different application of the doctrine. Whereas most of the previous cases addressing the application of the doctrine involved minor children suing their parents, this case involved a mother suing her son for injuries sustained in an automobile accident.[^98] The alleged injury occurred when the son was sixteen years old, thus precluding the mother's ability to sue based on the parent-child immunity doctrine.[^99] The mother, however, waited

[^90]: Id. at 490, 342 S.E.2d at 883 ("Because the parent-child immunity doctrine is firmly embedded in our case law and the legislature has declined to enact its abolition, we do not disturb the doctrine as it now exists").
[^91]: Id.
[^92]: Id.
[^93]: Id.
[^94]: Id. The Court of Appeals relied on *Watson v. Nichols*, 270 N.C. 733, 155 S.E.2d 154 (1967), which stated that a third-party could not maintain an action for contribution against a parent in such cases, since the parent cannot be held liable in a direct action by the injured child due to the doctrine of parent-child immunity.
[^95]: Id.
[^96]: Id. at 494, 342 S.E. 2d at 885.
[^98]: Id. at 718, 381 S.E.2d at 468.
[^99]: Id. at 720, 381 S.E.2d at 470.
until the son had reached the age of majority to bring the suit.\textsuperscript{100} The court held that the right to sue must exist at the time of the injury, and therefore affirmed the lower court's ruling.\textsuperscript{101} The court noted that the statutory exception to the immunity doctrine created by N.C. Gen. Stat. § 1-539.21 allowed a minor child to bring suit against a parent for injuries resulting from the parent's negligent operation of a motor vehicle,\textsuperscript{102} but concluded that "this exception \ldots is limited and [does] not abolish the unemancipated minor's immunity from suits by his parents."\textsuperscript{103}

Eleven days after the \textit{Coffey} decision the legislature amended the statute, allowing parents to sue their minor children for injuries sustained as a result of the child's negligent operation of a motor vehicle.\textsuperscript{104}

\textbf{C. Alternatives to the Parental Immunity Doctrine:}

Although a number of states, in addition to North Carolina, have confined their modification of the doctrine to cases involving the negligent operation of a motor vehicle,\textsuperscript{105} this narrow restriction falls far short of the reforms made in other states\textsuperscript{106} and results in the "piecemeal abrogation" the \textit{Skinner} court attempted to avoid.\textsuperscript{107}

\textsuperscript{100.} \textit{Id.} at 719, 381 S.E.2d at 469.
\textsuperscript{101.} \textit{Id.} at 720, 381 S.E.2d at 470.
\textsuperscript{102.} \textit{Id.} at 719, 381 S.E.2d at 469.
\textsuperscript{103.} \textit{Id.} (citations omitted).
\textsuperscript{104.} N.C. GEN. STAT. § 1-539.21 (1989). N.C. GEN. STAT. § 1-539.21 abolished a parent's immunity to suit by a minor child for personal injury or property damage arising out of the operation of a motor vehicle. The State legislature amended the statute in 1989 to allow the reciprocal right of a parent to sue a child for injuries sustained by the parent arising out of the minor child's negligent operation of a motor vehicle. However, this amended statute failed to totally abrogate the doctrine.
\textsuperscript{105.} \textit{See supra} note 53. Fifteen States have limited their reform efforts in this context: Alaska, Delaware, Florida, Illinois, Kansas, Maine, Massachusetts, Montana, New Mexico, North Carolina, Oklahoma, Rhode Island, Virginia, Washington and West Virginia.
\textsuperscript{106.} \textit{See supra} note 54. Fourteen States do not recognize the doctrine in any form: Arizona, California, Hawaii, Minnesota, Nevada, New Hampshire, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota and Utah. \textit{See also supra} note 53. Five States have totally abrogated the doctrine except where the alleged negligent act involves an exercise of parental authority or discretion: Iowa, Kentucky, Michigan, New Jersey and Wisconsin.
\textsuperscript{107.} \textit{See supra} notes 78-87 and accompanying text.
"In recent years indications have appeared of a growing judicial inclination to depart very materially from the broad doctrine that an unemancipated minor cannot maintain a tort action against his parent."108 The arguments which were originally advanced in favor of application of the doctrine of parental immunity109 "no longer justify the doctrine for most purposes."110 In light of the mounting criticism being waged against the parental immunity doctrine, and the growing number of exceptions to the rule, the time has arrived for the North Carolina courts to remove the blanket immunity afforded to parents. A more flexible approach, that preserves parental authority and discretion while still allowing children to recover from their parents for negligent acts which fall outside the scope of parental authority or for grossly negligent acts which are within that scope of authority, should be adopted.

The most viable of the justifications offered in support of the doctrine, that of preserving parental care, discipline and control,111 has caused the most difficulty for states that have abolished or modified the doctrine. Over the years, three approaches have developed in courts across the country with regards to this justification.112

First, in Goller v. White,113 a foster child brought a suit against his foster father and the foster father's insurer for injuries he sustained while riding on the drawbar of a tractor operated by the foster father.114 The trial court found that the foster father was standing in loco parentis to the foster child, and therefore was entitled to enforce the parental immunity doctrine.115 In addressing the issue on appeal, the Wisconsin Supreme Court recognized that at common law a minor could maintain a suit against his parent for disputes concerning property and contract rights.116 The court then rationalized that it would be difficult "to argue that the

109. See supra note 50 and accompanying text.
111. See supra note 50 and accompanying text.
113. 122 N.W.2d 193 (Wisc. 1963).
114. Id.
115. Id. at 196.
116. Id. at 197.
law should protect the property rights of a minor more zealously than the rights of his person.”\textsuperscript{117}

The Wisconsin Supreme Court then articulated its test that retains the doctrine of parental immunity in only two situations: “(1) where the alleged negligent act involves an exercise of parental authority over the child; and (2) where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care.”\textsuperscript{118}

Under the \textit{Goller} approach, the parent is given broad discretion with respect to the legal obligations of the child, but this discretion “does not extend to the ordinary acts of upbringing . . . which are not of the same legal nature as providing food, clothing, housing, medical and dental services.”\textsuperscript{119} In the areas not within the legal obligations of the parent, the parent will presumably be subject to a reasonableness standard.\textsuperscript{120}

However, there is one major problem with this approach: if a parent’s acts are within the established protected zone, then the parent is in effect given a license to act negligently toward his child.\textsuperscript{121} This result is inevitable with any standard which permits immunity in some situations, because the parent is legally unrestricted in his conduct in those protected areas.\textsuperscript{122} For this reason, the \textit{Goller} approach, while a noble effort to solve the problems which have been created by the immunity doctrine, still falls short of correcting all of the evils created.

The second approach, which was adopted by the California Supreme Court in \textit{Gibson v. Gibson},\textsuperscript{123} attempts to redress the shortcomings of the \textit{Goller} approach. In \textit{Gibson}, a minor child was injured by an oncoming vehicle when his father negligently instructed him to go out on the roadway to inspect his vehicle’s tires.\textsuperscript{124} The trial court granted the father’s motion to dismiss on

\textsuperscript{117.} Id. (citations omitted).
\textsuperscript{118.} Id. at 198.
\textsuperscript{120.} Id.
\textsuperscript{121.} Id. at 807; \textit{See also} Gibson v. Gibson, 479 P.2d 648, 652-653 (Cal. 1971).
\textsuperscript{122.} Id.
\textsuperscript{123.} 479 P.2d 648 (Cal. 1971).
\textsuperscript{124.} Id. at 649.
the grounds that the father was immune from prosecution.\textsuperscript{125} After conducting an extensive review of the parental immunity doctrine, the California Supreme Court stated that while it agreed with the Goller court's "recognition of the undeniable fact that the parent-child relationship is unique in some aspects, and that traditional concepts of negligence cannot be blindly applied to it,"\textsuperscript{126} it rejected the Goller approach because it did not want to perpetuate the "implication . . . that within certain aspects of the parent-child relationship, the parent has carte blanche to act negligently toward his child."\textsuperscript{127} In so ruling, the court totally abrogated the parental immunity doctrine in favor of the more flexible "reasonably prudent parent" standard. This standard asks, "what would an ordinarily reasonable and prudent parent have done in similar circumstances?"\textsuperscript{128}

This is a much more flexible standard than that advanced by the Goller court. In contrast to the Goller approach, the Gibson approach treats all parental duties the same, applying the "reasonably prudent parent" standard uniformly.\textsuperscript{129} In effect, "this standard holds the parent to a standard of reasonableness regardless of the nature of his activity, thus eliminating the abstruse, often arbitrary division between immunity and liability existent in other alternatives."\textsuperscript{130}

However, this approach has received its share of criticism. The chief complaint against this approach is that the court is not in a position to judge the proper degree of discipline and supervision of a particular child.\textsuperscript{131} As one court points out:

[C]onsidering the different economic, educational, cultural, ethnic and religious backgrounds which must prevail, there are so many combinations and permutations of parent-child relation-

\begin{itemize}
\item \textsuperscript{125} Id.
\item \textsuperscript{126} Id. at 652. For example, the court stated that "[o]bviously, a parent may exercise certain authority over a minor child which would be tortious if directed toward someone else. For example, a parent may spank a child who has misbehaved without being liable for battery, or he may temporarily order the child to stay in his room as punishment, yet not be held responsible for false imprisonment." Id.
\item \textsuperscript{127} Id. at 652-53.
\item \textsuperscript{128} Id. at 653 (emphasis in original).
\item \textsuperscript{129} "Reasonable Parent," supra note 119, at 809.
\item \textsuperscript{130} Id.
\item \textsuperscript{131} Id. at 810.
\end{itemize}
ships that may result that the search for a standard would necessarily be in vain - and properly so.\textsuperscript{132}

For this reason, the \textit{Gibson} approach, while doing more for our children than the \textit{Goller} approach, is not the proper remedy for the problems created in North Carolina by the parental immunity doctrine.

The final approach is that of the American Law Institute in the Restatement (Second) of Torts \textsection 895G.\textsuperscript{133} In its commentary, the Restatement notes that the “[c]onstant criticism of the immunity has led to its erosion by the development of numerous exceptions to it, which have been more or less sporadically recognized by many courts, until there are now very few jurisdictions if any, in which the immunity exists in any complete form.”\textsuperscript{134} In an attempt to clear up the confusion that has been caused by the doctrine, and to blend the good aspects from both the \textit{Goller} and \textit{Gibson} approaches, the Restatement announces that:

\begin{enumerate}
\item A parent or child is not immune from tort liability to the other solely by reason of that relationship; and,
\item Repudiation of general tort immunity does not establish liability for an act or omission that, because of the parent-child relationship, is otherwise privileged or is not tortious.\textsuperscript{135}
\end{enumerate}

There are two points which should be noted with regard to this approach. First, in subsection (1) of the Restatement, the authors follow the approach of the \textit{Gibson} court by completely abrogating the parental immunity doctrine.\textsuperscript{136} Second, in subsection (2) of the Restatement, the authors offer an exception to this denial of tort immunity. This exception exists when the act or omission of the parent involves conduct which is either “privileged” or “not tortious.” This distinction between “immunity” and “privileged or not tortious conduct” is the deciding factor in determining whether liability exists.\textsuperscript{137}

In \textit{Winn v. Gilroy},\textsuperscript{138} the Oregon Supreme Court declined to apply either the \textit{Goller} or the \textit{Gibson} approaches, noting that “each has [its] shortcomings.”\textsuperscript{139} Instead, the court chose to apply

\begin{footnotes}
\item 133. \textit{RESTATEMENT (SECOND) OF TORTS} \textsection 895G (1979).
\item 134. \textit{Id.} at cmt. d.
\item 135. \textit{Id.} at \textsection 895G.
\item 137. \textit{Id.}
\item 138. \textit{Id.}
\item 139. \textit{Id.} at 783.
\end{footnotes}
the Restatement approach, stating that "the proper inquiry concerns the tortious or privileged nature of a parent's act that causes injury to the child, not a special parental immunity from a child's action for personal torts as distinct from other kinds of claims." 140

Expanding on the Supreme Court's holding in *Winn*, the Oregon Court of Appeals clarified the Restatement test in *Martin v. Yunker*. 141 The court stated that the first inquiry under the Restatement approach is whether the alleged conduct is "privileged." 142 There are certain categories of conduct, which are by their very nature tortious, that are denied liability by virtue of some privilege created either by consent or by law. 143 If such a privilege does exist, then no liability arises on the part of the parent. However, if there is no privilege, then the court must move on to the next step, which asks whether the alleged conduct can properly be characterized as "not tortious conduct." 144

The next step, determining whether parental conduct is "not tortious", is a two-step process. 145 First, it must be determined

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140. *Id.* at 784.
142. *Id.* at 1333.
143. *Id.* at 1333-1334; See also *Alpar v. Weyerhaeuser Co., Inc.*, 20 N.C. App. 340, 346, 201 S.E.2d 503, 507, *cert. denied*, 285 N.C. 85, 203 S.E.2d 57 (1974) (a qualified privilege exists for statements which would otherwise be defamatory when such statements were made in the corporate interest, and no showing of actual malice or excessive publication exists).
144. *Id.* at 1334; The court also stated that while the Supreme Court did not articulate any broad rule for classifying parental conduct as tortious or "not tortious" in *Winn*, under section 895G it did suggest that:

[i]t is possible to distinguish between those obligations that a parent owes his or her child specifically by virtue of parenthood from the general duty of ordinary care to avoid foreseeable harm that the defendant would owe to other persons . . . under the same circumstances. Negligence suffices to make the parent liable for the child's injury in the second kind of case though perhaps not for substandard performance of specifically parental duties, where a more stringent test . . . may remain proper.

*Id.* (quoting *Winn v. Gilroy*, 681 P.2d at 785); The Restatement states that "[i]f the conduct giving rise to an injury does not grow directly out of the family relationship, the existence of negligence may be determined as if the parties were not related." *Restatement (Second) of Torts* § 895G, cmt. K at 430. Further, "if the conduct grows directly out of the family relationship, it may be considered tortious only if it is 'palpably unreasonable.'" *Id.* Note, that the phrase "grows directly out of the family relationship" can be interpreted to include the provision of food, clothing, housing, medical and dental services, as well as other acts as the court deems appropriate.
145. *Id.*
whether the conduct involves "strictly parental obligations." If the conduct does not involve such obligations, then it may be evaluated under an ordinary negligence standard, regardless of the relationship of the parties. However, if the conduct does involve such obligations, then liability arises only when the conduct is "palpably unreasonable," not when it is "merely unreasonable." And, although the term "palpably unreasonable" is not defined in the Restatement, the standard of "gross negligence" closely resembles how some courts have applied the term. Further, in North Carolina, our courts have defined "gross negligence" as "wanton conduct done with conscious or reckless disregard for the rights and safety of others."

D. Application of Restatement Alternative to Facts of Liner v. Brown

Applying this Restatement test to the facts of Liner, a similar result would be reached and the defendants would be liable. The first question is whether a privilege exists in this case. Since the Liner court did not specifically address this question, it is difficult to ascertain whether such a privilege exists. However, it does not appear from the party's pleadings that such a privilege existed at the time of Ambra's death.

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146. Id.; The Winn court "mentions a number of possibilities concerning the nature of obligations that arise out of the family relationship, including the parent's responsibility for the physical conditions in the home, for food and medical care, for recreation, sports, toys, and games, and for general supervision." Id. at 1334, quoting Winn v. Gilroy, 681 P.2d at 785. However, the Martin court noted that it was "not convinced that the category of 'not tortious' parental conduct extends to all conduct that involves 'general supervision.' Such a test would leave little, if any, parental conduct subject to liability . . . " Id. at 1335.

147. Id. at 1334.

148. Id.

149. Id. at 1335.

150. Fowler v. N.C. Dept of Crime Control & Pub. Safety, 92 N.C. App. 733, 736, 376 S.E.2d 11, 13, review denied, 324 N.C. 577, 381 S.E.2d 773 (1989); See also Siders v. Gibbs, 31 N.C. App. 481, 229 S.E.2d 811 (1976) (the court defined "wanton negligence" as conduct which shows either a deliberate intention to harm, or an utter indifference to, or conscious disregard for, the rights or safety of others." Id. at 485, 229 S.E.2d at 814. Further, the court stated that "carelessness and recklessness, though more than ordinary negligence, is less than wilfulness or wantonness." Id).

151. See supra notes 142-143 and accompanying text.
The next question is whether the alleged conduct involved is "not tortious." This involves a two-step process. The first step is to determine whether the conduct involves "strictly parental obligations." As stated previously, the Winn court illustrated a number of possibilities for such conduct, including "the parent's responsibility for the physical conditions in the home, for food and medical care, for recreation, sports, toys, and games, and for general supervision."

In this case, Ambra was swimming in the defendants' pool when she drowned. Arguably, this conduct involves "recreation" or "general supervision," and therefore should be deemed to involve "strictly parental obligations." Therefore, in order for liability to exist, the conduct must be "palpably unreasonable," and not "merely unreasonable." Further, in North Carolina conduct is "palpably unreasonable" if it involves "wanton conduct done with conscious or reckless disregard for the rights and safety of others." Under these facts, a compelling case could be made that the defendants' lack of supervision of Ambra constitutes a "reckless disregard" for her rights and safety, and is therefore "palpably unreasonable." If this is the case, liability would attach to the defendants under this Restatement approach, just as it did under the Liner court's analysis.

E. Conclusion

Although the N.C. Court of Appeals further limited the application of the parental immunity doctrine in Liner, the court's decision did not go far enough. While the clear judicial trend across the nation has been to severely limit or totally abrogate the doctrine, the North Carolina legislative and judicial branches have consistently refused to do so.

Given the fact that the doctrine is a creature of the courts, and "[t]he courts are in a better position to judge the uniqueness

152. See supra notes 145-150 and accompanying text.
153. See Martin, 853 P.2d at 1334.
154. Id.
155. Id. at 1334 (quoting Winn v. Gilroy, 681 P.2d at 785). However, the Martin court refused to extend the category of "not tortious" parental conduct "to all conduct that involves 'general supervision.'" Id. at 1335.
156. Id. at 1334.
157. See supra note 150 and accompanying text.
158. See supra notes 53-54.
159. See supra note 55.
of the parent-child relationship," North Carolina courts should completely abrogate the doctrine in favor of a more flexible approach. The United States Supreme Court has echoed this same sentiment, stating that "[w]hen precedent and precedent alone is all the argument that can be made to support a court-fashioned rule, it is time for the rule's creator to destroy it." All three alternative approaches have "abolish[ed] [or severely restricted] the doctrine and replace[d] it with a narrow rule respecting the role of parental discipline." "This is to be preferred over an ad hoc approach, maintaining the parental immunity rule but carving our exceptions as they arise." However, the Restatement approach utilizes the rationales advanced by both the Goller and Gibson courts, and expands on these by "[taking] into consideration the uniqueness of family relationships and [giving] guidelines for the courts to follow." Further, the Restatement sets out guidelines for courts to follow in determining liability, which the Oregon courts have adopted. Therefore, this approach seems to be the preferred choice.

If the North Carolina courts stand idly by and continue to refuse to abolish the doctrine, and the legislature continues to only minimally restrict the doctrine's application, the children of the State will continue to be prevented to "plead at her altar of justice" wrongs done to them by their parents under the guise of the doctrine.

161. Trammel v. United States, 445 U.S. 40, 48 (1980), (quoting Francis v. Southern Pac. Co., 333 U.S. 445, 471 (1948) (Black, J., dissenting)). The Court also stated that "we cannot escape the reality that the law on occasion adheres to doctrinal concepts long after the reasons which gave them birth have disappeared and after experience suggests the need for change." Id.
162. Lee, 76 N.C. App. at 564, 334 S.E.2d at 255.
163. Id.
164. Id.
165. See supra notes 78-87 and accompanying text.
IV. PROTECTIONS SUCH AS PARENTAL IMMUNITY OR STATE-FUNDED INSURANCE SHOULD BE EXTENDED TO FOSTER PARENTS IN NORTH CAROLINA

A. Introduction

American Courts developed the parental immunity doctrine in an attempt to preserve harmony and tranquility among family members.166 The parental immunity doctrine functions as an absolute bar to a child bringing a negligence tort suit against his parents.167 The modern trend has been to abolish or restrict this type of immunity.168 North Carolina adopted the parental immunity doctrine in 1923.169 North Carolina's version of the doctrine provides that “an unemancipated minor child cannot maintain a tort action against his parent for personal injuries, even though the parent's liability is covered by insurance.”170 However, North Carolina has partially abrogated the immunity by enacting a statute that makes the doctrine inapplicable to actions “arising out of the operation of a motor vehicle owned or operated by the parent or child.”171

Several states have extended the parental immunity doctrine to apply to those persons standing in loco parentis.172 In North Carolina, the Court of Appeals has defined in loco parentis to mean “in the place of a parent.”173 North Carolina, however, does not recognize foster parents standing in loco parentis as meriting the protection of the parental immunity doctrine.174 The North Carolina Court of Appeals held in Liner v. Brown175 that the defendant foster parents did not stand in loco parentis to their foster child who drowned in defendants' backyard swimming

167. Id.
168. Id.
174. Id.
175. Id.
The Court reasoned that even if defendants did stand *in loco parentis*, they would not be entitled to parental immunity since extending the doctrine to those having temporary custody and control of a minor child does not further the public policy underlying the doctrine. Some of these policies include the maintenance of family harmony, the preservation of parental authority and security in the home, and the protection of financial resources of the family.

In my analysis I will discuss the *Liner* court's interpretation of the parental immunity doctrine as it relates to foster parents and persons standing *in loco parentis* to foster children. I will also examine the origins of the parental immunity doctrine and its development in North Carolina as well as in other jurisdictions. I will then analyze the justifications offered in support of extending parental immunity to foster parents and explore the alternatives to parental immunity that can still offer protection for foster parents. I will then conclude that North Carolina needs to take some action to protect foster parents from suits by a foster child by providing state-funded insurance for foster parents.

**B. Background**

1. *History of the Parental Immunity Doctrine*

As previously noted, American Courts developed the parental immunity doctrine in an attempt to preserve harmony and tranquility among family members. In 1891, the Mississippi Supreme Court became the first American court to establish the parental immunity doctrine. This doctrine was unique in American courts, as parental immunity was not recognized at English common law. The parental immunity doctrine disallows a tort action by a child against a parent. The main purpose behind this immunity is to avoid the disruption of family harmony.

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176. *Id.*
177. *Id.* at 51, 449 S.E.2d at 909.
178. *Id.* at 50, 449 S.E.2d at 908.
180. *Hewellete v. George*, 9 So. at 885 (Miss. 1891).
182. *Id.*
183. *Hewlett*, 9 So. at 887.
In *McKelvey v. McKelvey*, the Tennessee Supreme Court used the parental tort immunity doctrine to deny a child's cause of action against his father and stepmother for cruel and inhumane punishment. The Court compared parental immunity to spousal immunity and concluded that in a parent-child situation, a parent was given custody and control of a child in exchange for a parent's duty to provide support for the child.\(^{185}\)

In *Roller v. Roller*, the Washington Supreme Court disallowed a compensatory award to a minor child who had been raped by her father. The court reasoned that the financial welfare of the other minor children in the family had to be considered in denying the award to a particular child.\(^{188}\) In addition to family harmony justifications, the court rejected the award to the child on the ground that the parent would probably, upon the child's death, "become heir to the very property which had been wrested by the law from him."\(^{189}\)

2. **Justifications for the Parental Immunity Doctrine**

Several reasons are enumerated by the courts in support of the parental immunity doctrine. These reasons include: (1) prevention of the disruption of family harmony;\(^{190}\) (2) a reluctance by courts to interfere with parental control and discipline;\(^{191}\) (3) the possibility that the parent might regain the child's monetary damages through inheritance;\(^{192}\) (4) depletion of parental assets to the detriment of the injured child's siblings;\(^{193}\) and (5) the possibility of fraud and collusion between parent and child to obtain insurance money.\(^{194}\) Most jurisdictions that continue to maintain the

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184. 77 S.W. 664 (Tenn. 1903).
185. Id. The comparison fails because the spousal immunity is based on the common law theory that the spouses represent a singular entity, whereas courts have never defined the parent-child relationship as one entity.
186. 79 P. 788 (Wash. 1905).
187. Id.
188. Id.
189. Id. at 789.
190. Hewellette, 9 So. at 887; Small, 185 N.C. at 585, 118 S.E. at 16.
191. See, e.g., Barlow v. Iblings, 156 N.W.2d 105, 107-108 (Iowa 1968); McKelvey v. McKelvey, 77 S.W. 664 (Tenn. 1903), Small, 185 N.C. at 584, 118 S.E. at 15.
192. Roller, 79 P. at 789.
193. Id.
parental immunity doctrine justify its continuance on public policy grounds of promotion of family harmony\textsuperscript{195} and maintenance of parental discipline.\textsuperscript{196}

3. The Development of the Doctrine in North Carolina

North Carolina first adopted the parental immunity doctrine in 1923.\textsuperscript{197} North Carolina courts feared that suits brought by children against their parents for negligent injury would “tend to destroy parental authority and to undermine the security of the home.”\textsuperscript{198} Thus, the doctrine has been applied to bar actions between unemancipated children against their parents based on ordinary negligence.\textsuperscript{199}

The history of the parental immunity doctrine shows that maintenance of family harmony was the most important public policy rationale that the doctrine was intended to serve.\textsuperscript{200} However, basing the parental immunity doctrine primarily on this rationale fails to support the parental immunity doctrine in North Carolina because North Carolina recognizes various intrafamily liabilities. For example, North Carolina courts have permitted: (1) unemancipated minors to sue their parents for contract and property rights;\textsuperscript{201} (2) unemancipated minors to sue their parents for intentional torts;\textsuperscript{202} (3) emancipated children to sue their parents;\textsuperscript{203} (4) unemancipated siblings to sue each other;\textsuperscript{204} and (5) spouses to sue one another (now that North Carolina has abolished interspousal immunity).\textsuperscript{205}

\textsuperscript{195}. See, e.g., Hewellette, 9 So. at 887; Barlow v. Iblings, 156 N.W.2d 105, 107-108 (Iowa 1968); Small, 185 N.C. at 579-580, 118 S.E. at 13.
\textsuperscript{196}. See, e.g., Barlow, 156 N.W.2d at 107-108; Small, 185 N.C. at 584, 118 S.E. at 15.
\textsuperscript{197}. Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923).
\textsuperscript{198}. Id. at 584, 118 S.E. at 15.
\textsuperscript{199}. Lee, 316 N.C. at 491, 342 S.E.2d at 884; Skinner v. Whitley, 281 N.C. 476, 484, 189 S.E.2d 230, 235 (1972).
\textsuperscript{200}. Lee, 316 N.C. at 492, 342 S.E.2d at 884; Skinner, 281 N.C. at 480, 189 S.E.2d at 232.
\textsuperscript{201}. Lee, 316 N.C. at 492, 342 S.E.2d at 884; See also Homer H. Clark, Jr., Law of Domestic Relations § 9.2 (1968); 59 AM. JUR. 2d Parent and Child § 148 (1971).
In 1952 the North Carolina Supreme Court refused to abolish parental immunity, since no statute existed overruling Small v. Morrison, and no other state had abrogated the immunity for acts of negligence. In 1972, the North Carolina Supreme Court denied another request to abolish the parental immunity in Skinner v. Whitley, reiterating its belief that this was the legislature's job. The request to abolish parental immunity was again denied in Lee v. Mowett Sales Co. and in Coffey v. Coffey.

Thus in North Carolina, absent statutory authority, an unemancipated minor child cannot maintain a tort action against his parents for personal injuries. However, subsequent cases have eroded the protection provided by the parental immunity doctrine. For example, the parental immunity doctrine does not apply to injuries willfully or maliciously inflicted. In addition, North Carolina has abolished, by statute, a parent's immunity from a tort suit for personal injuries to his unemancipated minor child in cases involving the operation of a motor vehicle. Furthermore, North Carolina General Statute § 1-539.21 has been amended to remove the immunity of a child from suit by the child's parent for injuries or wrongful death arising out of the operation of a motor vehicle owned or operated by the child.

The current North Carolina General Statute § 1-539.21 states that "the relationship of parent and child shall not bar the right of action by a person or his estate against his parent or child for wrongful death, personal injury, or property damage arising out of operation of a motor vehicle owned or operated by the parent or child." This statute was held to be constitutional in Ledwell v.

206. 185 N.C. 577, 118 S.E. 12 (1923).
209. Id.
211. 94 N.C. App. 717, 721, 381 S.E.2d 467, 470 (1989) (unemancipated minor driving an automobile crashed and injured his passenger mother, but the mother's right to sue did not exist at the time of the injury).
212. See Lee, supra note 204.
215. Id.
216. Id.
The vast majority of North Carolina cases involving suits between a parent and a child arise in the context of a motor vehicle accident.\footnote{219} With regard to persons standing \textit{in loco parentis}, the general rule in North Carolina is that a minor child cannot recover from a person standing \textit{in loco parentis} for personal injuries resulting from ordinary negligence.\footnote{220} A person \textit{in loco parentis} stands "in the place of a parent"\footnote{221} and is defined as one who takes a child into his own home and treats the child as a member of his own family, educating and supporting the child as if he were the person's own child.\footnote{222} In addition to the use of the parental immunity doctrine to shield natural parents from suits by their children, North Carolina has also extended the doctrine to stepparents standing \textit{in loco parentis}.\footnote{223} Courts have surmised that the parental immunity doctrine applies to stepparents because they are more permanent in nature to a child's life when compared to foster parents who only have temporary custody and control of the child.\footnote{224}

However, North Carolina courts have stated that temporary status attaches to foster parents standing \textit{in loco parentis}, since the relationship exists at the will of the party assuming the obligations of a parent.\footnote{225} In 1980, the North Carolina Court of Appeals stated that an \textit{in loco parentis} relationship does not arise "from the mere placing of a child in the temporary care of other persons by a parent or guardian of such child."\footnote{226} Thus, such a relationship is established only when the person with whom the child is placed \textit{intends} to assume the status of a parent, and takes on obligations incidental to a parental relationship, particularly support and maintenance.\footnote{227}
4. The Parental Immunity Doctrine as it Applies to Foster Parents

a. Granting Immunity to Persons Related to the Child

Courts must first decide whether a foster parent stands in loco parentis to the foster child to determine if a foster parent can assert parental immunity for negligent conduct.\(^\text{228}\) In *Hush v. Devilbiss Co.*,\(^\text{229}\) a grandmother acting in loco parentis was protected from a negligent supervision suit. The *Hush* Court held that the rationales underlying parental immunity, including preservation of domestic tranquility and family unity, protection of family resources, and avoidance of judicial intervention in parenting decisions, were equally applicable where a person voluntarily assumes parental responsibility and attempts to create a home-like environment for a child.\(^\text{230}\)

In *Lawber v. Doil*,\(^\text{231}\) the Appellate Court of Illinois allowed a stepfather to invoke the parental immunity doctrine even though he was not the decedent's natural father and legal custody of the decedent child was with the plaintiff mother.\(^\text{232}\) The *Doil* court held that parental immunity applied not only to the natural parents of the child, but also to those who stand in loco parentis.\(^\text{233}\) The *Doil* court reasoned further that a finding of in loco parentis status involved a determination of whether the defendant had assumed the financial burdens of parenthood rather than whether the defendant had made financial contributions.\(^\text{234}\)

person receiving financial assistance from welfare agencies to assist him with the support of a child will not be precluded from being considered in loco parentis to a child. However, if a child is supported by the agency and only boards with the person claiming to be in loco parentis, such a relationship will be found to be negated.

\(^{228}\) Liner, 117 N.C. App. at 48, 449 S.E.2d at 907. As stated earlier, a person stands in loco parentis to an unemancipated minor child if he has assumed the status and obligation of a parent without a formal adoption. See also McManus v. Hinney, 143 N.W.2d 1, 3 (Wis. 1966). Whether an in loco parentis relationship exists is determined from the facts of a particular case. Factors considered to determine whether a person stands in loco parentis include the children's ages, their dependence upon the person claiming to be in loco parentis, and whether the person claiming to be in loco parentis supports the children and exercises the duties and obligations of a natural parent.

\(^{230}\) Id.
\(^{232}\) Id. at 753.
\(^{233}\) Id.
\(^{234}\) Id.
b. Granting Immunity to Foster Parents

Foster family care is "the child welfare service that provides substitute family care for a planned period for a child when his own family cannot care for him, for a temporary or extended period, and when adoption is either not yet possible or not desirable." 235 A foster parent performs the duties of a parent to the child of another by rearing the child as his own child. 236 Common sense dictates that the failure of our courts and/or legislature to provide some minimal protections to foster parents means that people will be less likely to offer to take in foster children. 237 For this reason, other jurisdictions do not automatically exclude foster parents from an in loco parentis status. 238

The Minnesota Supreme Court, in Miller v. Pelzer, 239 was the first appellate court to grant in loco parentis status to foster parents. The Miller court declared that the public policy of protecting the unity of the home from suits by an unemancipated minor was equally applicable to a home provided by foster parents. 240 In Miller, a foster child sued her foster parents for fraud and deceit when she learned she was a foster child rather than the natural child of her foster parents. 241 The foster daughter stayed in defendants' home for twenty-five years without the knowledge that defendants were not her natural parents. 242 The Miller court reasoned that the family relationship in this case was just as sacred as if the plaintiff had been the defendants' natural daughter. 243 This court also noted the public policy that family settlements are favored in the law, and the good of society requires that the family relation be preserved, protected, and encouraged, and an occasional misfortune to one who has a grievance of this character is of far less importance than to establish a precedent which

235. CHILD WELFARE LEAGUE OF AMERICA, STANDARDS FOR FOSTER FAMILY SERVICE 8 (1975).
239. 199 N.W. 97 (Minn. 1924).
240. Id.
241. Id.
242. Id.
243. Id.
will open wide the gates for litigation affecting the family relation. 244

Although the parental immunity doctrine has since been abolished in Minnesota, foster parents in that state still receive statutory protections. 245

Since the 1986 decision of Brown v. Phillips, 246 Georgia has held that foster parents are clothed with parental immunity identical to that afforded to natural parents. Georgia courts reasoned that preservation of family tranquility, even in foster families, was an important public policy consideration. 247 Therefore, foster parents are entitled to assert parental immunity as a defense to any action brought against them by their foster children for torts allegedly committed by them during the period that they stood in loco parentis. 248

c. Cases Not Granting Immunity to Foster Parents

A foster care arrangement typically involves a preexisting contractual arrangement between a state department of social services and the foster parents in which the foster parents are compensated for expenses incurred in caring for the child. 249 The goal of foster care is:

- not to create a new family unit or encourage permanent emotional ties between the child and foster parents. Foster care is designed to provide a stable nurturing environment for the child while the natural parent attempts to remedy the problems which precipi-

244. Id. at 98.
245. See Minn. Stat. Ann. §245.814 (West Supp. 1986) (provides that the commissioner of human services shall purchase and provide insurance to foster parents to cover their liability for injuries or property damage caused or sustained by foster children in their home).
when a parenting relationship exists, even on an impermanent basis, allowing suit against the parent on behalf of the child violates the public policy of [the] state favoring the preservation of family tranquility and affording to foster children an environment which resembles, as much as is possible, a natural family.
However, the court reasoned that if the foster relationship no longer exists between the parties, the reasons behind the grant of the immunity are cancelled.
tated the child's removal or until suitable adoptive parents are found. 250

Several courts have refused to extend the parental immunity doctrine to those standing temporarily *in loco parentis*. At least one court has reasoned that persons standing *in loco parentis* “may not shut [their] eyes to obvious danger threatening the moral or physical well-being of the child committed to [their] custody and plead nonliability when injury, due to [their] failure to exercise that degree of care incumbent upon [them] under the circumstances, results.” 251

For reasons such as these, the Michigan Supreme Court, in *Mayberry v. Pryor*, 252 did not allow foster parents to invoke the defense of parental immunity in an action by a foster child for damages arising from negligent supervision. The *Pryor* court found that foster parents may indeed be held liable for negligent conduct proximately causing injury to a foster child. 253 This Court reasoned that foster parents knowingly and voluntarily assume a contractual duty to provide supervisory care and therefore they should be held responsible for any failure to use reasonable care. 254 Moreover, the *Pryor* court found that when the injury occurred, the foster child was usually visiting or being cared for by these persons with the natural parents’ consent. 255 Finally, the court found that the policy rationales underlying the parental immunity doctrine such as promotion of domestic harmony, preserving family resources, and judicial nonintervention in parenting decisions, did not justify extending the defense to foster parents. 256

The Arizona Court of Appeals, in *Rourk v. State*, 257 held that the parental immunity doctrine does not protect foster parents from suit for the negligent supervision of a foster child if the foster parents are not related to the child by blood, marriage, or adoption, or are not providing long-term foster care in contemplation of

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250. *Id.* at 686-87.
253. *Id.*
254. *Id.* at 687.
255. *Id.* at 685.
256. *Id.* at 689.
adoption. Arizona, like Michigan, abolished the parental immunity doctrine except in situations involving supervision and the provision of ordinary care. In *Rourk*, the foster child sued her foster parents for negligent supervision after she was injured in an automobile accident when she was returning home from a teenage drinking party. The court noted that the majority of cases giving the benefits of the parental immunity doctrine to persons standing in loco parentis to a child involved stepparents, adoptive parents, grandparents, and other persons related by blood, marriage, or adoption. However, the court stated that foster parents are usually not related to the child by blood, marriage, or adoption and they are brought together by a contract between the state and the foster parents. Moreover, the court noted that the parental immunity doctrine promotes family well-being and tranquility. The court stated that extending the doctrine to unrelated foster parents does not further these policy objectives.

The Supreme Court of New York also has held that a foster child may not sue a foster parent for negligent supervision. The court gave four rationales including: (1) the distinctions between the foster family and the natural family; (2) the temporary relationship between foster families and foster children; (3) the objective of the foster family to facilitate the return of a child to

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258. *Id.* (The courts may have a hard time determining a meaning for "contemplation of adoption").

259. *Id.* at 275.

260. *Id.*


262. *Id.* (citing *Mayberry*, 375 N.W.2d at 685-686).

263. *Id.*

264. *Id.*


266. *Id.* at 41-43. The court observed that foster parents are only paid contract service providers and their contractual relationship, rather than emotional ties, dictates the duties the foster parents owe to their foster children.

267. *Id.* Therefore foster parents do not assume all the legal obligations of natural parents. Also the welfare agency retains legal custody of the child although the foster parents provide for the child's daily care.
the child's biological parents;268 and (4) improper supervision as a basis for termination of the foster family relationship.269

d. Other Jurisdictions

Some jurisdictions have held that juvenile caseworkers and shelter care or foster parents are generally immune from liability for acts and omissions relating to the supervision, care, and custody of a minor child.270 Maryland, Minnesota, New Hampshire, and Wisconsin have already embraced this approach by requiring their respective commissioners of human services to supply insurance coverage for any injuries that foster children sustain while in their foster parents' household.271 This approach shields foster parents or other persons standing in loco parentis, from economically damaging lawsuits while providing compensation for the injured foster child.272

In *Pickett v. Washington County*,273 the Oregon Court of Appeals concluded that foster or shelter care parents were immune from liability for negligence arising from failure to adequately supervise a runaway juvenile. The *Pickett* court founded this immunity on the doctrine of public official immunity since foster parents perform services similar to a public officer engaging in a discretionary act.274 Two important considerations included the importance of the government function involved and the extent to which governmental liability might impair the exercise of that function.275 The Oregon Court of Appeals noted that foster or shelter care parents are continually called upon to make delicate and complex judgments involving the weighing of risks, much like a public official.276 The *Pickett* court believed that if these foster parents adopt a policy too restrictive toward a particular child, "the child's development might be stifled whereas liberality might

268. Id. at 43. The natural parent retains a paramount right to raise the child.
269. Id. at 44. It would be inconsistent to suspend a foster parent's license for negligent supervision and then deny a foster child a cause of action for injuries sustained as a result of that negligence.
271. Id. at 230.
272. Id.
274. Id.
275. Id. at 1074.
276. Id.
endanger the safety of the child and others." The Pickett court stated that these decisions focusing on discretion "should not be subject to hindsight scrutiny by courts and juries." The court did not reach the question of parental immunity for persons standing in loco parentis because the court found that the defendants were immune from discretionary acts.

C. Analysis

1. Liner v. Brown: The Court's Decision

Liner v. Brown was the first North Carolina case interpreting the parental immunity doctrine as it applies to foster parents and their foster children. The majority opinion of the North Carolina Court of Appeals in Liner concluded that those persons standing in loco parentis having temporary control and custody of a minor are not protected by the parental immunity doctrine because the extension would not further the policies underlying the doctrine. However, as Judge John stated in his concurrence, the majority failed to recognize that the consequential rights and duties of foster parents and natural parents are substantially the same despite the temporary nature of the in loco parentis status of foster parents. Often, emotional ties between a foster parent and a foster child are quite close, and "undoubtedly in some [cases] as close as those existing in biological families." In addition, the Liner court failed to recognize that the defendants had a preexisting familial bond with the child, as they were the child's aunt and uncle. Thus, the Liner court essentially ignored the public policy concerns of family harmony in this situation.

The Liner court also neglected to consider the possible detrimental effects of imposing liability on foster parents. Failing to protect foster parents from negligence suits brought by their foster children may discourage many individuals from becoming fos-

277. Id.
278. Id.
279. Id. at 1075 (C.f. Headrick v. Parker, No. 224 (Tenn., Feb. 24, 1984) (LEXIS, State library, Tenn. file) where the Tennessee Supreme Court held in this unpublished opinion that the General Assembly did not purport to grant statutory immunity to foster parents prior to its statutory enactments in 1984 and 1985. The public policy of the state at the time of the accident was reflected by the statutes then in effect.).
281. Id.
282. Id. at 52, 449 S.E.2d at 909 (John, J., concurring).
Indeed, the Liner decision may have the potential to limit the number of people willing to become foster parents for fear of potential liability. Moreover, the Liner court failed to create any alternative protections for foster parents sued by their foster children for negligent acts.

2. The Future of Parental Immunity

Recently, the judicial trend has been to narrow the extent of parental immunity. As the parental relationship with the child moves further away from that of natural parents and their child, courts tend to lessen degrees of parental immunity. In general, foster parents have failed to qualify for the parental immunity doctrine because courts believe foster parents do not possess the traditional attributes of parental responsibility, and also because foster care is contractual and temporary in nature. North Carolina followed this judicial trend and disallowed parental immunity for foster parents in 1994.

This judicial trend ignores the increasingly familial nature of foster care. Foster parents often provide food, shelter, and discipline for foster children in their homes in much the same manner as a natural parent does. In addition, foster parents attempt to meet the emotional needs of the children. Therefore, some type of liability protection for foster parents should be provided which also safeguards the interests of the children entrusted to their care.

3. Alternatives Providing Protection for Foster Parents in North Carolina

North Carolina could adopt Oregon’s approach which allows foster parents to be considered state employees who enjoy immunity from liability for any acts concerning the supervision and care of their foster children. Therefore, foster parents in North Carolina could be afforded some type of protection from suits by their foster children. Moreover, parental immunity of foster parents

284. Nadile, supra note 270, at 229.
286. Id.
287. Id.
290. Id.
should be limited to negligent acts, rather than intentional acts, occurring while the foster child is in their custody.

Some courts have permitted foster children to sue their foster parents without the issue of parental immunity. A fair plan provides some procedural protection to all foster families, while giving additional protections to those foster families that have been together longer because a greater presumption of a familial bond between foster parent and foster child exists.

In addition, North Carolina could adopt the Goller approach. The Goller approach determines whether the injury to the child arose out of parental authority or discipline over the minor child. The Wisconsin Supreme Court, in Goller v. White, created the first partial abolishment of parental immunity. Goller involved a suit by a child against his father for negligently permitting the boy to ride on the drawbar of a tractor, thus causing the child's injuries. In this case, the trial court determined that the foster parent was standing in loco parentis to the foster child, thus entitling him to the protection of the parental immunity doctrine. The court stated that parental immunity would only apply when: (1) the allegedly negligent act involves an exercise of parental authority over the child; or (2) the allegedly negligent act involves an exercise of ordinary parental discretion with regard to food, clothing, housing, medical and dental services, etc. Thus, the Goller approach focuses upon whether the injury arose out of parental authority or discipline over the minor child. The problem with the Goller approach is determining which parental activities involve the exercise of authority or discretion over the child. Furthermore, the Goller

292. Mayberry, 374 N.W.2d at 686. See, e.g., Vonner v. Department of Public Welfare, 273 So.2d 252 (La. 1973) (holding a foster father liable on a breach of contract theory for failing to provide proper board and care rather than for actual participation in the beatings foster mother inflicted upon the foster child).

293. See Wackerman, supra note 237, at 507.


295. Id.

296. Id.

297. Id.

298. Id.

299. Id. at 196.

300. Id. at 198.

301. Id.

302. Wisconsin courts have subsequently interpreted the parental control and authority exception to include those actions that are undertaken to discipline a child. See, e.g., Howes v. Hansen, 201 N.W.2d 825 (Wis. 1972); Thoreson v.
approach does not allow consideration of the factors which distinguish a foster family from a natural family, including permanency, assumption of different levels of rights and obligations toward the child, and the legal custody of the child. Finally, the Goller approach fails to consider the necessity of the child welfare services that foster parents provide.

The California Supreme Court established yet another alternative approach to the parental immunity doctrine in Gibson v. Gibson.303 The Gibson court completely abrogated the parental immunity doctrine and established a reasonable parent standard.304 In Gibson, a child was injured by another automobile when he got out of the family car at his father's request to adjust the wheels of a jeep they were towing.305 The court decided that the father's conduct should be judged by what an ordinary reasonable prudent person would have done under the circumstances in light of the parental role.306 In effect, this standard holds a parent to a reasonableness standard regardless of the nature of his activity.307 The main criticism against this approach is that the court is not in a position to judge the proper degree of discipline and supervision of a particular child.308

The Restatement (Second) of Torts subsequently adopted the reasonably prudent parent standard from Gibson.309 The Restatement also gives examples of actions that give rise to liability.310 The Restatement approach recognizes that certain acts and omissions between a parent and a child should not be tortious even when an injury occurs.311 The Restatement view provides guidelines for parental activities that should not include liability.312 The Restatement notes that family life involves intended physical

Milwaukee & Suburban Transport Co., 201 N.W.2d 745 (Wis. 1972). Wisconsin courts have also interpreted the parental discretion exception to include the parents' right to raise and educate their children in accordance with their own beliefs and values. See, e.g., Lemmon v. Servais, 158 N.W.2d 341 (Wis. 1968).

304. Id. at 653; see also Anderson v. Stream, 295 N.W.2d 595 (Minn. 1980) (adopted the reasonable parent standard).
305. Id. at 648.
306. Id. at 654.
307. Id.
310. Id.
311. Id.
312. Id.
contact that would be actionable between strangers but may be commonplace and expected within the family. This approach is sound because foster parents would be treated just like natural parents since they take on the same parental responsibilities. However, this approach places the court in a position of deciding what is reasonable parental behavior which would require a case-by-case analysis of facts presented.

Another approach suggested by at least one case applies the Goller rule (parental authority and discretion) and the Gibson test (ordinarily reasonable and prudent parent) only to the extent of liability insurance coverage. Courts have stated that family harmony would not be disrupted and family funds would not be depleted since claims are paid by third parties such as insurance companies. However, a problem with this system is that the negligence claims are often not limited by the coverage amount of the policy.

If North Carolina does not extend parental immunity to foster parents, the best alternative would be for North Carolina to provide state-funded liability insurance for foster parents. However, this system would have to provide a way to limit claims to the coverage amount provided by the insurance. This approach seems to be the best solution for North Carolina because foster parents are shielded from unintentional acts and foster children are compensated for their injuries.

313. Id. at cmt. k.
316. Nadile, supra note 270 at 230. This state-funded insurance could potentially become too expensive. Therefore, the extent of liability coverage would have to be determined by the North Carolina legislature yearly. The decision on the total dollar amount of coverage should include a consideration of prior foster parent negligence cases in North Carolina. To decrease costs, North Carolina should also allocate a small portion of the money foster parents are paid to care for these foster children towards this protective insurance. This additional protection to foster parents will more than compensate for a small reduction in their pay. This small portion taken from foster parents' paychecks should also be determined yearly by the legislature based on the economy. One way to get this money is through taxes. Although people are often weary to pay additional taxes, protection of our children is extremely important. This money could be allotted directly to DSS to be applied to unintentional acts of negligent supervision by foster parents standing in loco parentis. Another alternative is to have part of the money paid to foster parents to be applied directly to this protective insurance.
Maryland, Minnesota, New Hampshire, and Wisconsin have already embraced this state-funded liability approach by requiring the commissioner of human services to supply insurance coverage for any injuries that foster children sustain while in their foster parents' household. 317 This approach shields foster parents or those standing in loco parentis from economically damaging lawsuits while providing compensation for the injured foster child. 318

D. Conclusion

North Carolina needs to respond to some of the more modern family situations, including foster families, by creating new standards for determining those foster parents and persons in loco parentis that are protected by the parental immunity doctrine from suits brought by a minor child in their custody. North Carolina courts need to recognize that foster parents fill what is usually considered a parental role and in many cases, the foster parents have developed strong relationships with the child. Emotional ties between foster parents and foster children often resemble those existing in biological families. Failing to protect foster parents from negligence suits brought by their foster children may discourage many individuals from becoming foster parents. Therefore, if North Carolina does not extend parental immunity to foster parents, the courts or the legislature should provide other alternatives to allow protection of the foster parents for their negligent conduct.

The best alternative for North Carolina is to have the legislature provide state-funded insurance (a type of state immunity) for foster parents. This approach would allow foster parents to be shielded from unintentional acts and foster children will be compensated for their injuries. As noted by Justice Carley of the Georgia Court of Appeals, "few, if any, citizens will elect to become foster parents if the effect of that election is to invite a potential plaintiff to live in one's home." 319

317. Id.
318. Id.
319. Newsome v. Department of Human Resources, 405 S.E.2d at 67 (Carley, J., concurring). Carley noted that an unemancipated foster or natural child is not barred from suing his foster or natural parent for a willful or malicious tort.
V. CONCLUSION

In conclusion, the North Carolina Court of Appeals caused concern on both sides of the parental immunity debate in Liner v. Brown when it refused to extend the doctrine to foster parents standing in loco parentis. For the doctrine's opponents, the ruling served merely as a "piecemeal abrogation" of the type that was abhored by the Skinner court.320 And, for the doctrine's proponents, the ruling was an illogical and unfair restriction of the doctrine's protections to foster parents.

The time has come for North Carolina to move forward in the evolution of the doctrine and either completely abrogate the doctrine in favor of a more flexible approach, or allow all those who stand in loco parentis, including foster parents, to receive its benefit.

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320. See supra notes 78-87 and accompanying text.