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STATUTORY VICARIOUS PARENTAL LIABILITY: REVIEW AND REFORM

The difficulties of holding parents liable for the torts of their minor children under the common law led to the passage of state parental responsibility statutes. These statutes impose a limited monetary liability on parents for the torts of their children. This Note examines the rationale, evolution, and purpose of parental responsibility statutes. The author also discusses the varying judicial outlooks on the various statutes. In an effort to obviate interpretative difficulties, the Note concludes by presenting a Model Parental Responsibility act, which will provide for a fairer and more coherent system.

INTRODUCTION

The dominant goal pervading the entire body of tort law is compensation of the innocent victim.¹ When the tortfeasor is an impecunious minor child, and the injured victim sues the child's parents, four basic common law recovery theories are available: agency, ratification, parental negligence, and knowledge of tortious activity.² Each, however, presents unique obstacles to the achievement of the compensatory aim. A plaintiff using an agency theory,³ for example, must establish the existence of an agency relationship—a difficult task in the parent-child setting. The imposition of parental liability via the parent's post-act ratification⁴ of the child's act can be justified only where the parent's pre-act subjective view is that vicarious liability exists, or where a

1. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 6 (4th ed. 1971).

2. Under the common law parents cannot be held liable for their minor child's torts solely on the basis of the parent-child relationship. *General Ins. Co. of Am. v. Faulkner*, 259 N.C. 317, 130 S.E.2d 645 (1963); *Aetna Ins. Co. v. Richardelle*, 528 S.W.2d 280 (Tex. Civ. App. 1975). This Note limits its analysis to common law jurisdictions. In civil law jurisdictions liability can be based solely on the parent-child relationship. *Deshotel v. Travelers Indem. Co.*, 231 So. 2d 448 (La. Ct. App. 1970), *aff'd*, 257 La. 567, 243 So. 2d 259 (1971). For a general discussion of the four common law bases for parental liability: agency, ratification, parental negligence, and knowledge of tortious tendencies, see Kent, *Parental Liability for the Torts of Children*, 50 CONN. B.J. 452, 455-64 (1976).

3. See, e.g., *Trahan v. Smith*, 239 S.W. 345 (Tex. Civ. App. 1922) (defendant's son attacked and killed plaintiff's cow with a dog so as to impose liability on defendant based on agency).

4. See, e.g., *Howell v. Norton*, 134 Miss. 616, 99 So. 440 (1924) (defendant liable where evidence showed he ratified his son's shooting of plaintiff's dog).

master-servant relationship actually exists.⁵ In a simple negligence action against the parents,⁶ the plaintiff's task is hindered by the general rule that a parental duty to control a child's behavior does not arise unless the parent knows or is recklessly unaware of the child's propensity to commit tortious acts.⁷ Finally, an action may arise where the parent entrusts the child with a dangerous instrumentality.⁸ The intrinsic difficulties with this approach include the finding that many instrumentalities are not, per se, dangerous.⁹ Furthermore, even where a dangerous instrumentality is involved, a strict showing of the child's incompetence is often required.¹⁰

The problems inherent in establishing common law liability against parents of minor tortfeasors led to the passage of many state parental responsibility tort statutes.¹¹ This Note examines the imposition of vicarious liability on parents through these parental responsibility statutes by exploring the economic rationales supporting such statutes.¹² Concluding that parental responsibility tort statutes generally are supported by the theories of least cost prevention and shock reduction loss spreading,¹³ the Note then analyzes the evolution and nature of parental responsibility

5. See *Jones v. Mutual Creamery Co.*, 81 Utah 223, 230, 17 P.2d 256, 259 (1932). Ratification based on the mere acceptance of benefits by the parent, which in the parent-child tort context presumably consists of the parent's pleasure in seeing the tort victim suffer, is often not sufficient to impose liability. See, e.g., *id.* at 233, 17 P.2d at 260.

6. See, e.g., *Mitchell v. Wiltfong*, 4 Kan. App. 2d 231, 604 P.2d 79 (1979) (complaint alleging plaintiff's child was beaten by defendant's child states valid claim, since parents may be held liable for tortious acts caused by their own negligence in failing to exercise reasonable care to control their child). As with any negligence claim, the usual four elements of the cause of action—duty, breach of the duty, proximate cause, and injury—must be established. See W. PROSSER, *supra* note 1, at 143-44.

7. See *Caldwell v. Zaher*, 344 Mass. 590, 592, 183 N.E.2d 706, 707 (1962) (father who knew of son's tendency to assault and molest young children liable for son's tortious actions).

8. See, e.g., *Jarboe v. Edwards*, 26 Conn. Supp. 350, 223 A.2d 402 (Super. Ct. 1966) (jury allowed to determine whether matches constitute a dangerous instrumentality). The inherently dangerous instrumentality doctrine, of course, has no application in cases where the child committed the tort solely through the use of bodily force.

9. See, e.g., *Hopkins v. Droppers*, 184 Wis. 400, 198 N.W. 738 (1924) (automobile held not to be inherently dangerous per se). In cases where noninherently dangerous instrumentalities are involved, courts must conduct a balancing analysis, Kent, *supra* note 2, at 461, which further decreases the predictability of the outcome of plaintiff's action.

10. See Comment, *Liability of Negligent Parents for the Torts of Their Minor Children*, 19 ALA. L. REV. 123, 127 (1966).

11. Kent, *supra* note 2, at 465.

12. See *infra* notes 18-37 and accompanying text.

13. See *infra* notes 37-38 and accompanying text.

statutes.¹⁴ An investigation of the purposes underlying the statutes and judicial interpretations of various statutory requirements is then presented,¹⁵ followed by an examination of insurance relief available under the acts.¹⁶ The Note concludes with the presentation and analysis of a Model Parental Responsibility Act¹⁷ offered in an attempt to improve current statutes.

I. ECONOMIC RATIONALES FOR PARENTAL RESPONSIBILITY STATUTES

Vicarious liability is justified by several economic rationales.¹⁸ Two of these rationales are particularly relevant to the imposition of vicarious liability through parental responsibility tort statutes: least cost prevention and shock reduction loss spreading.

A. *Least Cost Prevention*

The typical vicarious liability scenario consists of three actors: the master, the servant, and the injured third party. The aim of least cost prevention is to determine on which party to impose liability so as to minimize overall costs.¹⁹ That party, termed the "least cost preventor," is usually the master.²⁰ In the typical enterprise setting, the master usually knows more about the business and its attendant risks than do either the servant or the third party. As among all three parties, therefore, the master usually can best take precautionary measures against the servant's tortious activities. Similarly, as between the parent, child, and injured third party, the parent usually can best take precautions against the child's tortious behavior.²¹ The parent's superior knowledge of the child and the child's propensities justifies imposition of liability on the parent, just as the master's superior knowledge justi-

14. See *infra* notes 40-93 and accompanying text.

15. See *infra* notes 94-177 and accompanying text.

16. See *infra* notes 172-206 and accompanying text.

17. See *infra* notes 215-25 and accompanying text.

18. See *Becker v. Interstate Properties*, 569 F.2d 1203 (3d Cir. 1977); *Hinman v. Westinghouse Elec. Co.*, 2 Cal. 3d 956, 959-600, 471 P.2d 988, 990, 88 Cal. Rptr. 188, 190 (1970); *Strait v. Hale Constr. Co.*, 26 Cal. App. 3d 941, 948-49, 103 Cal. Rptr. 487, 492-93 (1972); Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Douglas, *Vicarious Liability and Administration of Risk*, 38 YALE L.J. 584, 592-94 (1929); James, *Vicarious Liability*, 28 TUL. L. REV. 161, 163 (1954).

19. James, *supra* note 18, at 163.

20. W. PROSSER, *supra* note 1, at 459; James, *supra* note 18, at 163; Seavey, *Speculations as to "Respondeat Superior,"* in HARVARD LEGAL ESSAYS 433, 448 (R. Pound ed. 1934).

21. See *Becker v. Interstate Properties*, 569 F.2d 1203, 1211 (3d Cir. 1977).

fies imposition of liability in the enterprise setting. Furthermore, children are often too immature to realize the consequences of their actions. Failing to perceive a risk in their activity, children are not apt to take substantial precautionary actions.²² Innocent victims who may never have had previous contact with the child are also in a poor position to plan for the child's potential tortious acts, because they are ignorant of the child's propensities.

Least cost prevention theory also "prods" the least cost preventor into taking preventive action.²³ The imposition of statutory vicarious liability is justified similarly as an inducement to parents to modify their own behavior by exercising more control over their children. To provide an effective prod to stimulate the desired behavior, the least cost prevention rationale assumes the master can exercise a right of control over the servant.²⁴ Without an exercisable right of control, precautionary measures will not be encouraged because absent such a right, the master cannot be certain that precautionary measures will not be vitiated by the servant's deviations from the assigned duties.

The assumption of an exercisable right of control presents the strongest challenge to the efficacy of the least cost prevention rationale in the parent-child context. The goal of the rationale is to determine which party is the least cost preventor.²⁵ The parent certainly has a stronger right of control over the child than does the tort victim. Considering the child's immaturity and failure to perceive risk in tortious activity, the least cost preventor in the transaction is the parent. Because vicarious parental liability prods parents into taking precautionary actions to control their child's behavior, parental responsibility statutes are justified by the basic economic rationale of least cost prevention.

B. *Shock Reduction Loss Spreading*²⁶

The objective of the shock reduction loss spreading rationale is

22. See Calabresi, *supra* note 18, at 543.

23. 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 26.5 (1956); see W. PROSSER, *supra* note 1, at 459.

24. See Douglas, *supra* note 18, at 588.

25. James, *supra* note 18, at 163.

26. The term "shock reduction loss spreading" may have originated in the now classic article by Professor Young B. Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444 (1923), in which Smith implied that "the justification for imposing liability upon the master is the desire to spread and distribute 'the shock of the accident . . .'" *Id.* at 460. Another commentator has described the shock reduction loss spreading rationale for respondeat superior liability as "focus[ing] on the ability of principals, especially in a commercial

compassion.²⁷ The loss resulting from tort liability does not fall solely on one of the three parties, but is distributed among individuals who were not involved in the tortious incident.²⁸ In the business setting, the master can spread the loss by allocating it between multiple owners, obtaining insurance, increasing the price of its product,²⁹ or obtaining lower factor input costs.³⁰ The reasoning is that the servant cannot perform these loss spreading functions—or at least not as well as can the master.³¹ Liability is thus imposed on the master as the instigator of the loss producing activity.³²

Although tort liability may be imposed on a minor child,³³ shock reduction loss spreading reallocates the loss resulting from a child's tort from the victim to the child's parents, often spreading the costs between *two* parents instead of imposing costs on *one* child.³⁴ Furthermore, while parents can obtain insurance³⁵ against their minor child's torts, children usually can neither understand, nor procure insurance.³⁶ While loss spreading could be achieved by holding the child responsible, it will be performed more efficiently by imposing parental responsibility. The tort victim benefits, in particular, from the shock reduction loss spreading justification for parental responsibility statutes; since the child-tortfeasor will usually be impecunious, the loss spreading accomplished by parental responsibility statutes increases the likelihood of adequate compensation for the victim.

Parental responsibility statutes, justified by the rationale of

setting, to distribute the risk of loss arising out of the torts of their agents by either increasing the sale price of the goods or services that they sell, or by obtaining insurance." Wyse, *A Framework of Analysis for the Law of Agency*, 40 MONT. L. REV. 30, 37 (1979).

27. See Calabresi, *supra* note 18, at 588.

28. See *infra* notes 29 & 37 and accompanying text.

29. Loss spreading via increased product prices is termed "secondary" loss spreading. Calabresi, *supra* note 18, at 518-19.

30. *Id.* at 543-44.

31. *Id.* at 543.

32. The instigation of the activity is crucial for it furnishes the awareness that shock reduction loss spreading should begin. Instigation provides: 1) awareness that the conduct has begun; 2) awareness of the risks involved; and 3) awareness of the sort of losses that might be occasioned.

33. See W. PROSSER, *supra* note 1, at 996-1000.

34. See *Becker v. Interstate Properties*, 569 F.2d 1203, 1209-10 (3d Cir. 1977).

35. Simple homeowner's policies often provide protection. See *infra* notes 172-85 and accompanying text. But see *infra* notes 186-92 and accompanying text (homeowner's policy held not to provide coverage for statutorily imposed parental liability).

36. Cf. Calabresi, *supra* note 18, at 543 (master better able to perceive risks and obtain insurance at lower rates).

shock reduction loss spreading, prevent the imposition of undue economic burdens on any individual party by distributing the losses resulting from the child's tort. The statutes find further support in the least cost prevention doctrine.³⁷ This justification of parental liability by basic economic rationales for vicarious liability is a factor that pervades the entire discussion of parental responsibility statutes.³⁸

37. See *supra* notes 19-24 and accompanying text.

38. The respondeat superior rationales are rigorously tested when the master is held liable for the servant's *knowingly harmful* behavior. This inquiry is particularly relevant to the discussion of parental responsibility tort statutes, for these statutes typically hold parents liable for only the "willful" or "malicious" torts of their children. See *infra* notes 46-51 and accompanying text.

Under traditional respondeat superior analysis, a master is generally liable only for the torts of servants committed within the scope of their employment. RESTATEMENT (SECOND) OF AGENCY § 219(1) (1957). Knowingly harmful behavior is traditionally excluded from the scope of employment as conduct which is "too little actuated by a purpose to serve the master." *Id.* § 228(2). Courts applying this reasoning were reluctant to hold the master liable because of a lack of assent to the knowingly harmful acts. Comment, *Respondeat Superior—Intentional Torts as Being Within the Scope of Employment*, 40 MARQ. L. REV. 337, 338 (1956). Under this standard, a master would not be held liable for a servant's knowingly harmful behavior.

The modern trend seems to include the servant's knowingly harmful behavior within the scope of employment in certain instances and, hence to broaden the category of acts for which a master may be held vicariously liable. See Brill, *The Liability of An Employer For the Wilful Torts of His Servants*, 45 CHI.-KENT L. REV. 1, 4 (1968). Illustrative of this trend are two cases from the Court of Appeals for the Second Circuit. In *Nelson v. American-West African Line, Inc.*, 86 F.2d 730 (2d Cir.), *cert. denied*, 300 U.S. 665 (1936), Judge Learned Hand made a pioneering attempt to bring knowingly harmful behavior within the scope of employment by applying a mixture-of-motives test. Judge Hand held that the alcohol induced act of a ship's boatswain in awakening a plaintiff-sailor by a crack over the head with a wooden bench and a cry to "turn to," although knowingly harmful, may have been within the scope of employment if the behavior was coupled with the boatswain-servant's intent to serve the defendant-master. *Id.* at 732. In another drunken sailor case, *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167 (2d Cir. 1968), Judge Henry Friendly rejected Hand's mixture-of-motives test, *id.* at 171, and substituted the standard that a servant's knowingly harmful behavior may be imputed to the master if its risks are characteristically attendant upon the operation of the master's business through the servant. *Id.* The plaintiff in *Bushey* thus recovered for damage to its drydock caused by an intoxicated Coast Guard seaman's opening of a floodgate. *Id.* at 173.

The inclusion of knowingly harmful behavior challenges, but does not overwhelm, the ability of the rationales to justify respondeat superior liability in the parent-child framework. In terms of least cost prevention, while parents may not be able to pinpoint the exact type of knowingly harmful behavior in which their children will engage, they probably can be fairly certain that such activity inevitably will occur despite their best efforts to the contrary; precautionary actions may still be taken. For an extended discussion on why least cost prevention may actually be more justifiable by including liability for intentional activity, which may or may not be knowingly harmful—as opposed to negligent behavior—see *infra* text accompanying note 49. Similarly, while pretort shock reduction loss spreading may be more difficult for parents to engage in, the fact that the child's tortious behavior was knowingly harmful will not affect the ability of the parents to fractionalize

II. THE EVOLUTION AND NATURE OF PARENTAL RESPONSIBILITY STATUTES

The inherent difficulties with the four common law bases for parental liability³⁹ led to the passage of state parental responsibility statutes.⁴⁰ Every state except New Hampshire has enacted such legislation.⁴¹ Although most states adopted parental respon-

the accompanying losses via traditional loss spreading techniques. *See generally* text accompanying *supra* notes 34-36 (general loss spreading techniques). Furthermore, as one commentator notes:

[t]he trend . . . toward expansion of the "scope of employment" . . . validly reflects the underlying justification for *respondeat superior*—that the employer [master] is the one best able to absorb the injured person's losses as a risk of doing business and to pass them on to society as a whole.

Brill, *supra*, at 34. Even with the inclusion of knowingly harmful behavior within the liability producing scope of employment of the servant, respondeat superior liability in general, and statutory vicarious parental liability in particular, are justified by the basic economic rationales of least cost prevention and shock reduction loss spreading.

39. *See supra* notes 3-10 and accompanying text.

40. Kent, *supra* note 2, at 465.

41. The 49 state parental responsibility statute are:

STATUTE	DATE OF ENACT- MENT	RECOVERY LIMIT	PERSONAL INJURY COVERED
ALA. CODE § 6-5-380 (1975)	1965	\$ 500	No
ALASKA STAT. § 34.50.020 (1975)	1957	2000	No
ARIZ. REV. STAT. ANN. § 12-661 (1982)	1956	2500	Yes
ARK. STAT. ANN. § 50-109 (Supp. 1979)	1959	2000	No
CAL. CIV. CODE § 1714.1 (West Supp. 1980)	1955	5000	Yes
COLO. REV. STAT. ANN. § 13-21-107 (Supp. 1978)	1959	1500	No
CONN. GEN. STAT. ANN. § 52-572 (West Supp. 1981)	1955	3000	Yes
DEL. CODE ANN. tit. 10, § 3922 (Supp. 1980)	1958	5000	No
FLA. STAT. ANN. § 741.24 (West Supp. 1982)	1967	2500	No
GA. CODE ANN. § 105-113 (Supp. 1981)	1956	500	No
HAWAII REV. STAT. § 577-3 (1976)	1858	No limit	Yes
IDAHO CODE ANN. § 6-210 (1979)	1957	1500	No
Parental Responsibility Law, ILL. ANN. STAT. ch. 70 ¶¶ 51-57 (Smith-Hurd Supp. 1981)	1969	1000	Yes
IND. CODE ANN. § 34-4-31-1 (Burns Supp. 1980)	1957	750	No
IOWA CODE ANN. § 613.16 (West Supp. 1981) ...	1969	1000	Yes
KAN. STAT. ANN. § 38-120 (Supp. 1979)	1959	1000	Yes
KY. REV. STAT. ANN. § 405.025 (Baldwin 1979) ..	1968	2500	No
LA. CIV. CODE ANN. art. 2318 (West 1979)	1804	No limit	Yes
ME. REV. STAT. ANN. tit. 19, § 217 (1981)	1959	800	Yes
MD. CTS. & JUD. PROC. CODE ANN. § 3-829 (Supp. 1981)	1959	5000	Yes
MASS. GEN. LAWS ANN. ch. 231, § 85G (West Supp. 1981)	1969	1000	Yes
MICH. COMP. LAWS ANN. § 600.2913 (Supp. 1981) ..	1953	2500	Yes
MINN. STAT. ANN. § 540.18 (West Supp. 1982) ..	1967	500	Yes
MISS. CODE ANN. § 93-13-2 (Supp. 1981)	1978	2000	No
MO. ANN. STAT. § 537.045 (Vernon Supp. 1981) .	1965	2000	Yes
MONT. REV. CODE ANN. §§ 40-6-237 to 40-6-238 (1981)	1957	2500	No

sibility statutes within the last three decades,⁴² Hawaii⁴³ and Louisiana⁴⁴ have had such statutes for over 100 years.⁴⁵

A. Basic Statutory Elements

1. Liability Limitation for Intentional Torts

Most parental responsibility statutes impose liability only for a child's *intentional* torts.⁴⁶ The typical statutory language em-

NEB. REV. STAT. § 43-801 (1978)	1951	1000*	Yes
NEV. REV. STAT. § 41.470 (1979)	1957	10,000	Yes
N.J. REV. STAT. §§ 2A:53A-14 to -17 (West Supp. 1981)	1965	No limit	No
N.M. STAT. ANN. § 32-1-46 (1981)	1957	2500	No
N.Y. GEN. OBLIG. LAW § 3-112 (McKinney Supp. 1981)	1970	1500	No
N.C. GEN. STAT. § 1-538.1 (1969)	1961	500	No
N.D. CENT. CODE § 32-03-39 (1976)	1957	1000	No
OHIO REV. CODE ANN. §§ 3109.09, 3109.10 (Page 1980)	1967	3000** 2000***	Yes
OKLA. STAT. ANN. tit. 23, § 10 (West Supp. 1981)	1957	1500	Yes
OR. REV. STAT. § 30.765 (1979)	1959	5000	Yes
PA. STAT. ANN. tit. 11, §§ 2001-2005 (Purdon Supp. 1981)	1967	300**** 1000*****	Yes Yes
R.I. GEN. LAWS ANN. § 9-1-3 (Supp. 1981)	1956	1500	Yes
S.C. CODE § 20-7-340 (Supp. 1982)	1965	1000	No
S.D. CODIFIED LAWS ANN. § 25-5-15 (Supp. 1981)	1957	750	Yes
TENN. CODE ANN. §§ 37-1001 to -1003 (Supp. 1981)	1957	10,000	No
TEX. FAM. CODE ANN. tit. 2, §§ 33.01-.03 (Vernon Supp. 1981)	1957	15,000	No
UTAH CODE ANN. § 78-11-20 (1977)	1977	1000	No
VT. STAT. ANN. tit. 15, § 901 (1974)	1959	250	Yes
VA. CODE §§ 8.01-43 to -44 (1977)	1960	200	No
WASH. REV. CODE ANN. § 4.24.190 (Supp. 1981) ..	1961	3000	No
W. VA. CODE ANN. § 55-7A-2 (Supp. 1981)	1957	2500	Yes
WIS. STAT. ANN. § 895.035 (West Supp. 1981) ...	1957	1000	Yes
WYO. STAT. ANN. § 14-2-203 (1978)	1965	300	No

* Recovery only limited for personal injury.

** Property damage recovery limit.

*** Personal injury recovery limit.

**** Recovery limit in single-plaintiff cases.

***** Recovery limit in multiple-plaintiff cases.

42. Note, *The Iowa Parental Responsibility Act*, 55 IOWA L. REV. 1037, 1037 n.3 (1970).

43. HAWAII REV. STAT. § 577-3 (1976).

44. LA. CIV. CODE ANN. art. 2318 (West 1979).

45. See *supra* note 42.

46. But see DEL. CODE ANN. tit. 10, § 3922 (Supp. 1980) (intentional or reckless torts); HAWAII REV. STAT. § 577-3 (1976) ("tortious acts"); IOWA CODE ANN. § 613-16 (West Supp. 1981) ("unlawful acts"); LA. CIV. CODE ANN. art. 2318 (West 1979) ("damage" inflicted by minor); MD. CTS. & JUD. PROC. CODE ANN. § 3-829 (Supp. 1981) ("delinquent act"); OKLA. STAT. ANN. tit. 23, § 10 (West Supp. 1981) ("criminal or delinquent act");

played holds parents liable for their child's "malicious" and/or "willful" tortious acts.⁴⁷ That limitation is supported by the least cost prevention rationale for vicarious liability.

Arguably, least cost preventing parents modify their behavior to guard against only those tortious acts of their children that are reasonably foreseeable—intentional acts. Negligent acts are less predictable than intentional acts and thus the justifications underlying the least cost prevention theory are not so pertinent.⁴⁸ The more negligent and unpredictable the child's behavior, the less effective the parents' rights of control and ability to take precautionary measures. Furthermore, since negligent behavior is by definition unpredictable, imposing vicarious parental liability for such acts would create an onerous burden a parent could not reasonably be expected to discharge. In a least cost prevention framework, limiting the parents' statutorily imposed responsibility to the child's intentional torts confines the liability producing behavior of the child within the parents' exercisable right of control. This constraint prods parents into taking adequate precautionary measures while limiting liability to those areas where third parties can reasonably expect the effective exercise of parental control.

Limiting liability to intentional torts is less easily justified under the shock reduction loss spreading theory. The compassionate aim of that theory would favor parental liability for the child's negligent torts, as well. The prime loss spreaders in the transaction—the parents—can remove the costs of the tortious negligence from any one of the individual actors by engaging in loss spreading. A child's negligent acts, however, seem to engender more compassion for the child than would the child's intentional acts. (This observation is tempered, perhaps, by the frequent inability of children to perceive the risks of even their intentional acts.) In addition, limiting liability to intentional torts does not aid the parent's ability to spread the loss through insurance. Most standard homeowners' insurance policies will cover the parent for *any* liability incurred without differentiating be-

TEX. FAM. CODE ANN. tit. 2, § 33.01 (Vernon Supp. 1981) (parents also liable for minor's negligent torts if attributable to negligent parental control).

47. *E.g.*, KAN. STAT. ANN. § 38-120 (Supp. 1979); N.M. STAT. ANN. § 32-1-46 (1981); W. VA. CODE § 55-7A-2 (Supp. 1981).

48. The parent-child context illustrates this fact by imposing a duty on parents to control their minor child if they are aware of the child's *propensity* to commit tortious acts. *See, e.g.*, *Caldwell v. Zaher*, 344 Mass. 590, 183 N.E.2d 706 (1962).

tween liability for the child's negligent or intentional acts.⁴⁹ Therefore, the shock reduction loss spreading rationale does not fully support the limitation of parental liability to the child's intentional torts.

The limitation of liability to intentional torts recognizes that parents cannot fully control their child's actions.⁵⁰ Least cost prevention analysis supports the limitation. Shock reduction loss spreading, though, does not fully justify the intentional torts limitation. That limitation is a valid concession to the fact that parents may also be found liable under the common law for their child's negligent acts.⁵¹

2. *Types of Intentional Tortious Activity Embraced*

All parental reponsibility statutes hold parents liable for property damage intentionally caused by their children; many also impose liability for personal injury inflicted by the child.⁵² Again, the basic economic rationales justify these provisions. The statutes' inclusion of liability for only relatively common torts like property damage or personal injury greatly facilitates least cost prevention by parents.⁵³ Parents can take precautions more easily for such tortious activity than for more unusual torts like defamation or misrepresentation. Shock reduction loss spreading also supports the limitation of liability to fairly common torts. The primary vehicle by which parents spread costs is insurance.⁵⁴ Property damage and personal injury are common types of child-inflicted torts, and so parental liability insurance coverage for such acts presumably would be easy to procure. Thus, further

49. See generally *infra* notes 161-73 and accompanying text (rights of insured parents discussed).

50. Cf. Kent, *supra* note 2, at 453 (limits on amount of recovery recognize parental inability to fully control their minor children).

51. One commonly used method for holding a parent liable for the minor child's negligence is the "family purpose doctrine." Comment, *Parental Liability for a Child's Tortious Acts*, 81 DICK. L. REV. 755, 760 (1977). The child's negligence is imputed to the parent, who has made an automobile available for family use. W. PROSSER, *supra* note 1, at 483-84; see also *Finnocchio v. Lunsford*, 129 Ga. App. 694, 201 S.E.2d 1 (1973) (parent held liable under family purpose doctrine).

52. Twenty-three statutes allow recovery for property damage only; 26 permit actions for both property damage and personal injury. But see HAWAII REV. STAT. § 577-3 (1976) ("tortious acts"); LA. CIV. CODE ANN. art. 2318 (West 1979) ("damage occasioned by" the minor); OR. REV. STAT. § 30.765 (1979) ("any tort intentionally committed").

53. An interesting issue is whether the term "personal injury" in parental responsibility statutes encompasses emotional, as well as physical injury. No court has found a parent liable under a parental responsibility statute for a child's infliction of emotional injury.

54. See *infra* notes 172-206 and accompanying text.

limiting imposition of statutory parental liability to property damage and personal injury inflicted by the child is consistent with the general economic rationales underlying parental responsibility statutes.

3. *The Limitation on Recoverable Damages*

Many states also limit the amount of damages recoverable under parental responsibility statutes.⁵⁵ The average recovery limit is approximately \$2500.⁵⁶ Limiting the amount of recoverable damages, however, does not serve the statutes compensatory aim.⁵⁷ In many cases the amounts of recoverable damages will not adequately compensate the victim. Furthermore, by limiting the amount of recoverable damages, parental responsibility statutes can be viewed as a fine or penalty on parents disguised as a compensatory measure.⁵⁸

a. *Judicial Interpretations of Recovery Limits.* Litigation under the various parental responsibility statutes forces courts to construe the statutes' wording. Creative judicial interpretation has produced some interesting determinations of the various parties' rights and duties regarding the damage limits. For instance, typical statutes limit the recovery from "parents" to a certain dollar amount.⁵⁹ In construing the word "parents," courts have held that a plaintiff may not collect damages up to the statutory limit from *each* parent and, in effect, win a double judgment.⁶⁰ This interpretation accords with the general vicarious liability rationales supporting parental responsibility statutes. The least cost

55. Note, *supra* note 42, at 1041. But see HAWAII REV. STAT. § 577-3 (1976) (unlimited damages allowed); LA. CIV. CODE ANN. art. 2318 (West 1979) (unlimited damages allowed); NEB. REV. STAT. § 43-801 (1978) (only damage limit placed on personal injury; no limit on damages for destruction of property); N.J. STAT. ANN. §§ 2A:53A-15 (West Supp. 1981) (unlimited damages allowed).

56. The \$2500 average recovery limit was calculated from the damage limits previously noted in *supra* note 41.

57. See *General Ins. Co. of Am. v. Faulkner*, 259 N.C. 317, 323, 130 S.E.2d 645, 650 (1963). For a general discussion of the purpose behind parental responsibility statutes, see *infra* notes 94-127 and accompanying text.

58. See *Corley v. Lewless*, 227 Ga. 745, 749, 182 S.E.2d 766, 769 (1971).

59. E.g., ARK. STAT. ANN. § 50-109 (Supp. 1979) FLA. STAT. ANN. § 741.24 (West Supp. 1982); N.C. GEN. STAT. § 1-538.1 (1969).

60. See, e.g., *Windish v. Watts*, 9 Pa. D. & C.3d 234, 235 (C.P. Bucks County 1979). The court noted that part of the Pennsylvania statute defines the term "parent" as "includ[ing] natural or adoptive parents." *Id.* at 235. The liability section's use of "parents," however, was held to preclude any finding other than that only one judgment was allowed. *Id.* "If the legislators wish to impose a liability . . . on each parent they could have easily so stated . . . but did not do so." *Id.*

preventor is, technically speaking, the "parental-unit," consisting of both mother and father together. Recovery is properly limited to damages from that least cost preventor—the parental unit. Denying a recovery from each parent separately does not blunt the statutes' shock reduction loss spreading impact; liability and the loss are still shifted away from the child and the victim.⁶¹

Another interesting result of this recovery limit interpretation is the effect on episodic tortious behavior by the child. In *Buie v. Longspagh*.⁶² the defendant's minor daughter and a friend entered three houses, each owned by a separate plaintiff.⁶³ The girls plugged various drains in the houses and turned on the water. The water overflowed, resulting in extensive damage in each house.⁶⁴ The three plaintiffs sued under the Texas parental responsibility statute.⁶⁵ Each plaintiff recovered the statutory limit of \$5,000 (\$2,500 per defendant), for a total judgment of \$15,000.⁶⁶ The Texas Court of Civil Appeals affirmed the lower court's decision, holding that the Texas statute limited parental liability to \$5,000 *per tortious act*, not \$5,000 for a *series of tortious acts in a single episode*.⁶⁷ The court found that allowing the maximum recovery for each tortious act on a single occasion affords property owners the greatest amount of protection.⁶⁸ The court also implicitly recognized the least cost prevention ramifications of its holding, observing that the allowance for recovery for each act "will provide . . . encouragement for parents to train, control, and discipline their children."⁶⁹ Thus, permitting such a recovery will

61. Indeed, such a de facto reduction of damages, from twice what they might have been, may actually enhance the loss spreading effect. The lower the damage amount, the easier it will be for the parents to spread. The relatively low recovery limits may, however, retard the parents' incentive to engage in loss spreading.

62. 598 S.W.2d 673 (Tex. Civ. App. 1980).

63. *Id.* at 674.

64. *Id.*

65. *Id.* See TEX. FAM. CODE ANN. tit. 2, §§ 33.01-.03 (Vernon Supp. 1981).

66. 598 S.W.2d at 674.

67. *Id.* Appellant-parents argued that since the purpose of the Texas parental responsibility statute was penal in nature, the required strict construction of its provisions limited parental liability to \$5,000 *per episode* of tortious acts. *Id.* at 675. At least one other court has partially accepted this argument regarding another state's parental responsibility statute. See *infra* note 121 and accompanying text. The Texas Court of Civil Appeals, however, rejected this alleged penal purpose: "Upon careful consideration we conclude that the purpose of these provisions is to protect and compensate property owners from the wilful and malicious destruction of their property by minors." 598 S.W.2d at 675.

68. *Id.* at 676.

69. *Id.*

emphasize the role of the least cost preventor in taking precautionary measures.

The *Buie* interpretation is clearly correct. Parental responsibility statutes allow recovery for the infliction of damage. In *Buie*, three separate plaintiffs suffered three isolated occurrences of damage. Had there been only one plaintiff and one damaged house the maximum allowable recovery for that plaintiff would have been \$5,000. If the defendants had committed three separate drain-plugging acts in one plaintiff's house, each resulting in water damage, allowing recovery of the statutory limit for each act becomes more questionable. Although the acts may be separable, the damage may not be apportionable.⁷⁰ The separate acts in one house produce, in effect, one "quantum" of damage.

Finally, limiting of damages under a parental responsibility statute generally does not preclude a concurrent common law action for damages. In *Board of County Commissioners v. Harkey*,⁷¹ the defendant's minor son destroyed an \$18,000 tractor owned by the county, using blasting caps the defendant had stored negligently.⁷² The county commissioners alleged two causes of action against the defendant,⁷³ negligence and statutory vicarious liability.⁷⁴ Finding the county sought a single remedy—damages⁷⁵—the court held no election of remedies was required.⁷⁶ Furthermore, since the requisite burden of proof and relief sought in the two causes were not repugnant to each other, the common law and statutory claims were held to be joinable in a single action.⁷⁷ Adequate compensation of the tort victim mandates such concurrent use of common law and statutory remedies. Parental responsibility statutes were enacted originally to fill the gaps and cure the procedural and evidentiary deficiencies which existed in

70. The general problem suggested is the matching of effects with causes. For a discussion of this problem, see Scott, *The Apportionment of "Indivisible" Injuries*, 61 MARQ. L. REV. 559 (1978). The parental responsibility statutes were designed to hold parents liable for their children's torts; they cannot be expected to solve the apportionment problem, which pervades the entire field of torts.

71. 601 P.2d 125 (Okla. Ct. App. 1979).

72. *Id.* at 126.

73. *Id.* at 126-27. The Oklahoma parental responsibility statute, typical of such statutes, provides "[t]he state or any county, city, town, municipal corporation or school district, or any person, corporation or organization" with specific standing to sue. OKLA. STAT. ANN. tit. 23, § 10 (West Supp. 1981).

74. 601 P.2d at 126-27.

75. *Id.* at 128.

76. *Id.* at 127.

77. *Id.*

the various common law remedies.⁷⁸ As interstitial relief, the statutes should not preclude the use of common law theories, but rather should be available if the common law relief is inapplicable.

Buie demonstrates how the damage limits in parental responsibility statutes are interpreted to mold the relief portions of the statutes to the avowed statutory purpose. As *Harkey* further illustrates, liberal judicial interpretation of the damage limits provides a great deal of flexibility in granting relief.

b. *Advantages and Disadvantages of Recovery Limits.* Limiting the amount of damages recoverable under a parental responsibility statute has several benefits. Without a damage limit, parents of a minor tortfeasor could incur huge debts to the victim's insurance company.⁷⁹ As a result, insurance would be harder to obtain, and premiums would almost certainly increase. Another beneficial aspect of statutory damage limits is adjustability.⁸⁰ Limits on recovery can be increased by amendment to keep up with inflation.

Placing an absolute limit on the amount a tort victim can recover, however, also has serious disadvantages. The most obvious drawback is that the victim is often not adequately compensated.⁸¹ As the difference between the victim's actual damages and the statutory limit increases, the discriminatory effect becomes more pronounced since a smaller percentage of total damages will actually be recovered. A sliding scale measure, providing the same percentage recovery to all victims, would further the compensatory goal of the statute and remedy this deficiency.

Another limiting factor of damage ceilings is the inhibitory effect on litigation. Artificially depressed statutory recovery limits may discourage attorneys from representing a plaintiff on a contingency fee basis. This effectively prevents a large class of potential litigants, unable to afford an initial retainer, from obtaining counsel to pursue their claims. Furthermore, without a statutory

78. See *supra* notes 3-11 and accompanying text.

79. See Nevada Committee on Judiciary, Minutes of Meeting, April 6, 1979, at 6 (remarks of Assemblyman Garrod). Most tort victims will seek compensation from their own insurance companies. After discharging the victim-insured's claim, the insurer will be subrogated to its insured's cause of action. In this capacity the insurer may seek reimbursement from the tortfeasor.

80. Cf. Letter from Sylvia M. Alberdi to Michael Axel (October 1, 1981) (indicating that comments at committee hearing, where damage limit of FLA. STAT. ANN. § 741.24 (West Supp. 1982) was increased from \$1,000 to \$2,500, imply that the increase was designed to keep pace with inflation).

81. See *Corley v. Lewless*, 227 Ga. 745, 749, 182 S.E.2d 766, 769 (1971).

provision allowing recovery of attorneys' fees, the damage amount may be insufficient to satisfy the needs of both the tort victim and the attorney.

c. *Conclusions.* By limiting parental liability to a set dollar amount, parental responsibility statutes do not further the general vicarious liability rationales.⁸² In a least cost prevention analysis, low recovery limits may be inadequate to induce preventative behavior by parents. With limits as low as \$1,000 or \$2,000, parents may tend to forego precautionary action and risk a judgment against them. Moreover, by establishing a set dollar figure on damages, parental responsibility statutes allow parents to calculate with certainty the economic cost of precautionary forbearance. If this economic cost is sufficiently low, parents will not be induced to take precautionary action. If the parent elects not to take precautionary measures, it is the tort victim who will suffer injury or damage that could have been avoided.

Shock reduction loss spreading is equally unfulfilled. The overall objective—compassion⁸³—is not advanced by placing a limit on parental liability. As the amount of damages imposed on the parents increases, loss spreading will increase correspondingly. Thus, as parental liability is expanded, the compassionate aim of the rationale is enhanced by preventing more of the damage from falling on any one of the three actors.

Most parental responsibility statutes thus possess certain similar features. Liability is often limited to the child's intentional torts.⁸⁴ Most of the statutes, furthermore, pertain only to relatively common torts like property damage and personal injury.⁸⁵ Finally, recovery is often limited to a specific maximum dollar

82. New Jersey sought to remedy this problem by totally abolishing the damage limit in its parental responsibility statute, N.J. REV. STAT. §§ 2A:53A-14 to -17 (West Supp. 1981). The New Jersey experience illustrates the typical "number juggling" that often accompanies changes in the damage limit.

The parental responsibility statute originally contained a recovery limit of \$250. N.J. STAT. ANN. § 2A:53A-15 (West Supp. 1981). The original amendment, S.B. No. 650, would have increased the limit to \$1,000. STATE OF NEW JERSEY, STATEMENT ON S.B. No. 650 (1978). As presented to the governor, the recovery limit would have been set at \$2,000. NEW JERSEY ASSEMBLY JUDICIARY, LAW, PUBLIC SAFETY AND DEFENSE COMMITTEE, STATEMENT TO SENATE, No. 640 (1979). Governor Byrne, apparently striving to make the statute more compensatory in nature, recommended the elimination of the recovery limit altogether. B. BYRNE, VETO MESSAGE TO S.B. No. 650 (1979). Following the governor's lead, the legislature abolished the damage limit. 1979 N.J. Laws c. 318.

83. See *supra* note 27 and accompanying text.

84. See *supra* notes 46-51 and accompanying text.

85. See *supra* notes 52-54 and accompanying text.

amount.⁸⁶ There are, however, several notable differences among the state parental responsibility statutes.

B. *Differences Among the Statutes*

One major difference among the various parental responsibility statutes is the wide disparity in the amount of recoverable damages.⁸⁷ While some states limit recovery to nominal amounts,⁸⁸ a few states set no recovery limit.⁸⁹ The wide range of damage limits probably reflects the differing objectives of the various state legislatures.

Another variation among states is the effect of recovery under a parental responsibility statute on a common law action.⁹⁰ The states take different approaches.⁹¹ One commentator observes that a parental responsibility statute which fails specifically to preserve common law remedies may produce the objectionable result of limiting recovery to an amount less than would have been obtained had there been no statute.⁹² Such an effect clearly contradicts the general tort law goal of compensation of the victim.⁹³

III. PURPOSES OF PARENTAL RESPONSIBILITY STATUTES

The purposes behind parental responsibility statutes have been examined in three different forums. First, commentators objectively analyze the statutes to determine what purpose they serve.⁹⁴ Second, legislatures occasionally articulate the goals of the parental responsibility statutes during debate on their passage.⁹⁵ Finally, courts interpret the statutes to decipher their purposes.⁹⁶

86. See *supra* notes 55-83 and accompanying text.

87. A tort victim in Texas for instance, can recover up to \$15,000 for any child's "wilful and malicious" conduct resulting in personal injury or property damage. TEX. FAM. CODE ANN. tit. 2, §§ 33.01-.03 (Vernon Supp. 1981). The Virginia parental responsibility statute, however, only permits a maximum recovery of \$200. VA. CODE §§ 8.01-43 to -44 (1977).

88. See, e.g., VA. CODE §§ 8.01-43 to -44 (1977).

89. See *supra* note 55.

90. See *supra* notes 1-10 & 71-78 and accompanying text.

91. Twenty-one parental responsibility statutes specifically state that the statute does not preclude the additional use of common law remedies. Twenty-eight statutes have no such statement.

92. Note, *supra* note 42, at 1044.

93. *Id.*

94. See *infra* notes 97-110 and accompanying text.

95. See *infra* notes 111-17 and accompanying text.

96. See *infra* notes 118-24 and accompanying text.

A. *Purposes Enunciated by Commentators*

Scholarly analysis has enumerated four main purposes behind parental responsibility statutes. Many commentators note that such statutes were passed to compensate the tort victim.⁹⁷ Compensation may be a partial goal, but it is probably not the primary aim of parental responsibility statutes, since full compensation cannot be obtained when recoverable damages are limited.

Stemming the tide of child vandalism is another goal identified by commentators.⁹⁸ The rise in child vandalism creates a desire to hold parents more responsible for their children's actions.⁹⁹ This goal is probably the prime force behind those parental responsibility statutes that impose liability only for property damage committed by the child.¹⁰⁰

A third objective of the parental responsibility statutes identified in the commentary is to prevent personal injury.¹⁰¹ Parental responsibility statutes are seen as a mechanism to impose an obligation upon parents to control their minor children and prevent them from intentionally harming others.¹⁰² The commentators perceive a statutory duty requiring parents to exercise more control over their children.¹⁰³ This tendency to imply a duty probably results from the reluctance of the common law to impose a duty of control on the parent unless the child is known to have dangerous propensities.¹⁰⁴

Finally, commentators logically deduce that parental responsibility statutes are designed to overcome the difficulty of obtaining relief from the common law remedies.¹⁰⁵ Exclusively statutory relief, however, may not adequately compensate the tort victim. The goal of improving on common law remedies should not obscure the need for concurrent use of both common law and statutory relief.¹⁰⁶

97. Note, *supra* note 42, at 1044; *cf.* Kent, *supra* note 2, at 452-53 (purpose of parental responsibility statutes not purely compensatory, although the steady increase in the damage limits tends to suggest otherwise).

98. 44 ALB. L. REV. 943, 952 (1980).

99. Note, *supra* note 42, at 1037.

100. Of course, the mere fact that a limit is placed on parental liability contradicts the general aim of the shock reduction loss spreading rationale. See generally *supra* notes 27-37 and accompanying text.

101. See, e.g., Comment, *supra* note 51, at 762.

102. *Id.*

103. *Id.*

104. See *supra* note 7 and accompanying text.

105. 44 ALB. L. REV. 943, 947 (1980); See *supra* note 11 and accompanying text.

106. See *supra* note 78 and accompanying text.

The statutory purposes identified by commentators, therefore, consist of: 1) compensating tort victims;¹⁰⁷ 2) controlling child vandalism;¹⁰⁸ 3) preventing personal injury;¹⁰⁹ and 4) providing relief beyond common law remedies.¹¹⁰

The second major source of pronouncements on the purposes underlying parental responsibility statutes is legislative intent.

B. *Purposes Derived from Legislative Intent*

Legislative histories on state parental responsibility statutes are relatively scarce. Those which do exist, however, reveal a wide diversity of legislatively contemplated aims. Some indicate a simple desire to make parents more responsible for the actions of their children.¹¹¹ Such general statements, however, do little to aid proper interpretation of the statute.

Legislatures often expressly state that compensation is not the primary purpose of the parental responsibility statute. The Georgia statute, for example, states that its purpose is "to provide for the public welfare and aid in the control of juvenile delinquency, *not* to provide restorative compensation to victims of injurious or tortious conduct by children."¹¹² The Mississippi parental responsibility statute provides that the purpose of the act is to "authorize recovery from parents in situations where they are not otherwise liable *and to limit the amount of recovery*."¹¹³ And debate indicates the Nevada statute¹¹⁴ was designed to hold parents liable for their minors' willful misconduct, while limiting that liability.¹¹⁵

Finally, some legislatures identify multiple purposes for their parental responsibility statutes.¹¹⁶ While state lawmakers often

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

108. See *supra* notes 98-100 and accompanying text.

109. See *supra* notes 101-04 and accompanying text.

110. See *supra* notes 105-06 and accompanying text.

111. Letter from JoAnn M. Hedrick, Secretary to the Chief Clerk, Delaware House of Representatives, to Michael Axel (September 3, 1981); see Illinois General Assembly Debates, June 20, 1979, at 38 (remarks of Rep. Vinson).

112. Parental Liability for Minor Children's Torts Act — Provisions Changed, Etc., No. 977, 1976 Ga. Laws 511 (emphasis added).

113. MISS. CODE ANN. § 93-13-2(3) (Supp. 1981).

114. NEV. REV. STAT. § 41.470 (1979).

115. See Nevada Assembly Committee on Judiciary, Minutes of Meeting, 54th Sess., February 22, 1967, at 112 (remarks of Sen. Swobe).

116. For example, the purpose of the New York parental responsibility act, N.Y. GEN. OBLIG. LAW § 3-112 (McKinney Supp. 1981), has been variously described by the legislature to be to decrease vandalism against public property, to create a meaningful recourse for injured parties, to compel parents to supervise their children more closely and develop the child's respect for the property of others, see New York Legislative Annual (1977), at

disagree on a single purpose, many agree that compensation is not to be considered a primary goal.

Legislative history, therefore, also identifies various purposes behind parental responsibility statutes. As has been indicated, these stated purposes can be either general, highly specific, or multifaceted. Although there is a dearth of state legislative history, when such information is available it is also used by courts to determine the intended statutory purpose.¹¹⁷

C. *Purposes Derived from Judicial Decisions*

Courts usually examine the views of commentators and legislatures when defining the purpose of a parental responsibility statute.¹¹⁸ Judicial opinions, therefore, are typically the most exhaustive source of commentary on the relevant purposes.

Many courts, like the commentators, perceive a goal of parental responsibility statutes as inhibition of juvenile delinquency.¹¹⁹ The goal of imposing an obligation on parents to control their children to prevent them from intentionally harming others is often enunciated as a related objective.¹²⁰ Judges also see the statutes as penalizing parents for the torts of their minor children.¹²¹ By viewing parental responsibility statutes as penal in nature, courts may be trying to establish a standard of care for parents to follow. This result, however, is not at all clear from the opinions. Finally, unlike legislative history, judicial opinions often ascribe a compensatory purpose to parental responsibility statutes.¹²² This

178-79; New York Legislative Annual (1979), at 107, and to deter the malicious destruction of property. See Transcripts of Minutes of a Public Hearing of the Sub-Committee of the Senate Standing Committee on Codes, December 18, 1968 (remarks of Judge Raymond R. Niemer).

117. For an example of a court considering legislative history to determine the purpose behind a parental responsibility statute, see *Buie v. Longspaugh*, 598 S.W.2d 673, 675-76 (Tex. Civ. App. 1980). See *supra* notes 62-69 and accompanying text.

118. See, e.g., *Buie v. Longspaugh*, 598 S.W.2d 673 (Tex. Civ. App. 1980).

119. *Watson v. Gradzik*, 34 Conn. Supp. 7, 10, 373 A.2d 191, 193 (1977); *General Ins. Co. of Am. v. Faulkner*, 259 N.C. 317, 323, 130 S.E.2d 645, 650 (1963); see *Motorists Mut. Ins. Co. v. Bill*, 56 Ohio St. 2d 258, 263, 383 N.E.2d 880, 883 (1978); *Rudnay v. Corbett*, 53 Ohio App. 2d 311, 315, 374 N.E.2d 171, 174 (1977).

120. See, e.g., *Lutteman v. Martin*, 20 Conn. Supp. 371, 373, 135 A.2d 600, 602 (C.P. 1957); *Town of Groton v. Medberry*, 6 Conn. Cir. Ct. 671, 673, 301 A.2d 270, 272 (1972); *Repko v. Seriani*, 3 Conn. Cir. Ct. 374, 377, 214 A.2d 843, 845 (1965); *Gillespie v. Gallant*, 1 Conn. Cir. Ct. 594, 597, 190 A.2d 607, 608 (1963); *Vanthournout v. Burge*, 69 Ill. App. 3d 193, 196, 387 N.E.2d 341, 343 (1979); see *Motorists Mut. Ins. Co. v. Bill*, 56 Ohio St. 2d 258, 263, 383 N.E.2d 880, 883 (1978).

121. See, e.g., *Motorists Mut. Ins. Co. v. Bill*, 56 Ohio St. 2d 258, 263, 383 N.E.2d 880, 883 (1978).

122. See, e.g., *Watson v. Gradzik*, 34 Conn. Supp. 7, 10, 373 A.2d 191, 193 (1977);

objective is readily discernible in those statutes which do not limit the amount of recoverable damages.¹²³ Even in those states which limit recoverable damages, courts imply a compensatory goal into parental responsibility statutes. These courts may be more willing to view the statute's goal as compensatory when faced with a suffering tort victim and a relatively low damage limit.¹²⁴

D. *The Purposes and the Rationales*

The general purpose of imposing responsibility on parents to control their children accords with both basic vicarious liability rationales. The primary objective of least cost prevention¹²⁵ is to induce the least cost preventor to modify its behavior and take precautionary measures. This parental behavior modification is facilitated by imposing a statutory duty on parents to control their children. Shock reduction loss spreading¹²⁶ is also enhanced by imposing a statutory duty of parental control. Imposition of such a duty is a legal recognition that the parents are best equipped to spread the loss.¹²⁷

Rathburn v. Kaio, 23 Hawaii 541, 544 (1916); Vanthournout v. Burge, 69 Ill. App. 3d 193, 196, 387 N.E.2d 341, 343 (1979); Buie v. Longspaugh, 598 S.W.2d 673, 675 (Tex. Civ. App. 1980); see Izzo v. Gratton, 86 Misc. 2d 233, 235, 383 N.Y.S.2d 523, 524 (Cohoes City Ct. 1976). *Contra* Corley v. Lewless, 227 Ga. 745, 749-50, 182 S.E.2d 766, 769 (1971) (limits on recovery do not serve a compensatory goal); General Ins. Co. of Am. v. Faulkner, 259 N.C. 317, 323, 130 S.E.2d 645, 650 (1963) (recovery limits do not aid compensation).

123. *E.g.*, HAWAII REV. STAT. § 577-3 (1976); see Rathburn v. Kaio, 23 Hawaii 541, 544 (1916).

124. It may be important that the legislature and judiciary often articulate different purposes underlying parental responsibility statutes. For example, the legislative intent behind the Georgia statute, GA. CODE ANN. § 105-113 (Supp. 1981), is to provide for the public welfare and to control juvenile delinquency. Parental Liability for Minor Children's Torts Act—Provisions Changed, Etc., No. 977, 1977 Ga. Laws 511. Before the Georgia statute limited recovery, the Georgia Supreme Court also included compensation of the tort victim as a goal. See Corley v. Lewless, 227 Ga. 745, 749, 182 S.E.2d 766, 770 (1971). Similarly, the Illinois General Assembly implied that the purpose behind Parental Responsibility Law, ILL. ANN. STAT. ch. 70, ¶¶ 51-57 (Smith-Hurd Supp. 1981), was to "impose legal responsibility on the parents to try to force them to make kids behave," Illinois General Assembly Debates, June 20, 1979, at 38 (Remarks of Rep. Vinson). Just four months earlier the Appellate Court of Illinois added compensating the injured party as an additional aim. See Vanthournout v. Burge, 69 Ill. App. 3d 193, 196, 387 N.E.2d 341, 343 (1979). Without an explicitly stated legislative purpose in the statute itself, judicial interpretations may impose different duties and obligations on parents than those which were intended by the legislature.

125. See *supra* notes 19-24 and accompanying text.

126. See *supra* notes 27-37 and accompanying text.

127. In an elementary sense, the parents are ultimately responsible for the existence of their child. In cold, economic terms, parents presumably have considered future tortious behavior by their children as part of their preconception "cost-benefit analysis." This justification may, however, extend legal analysis beyond its useful limits.

The compensatory goal also comports with economic rationales. Knowing they must compensate victims of their child's torts will induce parents to modify their behavior and take precautionary action. Similarly, a compensatory goal aids loss spreading. Insurance is the primary means by which tort victims are compensated¹²⁸ and parents can obtain insurance more readily than can their children. Thus, in terms of the economic rationales for parental responsibility statutes, the best supported statutory purposes are imposing a parental duty to control their children and compensating tort victims.

IV. JUDICIAL INTERPRETATION OF THE STATUTORY REQUIREMENTS

Judicial explanation of the express wording of parental responsibility statutes can affect the substantive rights of the parties and frustrate the statutory goals.¹²⁹ It is not uncommon to find courts in different states interpreting similar provisions in parental responsibility statutes differently. This in turn establishes nonuniform burdens of pleading and proof.

A. Judicial Interpretation of the "Malicious and Willful" Requirements

Most parental responsibility statutes limit recovery to instances where the child's tort was performed "maliciously" or "willfully."¹³⁰ Two divergent interpretations have been adopted in the application of this standard. Some courts hold that plaintiffs need not show that the defendant's child possessed a willful or malicious intent to injure or damage. In *Potomac Insurance Co. v. Torres*,¹³¹ for example, defendant's minor son stole a car and was pursued by the police.¹³² During the ensuing high speed chase, the minor drove the car into a car owned by plaintiff's insured, damaging it.¹³³ The New Mexico Supreme Court saw very little difference between "willful" and "malicious" conduct.¹³⁴ Both

128. For a discussion of insurance, see *infra* notes 172-206 and accompanying text.

129. See Note, *supra* note 42, at 1044-45.

130. See, e.g., FLA. STAT. ANN. § 741.24 (West Supp. 1981) ("maliciously" or "willfully"); ME. REV. STAT. ANN. tit. 19, § 217 (1981) ("willfully or maliciously"); N.D. CENT. CODE § 32-03-39 (1976) ("maliciously" or willfully"); cf. WIS. STAT. ANN. § 895.035 (West Supp. 1981) ("willful, malicious or wanton").

131. 75 N.M. 129, 401 P.2d 308 (1965).

132. *Id.* at 130, 401 P.2d at 308.

133. *Id.*

134. *Id.* at 131-32, 401 P.2d at 309.

words were interpreted to mean "the intentioned doing of a harmful act without just cause or . . . in utter disregard for the consequences."¹³⁵ The court reasoned that since the minor's intentional acts were done without just cause and with utter disregard for their consequences, the requisite statutory malice or willfulness was present, and defendant was held liable.¹³⁶ Thus, under *Torres*, only the child's initial act, and not the subsequent injury or damage need be performed willfully or maliciously for liability to attach under the parental responsibility statute.

Another line of decisions requires a stricter showing of willful or malicious intent. In a factual setting nearly identical to that in *Torres*, the Ohio Supreme Court, in *Motorists Mutual Insurance Co. v. Bill*,¹³⁷ rejected the *Torres* standard and interpreted "willfully damages property" under the Ohio parental responsibility statute¹³⁸ to require a dual showing of intent.¹³⁹

Under the Ohio rule both the initial act, as well as the subsequent damage, must be performed intentionally.¹⁴⁰ This is opposed to the *Torres* rule which only requires the initial act to be intentionally performed for parental liability to attach.¹⁴¹ As the court aptly observed, "the intentional doing of an act does not necessarily make the unintentional damage it produces, willful or intentional."¹⁴² Under the "dual intent" rule, a mere showing of a child's intentional act, absent an actual intent to injure or damage, will not impose liability under a parental responsibility tort statute.¹⁴³ Application of the dual intent standard in *Bill* resulted in a finding of no parental liability.¹⁴⁴

A similar interpretation of the "willful or malicious" requirement was made in *Crum v. Groce*.¹⁴⁵ Defendant's minor son, against his mother's wishes and without a license, used a motorcy-

135. *Id.*

136. *Id.* at 132, 401 P.2d at 309. See also N.M. STAT. ANN. § 32-1-46 (1981).

137. 56 Ohio St. 2d 258, 383 N.E.2d 880 (1978).

138. OHIO REV. CODE ANN. §§ 3109.09, 3109.10 (Page 1980).

139. 56 Ohio St. 2d at 266, 383 N.E.2d at 884.

140. *Id.*

141. See *supra* note 136 and accompanying text.

142. 56 Ohio St. 2d at 266, 383 N.E.2d at 884.

143. The dual intent rule was succinctly described in *Town of Groton v. Medberry*, 6 Conn. Cir. Ct. 671, 673, 301 A.2d 270, 272 (1972): "Not only the action producing the injury but the resulting injury must be intentional." (quoting *Rogers v. Doody*, 119 Conn. 532, 534, 178 A. 51, 52 (1935)).

144. 56 Ohio St. 2d at 266, 383 N.E.2d at 885.

145. 192 Colo. 185, 556 P.2d 1223 (1976).

cle to complete an errand.¹⁴⁶ The child ran through a stop sign, colliding with and damaging plaintiff's van.¹⁴⁷ Determining that the child was, at most, negligent in failing to heed the stop sign, the court reasoned that he could not have intended to willfully damage plaintiff's vehicle.¹⁴⁸ Accordingly, defendant could not be held liable under the Colorado parental responsibility statute.¹⁴⁹

The dual intent interpretation of the "willful or malicious" requirement is the more preferable standard. Although loss spreading is not really affected by *how* the parental liability is incurred, least cost prevention strongly favors the dual intent rule. Least cost preventing parents will find it much easier to take precautionary action against intentional injury or damage, as opposed to only an intentional act with resulting but unforeseen damage or injury. Parents can warn the child against engaging in any intentional injury or damage, or constrict the child's liability producing behavior altogether in light of the likelihood that the child will engage in such intentional acts. The dual intent requirement is a recognition of the inability of parents to fully control their children's acts.¹⁵⁰ Since parents, however, cannot effectively prevent unknown and unknowable results—*negligent* outcomes—imposing vicarious liability in such situations would not be justifiable in terms of least cost prevention.

B. *Judicial Interpretation of the "Damaging Property" Requirement*

Courts give both narrow and broad interpretations to the statutory requirement that property be "damaged." Courts following the narrow approach often require actual damage to or destruction of the property before parental liability will be imposed. In *Lamb v. Randall*,¹⁵¹ defendant's son burglarized plaintiff's home, taking jewelry and coins, which were eventually pawned for

146. *Id.* at 186, 556 P.2d at 1223-24.

147. *Id.*

148. *Id.* at 187, 556 P.2d at 1224.

149. *Id.*

150. See *supra* note 50 and accompanying text. One additional interpretation of the "willful and malicious" requirement of parental responsibility statutes is not unique to these statutes, but is inherent within any statutory use of the terms. Courts sometimes construe "willful" and "malicious" so as to exclude parental liability because the minor's age precludes a finding of willfulness or malice. See, e.g., *Connors v. Pantano*, 165 Neb. 515, 86 N.W.2d 367 (1957) (holding six year old legally incapable of willfully and intentionally destroying property within the provision of the Nebraska statute).

151. 95 N.M. 35, 618 P.2d 379 (1980).

money.¹⁵² The New Mexico parental responsibility statute¹⁵³ makes parents liable if their minor child damages or destroys property. The New Mexico Supreme Court, however, refused to impose parental liability,¹⁵⁴ holding that since the stolen property was pawned, and not physically damaged or destroyed, defendants could not be held liable.¹⁵⁵

Other courts have viewed the term "damage" more expansively. The Ohio parental responsibility statute¹⁵⁶ permits recovery if the child "willfully damages property."¹⁵⁷ In *Liberty Mutual Insurance Co. v. Davis*,¹⁵⁸ this statutory wording was construed to include theft of property. The court reasoned that it makes little difference to the tort victim whether property is stolen or destroyed; the victim is deprived of the property either way.¹⁵⁹

The least cost prevention rationale might favor the narrow construction of "damage." Although the parent remains the least cost preventor in the transaction,¹⁶⁰ it may arguably be easier for parents to take precautions against their child's damage or destruction of property than against outright theft, since child vandalism or property damage may be more foreseeable than theft. Shock reduction loss spreading, however, is enhanced by a broad construction of "damage" which includes theft. As the definition of liability producing behavior is expanded, parental loss spreading activities can direct more liability from the child to other individuals better able to bear the costs. Including theft or use deprivation of property within the definition of "damage" is, therefore, explicable under this rationale.

152. *Id.* at 36-37, 618 P.2d at 380-81.

153. N.M. STAT. ANN. § 32-1-46 (1981).

154. 95 N.M. at 37, 618 P.2d at 381.

155. *Id.* The dissent in *Lamb* criticized the majority's ultra-strict construction:

If property "belonging" to a person is stolen from that person, the person has suffered a "loss," [and] his property is "damaged or destroyed. . . ." To hold otherwise is to restrict the scope of recovery and hinder accomplishment of the statute's compensatory goal, thereby limiting parental duty and encouraging children to engage in the "theft" of property.

Id. at 38, 618 P.2d at 382 (Andrews, J., dissenting). Less than a year after *Lamb* was decided, perhaps in response to Judge Andrews' dissent, the New Mexico Legislature amended the state parental responsibility statute to impose parental liability if the minor "deprive[s] the] use of property . . . belonging to the person bringing the action." 1981 N.M. Laws ch. 36, § 33. See also N.M. STAT. ANN. § 32-1-46 (1981).

156. OHIO REV. CODE ANN. §§ 3109.09 (Page 1980).

157. *Id.*

158. 52 Ohio Misc. 26 (Akron Mun. Ct. 1977).

159. *Id.* at 29.

160. See *supra* note 21 and accompanying text.

C. Judicial Interpretation of "Property"

Further problems arise when personal injury claims are brought under parental responsibility statutes which, by their wording, limit recovery to property damage. Such wording gives rise to a negative implication that personal injury actions were meant to be excluded. Thus, "property" has been narrowly construed to deny recovery in such cases. To circumvent this problem the resourceful plaintiff in *Ross v. Souter*¹⁶¹ sued to recover for damage to his son's teeth which were damaged in a fight with defendant's son.¹⁶² The New Mexico statute, while permitting recovery for damage to property, "real, personal, or mixed, belonging to such . . . person,"¹⁶³ did not expressly cover personal injury. The plaintiff reasoned that his substantial investment in his son's orthodontia constituted a property interest under the statute.¹⁶⁴ The court rejected this argument, stating:

[We see] no logical reason . . . which would justify holding that either the teeth or the investment in orthodontic work should properly be considered as property of the parent, and for the damage or destruction of which, recovery might be had under the statute.¹⁶⁵

Such cases demonstrate the need for clearly enunciated forms of relief in parental responsibility statutes.

The widely divergent judicial interpretations of statutory requirements affect the substantive rights of the parties. The dual intent rule¹⁶⁶ requiring a showing that both the initial tortious act as well as the subsequent injury or damage were committed intentionally conflicts directly with the looser standard¹⁶⁷ whereby intentional injury or damage need not be shown.¹⁶⁸ Furthermore, two basic definitions of "property damage" have evolved. Under one,¹⁶⁹ actual physical damage is required before recovery is al-

161. 81 N.M. 181, 464 P.2d 911 (1970).

162. *Id.* at 182, 464 P.2d at 912.

163. N.M. STAT. ANN. § 32-1-46 (1981).

164. 81 N.M. at 182-83, 464 P.2d at 912-13.

165. *Id.* at 183, 464 P.2d at 913.

166. *See supra* notes 137-50 and accompanying text.

167. *See supra* notes 131-36 and accompanying text.

168. *Compare* *Motorists Mut. Ins. Co. v. Bill*, 56 Ohio St. 2d 258, 383 N.E.2d 880 (1978) (no parental liability where both the initial act and the subsequent damage were not intentional) and OHIO REV. CODE ANN. § 3109.09 (Page 1980) with *Potomoc Ins. Co. v. Torres*, 75 N.M. 129, 401 P.2d 308 (1965) (parental liability appropriate since requisite malice or willfulness could be found in minor's intentional initial act from which damages flowed) and N.M. STAT. ANN. § 32-1-46 (1981).

169. *See supra* notes 151-55 and accompanying text.

lowed. According to the better position,¹⁷⁰ however, theft or deprivation of the use of property will suffice to impose parental liability.¹⁷¹ Finally, some statutes are ambiguously drafted so that it is unclear whether personal injury claims are actionable under the statute. The inconsistency among judicial interpretations of the statutory requirements further emphasizes the need for uniform legislation.

V. INSURANCE RELIEF UNDER PARENTAL RESPONSIBILITY STATUTES

Two basic questions are raised by the introduction of insurance protection in cases arising under parental responsibility statutes. First, whether an insurer must provide coverage to an insured for statutorily imposed parental liability; and second, whether the subrogated insurer of a minor tortfeasor's victim may bring an action in its own name against the parent under the parental responsibility statute.

A. *The Rights of Insured Parents*

The right of parents to coverage for any liability incurred under a parental responsibility statute depends on the interpretation of the various policy provisions. Insurance policies are often liberally construed to include coverage for parents who are sued under parental responsibility statutes. In *Walker v. Lumbermens Mutual Casualty Co.*,¹⁷² the plaintiff-parent previously had been sued under a parental responsibility statute and was forced to defend himself when the defendant-insurer refused coverage.¹⁷³ The plaintiff lost, and brought a subsequent action against the defendant on the insurance contract for the amount of the judgment and attorneys' fees.¹⁷⁴ The policy defined the term "insured" as including all members of the family; the court concluded the definition

170. See *supra* notes 156-72 and accompanying text.

171. Compare *Liberty Mut. Ins. Co. v. Davis*, 52 Ohio Misc. 26 (Akron Mun. Ct. 1977) (parental liability imposed because "damages" includes theft) and OHIO REV. CODE ANN. § 3109.09 (Page 1980) with *Lamb v. Randall*, 95 N.M. 35, 618 P.2d 379 (1980) (no parental liability because the property, not having been physically damaged, had not been "damaged" or "destroyed" within the meaning of the statute) and N.M. STAT. ANN. § 32-1-46 (1981).

172. 491 S.W.2d 696 (Tex. Civ. App. 1973).

173. *Id.* at 697.

174. *Id.* Coverage "D" of plaintiff's policy provided for damages the insured became legally obligated to pay. *Id.* Damage caused intentionally by or at the direction of the insured was excluded. *Id.*

was intended to broaden the coverage of the policy.¹⁷⁵ Construing the term expansively, the court held the plaintiff was entitled to coverage under the insurance contract.¹⁷⁶

*Shelby Mutual Insurance Co. v. United States Fire Insurance Co.*¹⁷⁷ provides another example of interpreting insurance policies liberally to provide coverage for parents who have incurred statutorily imposed parental liability. Insured's son stole a car belonging to the plaintiff's insured and recklessly damaged it.¹⁷⁸ After settling its insured's damage claim, the plaintiff-insurer obtained a judgment under the Michigan parental responsibility statute¹⁷⁹ against defendant's-insured.¹⁸⁰ The plaintiff-insurer then brought a garnishment action against the defendant—the parents' insurer.¹⁸¹ To decide whether coverage for statutory parental liability was provided, the court construed the policy terms¹⁸² by applying well-known rules of construction:

If the question is whether the policy be broad enough to cover an asserted liability the terms are liberally construed to favor coverage. If the question is whether the exclusionary provisions of a policy avoid the asserted liability, the exclusionary language is strictly construed, again to favor insurance.¹⁸³

Although coverage for automobile accidents occurring while the car was away from home was excluded,¹⁸⁴ the court required the defendant-insurer to provide coverage since the parental responsibility statute imposed liability "independent of the means the child employed to cause the destruction."¹⁸⁵

In contrast with *Walker* and *Shelby*, courts construing policy provisions strictly will deny coverage for statutorily imposed parental liability. In *Randolph v. Grange Mutual Casualty Co.*,¹⁸⁶ a plaintiff-parent was held liable under the Ohio parental responsi-

175. *Id.* at 699.

176. *Id.*

177. 12 Mich. App. 145, 162 N.W.2d 676 (1968).

178. *Id.* at 148, 162 N.W.2d at 677-78.

179. MICH. COMP. LAWS ANN. § 600.2913 (Supp. 1981).

180. 12 Mich. App. at 148.

181. *Id.*

182. The policy protected the parents for all damages they became legally obligated to pay. *Id.* at 147, 162 N.W.2d at 677. Automobile accidents, however, were excluded from coverage if the car was used while away from home. *Id.* at 147-48, 162 N.W.2d at 677. Each family member was covered. *Id.* at 148, 162 N.W.2d at 677.

183. *Id.* at 149, 162 N.W.2d at 678.

184. See *supra* note 181.

185. 12 Mich. App. at 150, 162 N.W.2d at 678.

186. 57 Ohio St. 2d 25, 385 N.E.2d 1305 (1979).

bility statute¹⁸⁷ for his minor son's intentional tort causing \$2,000 in property damage.¹⁸⁸ The defendant-insurer agreed to pay only \$250 via a supplemental coverage provision which obligated the defendant-insurer to pay for all "damage . . . caused by" an accident.¹⁸⁹ Plaintiff sued to collect the remaining \$1,750,¹⁹⁰ arguing that since his son's act was unexpected it was an accident and therefore defendant must pay the entire \$2,000 statutory liability.¹⁹¹ The Ohio Supreme Court upheld the denial of coverage, noting:

From the fact that *liability* may have been unexpected or "accidental" to appellant, it does not follow that the *damage* was unexpected or accidentally caused. Indeed, appellant concedes that the damage was not the product of an accident but of [his son's] willful and intentional misconduct.¹⁹²

Broad construction of insurance policies in cases involving liability under parental responsibility statutes is the preferred position. Both economic rationales justifying these statutes support a broad construction. Liability insurance is one of the major pre-accident precautions under least cost prevention. If parents know their insurance policies will be narrowly construed, added cost in obtaining coverage for statutory parental liability may preclude procurement of adequate insurance protection. Loss spreading, typically done through the use of insurance, will be encouraged by broad construction of insurance policies.

B. *The Rights of Insurance Company-Subrogees*

A controversial issue in this area of the law is whether a tort victim's subrogated insurance company has any direct recourse under the parental responsibility statutes. Several courts have held that a subrogated insurer of the tort victim may sue the tortfeasor's parent under a parental responsibility statute.¹⁹³ In *General Insurance Co. of America v. Faulkner*,¹⁹⁴ for example, the plaintiff-insurer became subrogated to the rights of its insured, the

187. OHIO REV. CODE ANN. §§ 3109.09 (Page 1980).

188. 57 Ohio St. 2d at 25-26, 385 N.E.2d at 1305.

189. *Id.*, 385 N.E.2d at 1306.

190. *Id.*, 385 N.E.2d at 1305.

191. *Id.* at 27, 385 N.E.2d at 1306.

192. *Id.*, 385 N.E.2d at 1306 (emphasis supplied). For a discussion of the dual intent rule, see *supra* notes 137-48 and accompanying text.

193. See, e.g., *General Ins. Co. of Am. v. Faulkner*, 259 N.C. 317, 325, 130 S.E.2d 645, 651 (1963); *Motorists Mut. Ins. Co. v. Bill*, 56 Ohio St. 2d 258, 267, 383 N.E.2d 880, 885 (1978); *Liberty Mut. Ins. Co. v. Davis*, 52 Ohio Misc. 26, 27 (Akron Mun. Ct. 1977).

194. 259 N.C. 317, 130 S.E.2d 645 (1963).

local board of education, upon paying the insured for fire damage caused by the malicious and willful conduct of the defendant's son.¹⁹⁵ The plaintiff-insurer sued under the North Carolina statute¹⁹⁶ to recover the statutory limit of \$500.¹⁹⁷ The defendant's demurrer alleged that the plaintiff lacked standing to sue under the statute and was not the real party in interest.¹⁹⁸ The court initially observed that if the board of education had not held liability insurance it certainly would have been able to sue under the parental responsibility statute.¹⁹⁹ The court refused to deny the plaintiff-insurer standing simply because the right was obtained through subrogation.²⁰⁰ The court further noted that denial of the subrogated claim,

[w]ould lead to the illogical result that the defendants admittedly liable . . . to the . . . Board of Education in an amount not exceeding \$500.00, if it had no insurance, are relieved of all liability by reason of the collection of insurance by the . . . Board of Education; in other words, the defendants would receive the benefit of the insurance without having to pay a cent for it.²⁰¹

The insurer-subrogee's right to maintain an action against the minor tortfeasor's parents was further discussed in *Motorists Mutual Insurance Co. v. Bill*.²⁰² To prevent what would be "a most inequitable determination,"²⁰³ the Ohio Supreme Court held that a subrogated insurer could maintain an action under the Ohio statute,²⁰⁴ observing that the "foresighted insured who has provided insurance coverage for his own damages . . . should not provide an escape hatch for parents who would have otherwise been held accountable to the owner for the damaging acts of their minor children."²⁰⁵

On first consideration, allowing subrogees to sue statutorily li-

195. *Id.* at 318-19, 130 S.E.2d at 647.

196. N.C. GEN. STAT. § 1-538.1 (1969).

197. 259 N.C. at 319, 130 S.E.2d at 647.

198. *Id.* The North Carolina statute permits recovery by "[a]ny person, firm, corporation, the State of North Carolina or any political subdivision thereof, or any religious, educational or charitable organization, or any nonprofit cemetery corporation, or organization, whether incorporated or unincorporated" N.C. GEN. STAT. § 1-538.1 (1969).

199. 259 N.C. at 325, 130 S.E.2d at 651-52.

200. *Id.*

201. *Id.* at 326, 130 S.E.2d at 652.

202. 56 Ohio St. 2d 258, 383 N.E.2d 880 (1978). *See supra* text accompanying notes 137-44 for a further discussion of *Bill*.

203. *Id.* at 268, 383 N.E.2d at 886.

204. *Id.* at 266-67, 383 N.E.2d at 885.

205. *Id.* at 267, 383 N.E.2d at 885.

able parents seems to provide a windfall to insurance companies whose job, after all, is to provide insurance coverage for a fee. The economic rationales, however, again illustrate the logic of the rule. In least cost prevention terms, the threat of suits by insurer-subrogees will provide a forceful prod to induce parents of potential minor tortfeasors to take preventive measures. Furthermore, in terms of shock reduction loss spreading, such insurer-subrogee actions merely represent another cost of obtaining insurance²⁰⁶—the fundamental loss spreading function.

VI. RECAPITULATION

Although common law remedies exist for torts committed by minors, these nonstatutory actions contain inherent pleading and evidentiary obstacles for plaintiffs.²⁰⁷ These deficiencies led to the adoption of state parental responsibility statutes—vicarious liability acts justified by the basic economic rationales of least cost prevention and shock reduction loss spreading. The widely disparate legislative and judicial interpretations of the statutes, however, have produced an array of differing rights and duties.²⁰⁸ A potential litigant, therefore, must analyze the relevant parental responsibility statute and correlative case law to find answers to several basic questions. First, who may be sued under the statute? Most parental responsibility statutes only hold “parents” liable—guardians or foster parents may not be covered.²⁰⁹ Furthermore, may separate suits be brought against each parent, or does the notion of a “parental unit”²¹⁰ preclude dual actions?²¹¹ A second major question is what constitutes “willful and malicious” behavior? In some states only an intentional *initial act* need be shown; others require an additional showing that the actual *damage* resulting from the initial act be intentionally inflicted.²¹² Third, what qualifies as “damage” to property? Some courts hold that physical damage or destruction is required, while others in-

206. Parental responsibility statutes have been found to increase insurance costs to consumers. See Nevada Assembly Committee on Judiciary, Minutes of Meeting, 58th Sess., May 7, 1975, at 273 (remarks of George L. Ciapusci, State Farm Insurance Co.).

207. See *supra* notes 2-10 and accompanying text.

208. See *supra* notes 128-60 and accompanying text.

209. See generally *Windish v. Watts*, 9 Pa. D. & C.3d 234 (C.P. Bucks County 1979) (discussing who may be sued and how much may be recovered).

210. See *supra* notes 60-61 and accompanying text.

211. See *supra* note 209.

212. See *supra* notes 131-50 and accompanying text.

clude theft within the "damage" definition.²¹³ Finally, a litigant must determine the proper purpose behind the parental responsibility statute—compensation, control of child vandalism, provision of relief beyond the common law remedies, or another as yet unarticulated purpose—and how this aim can best be served in light of the other competing statutory goals.²¹⁴ By delineating the proper purpose for parental responsibility statutes, the litigant can construct a case which both furthers the statutory goals and adds to the substantive body of tort law as well.

VII. MODEL PARENTAL RESPONSIBILITY ACT

In an attempt to provide concrete answers to the questions that have been raised, this Note concludes with a presentation of a Model Parental Responsibility Act.

A. *Model Parental Responsibility Act*

- Sec. 1. The parent or parents, or guardian or guardians, of a minor child may be held liable for:
- a) personal injury to another inflicted nonnegligently by the minor child; and/or
 - b) damage to, or deprivation of the use of, property belonging to another, committed nonnegligently by the minor child.
- Sec. 2. Damages are recoverable as follows:
- a) damages up to two thousand five hundred dollars (\$2,500) inclusive are recoverable in full;
 - b) damages exceeding two thousand five hundred dollars (\$2,500) are recoverable to the extent of one-half of such damages actually suffered;
 - c) only one recovery per pair of parents or guardians may be obtained;
 - d) payment of costs and attorneys' fees may be awarded in addition to damages if judgment shall be rendered against a party litigant and, in the opinion of the court, such award is merited.
- Sec. 3. Statutory liability is additional to, and does not preclude, any common law liability of the parent(s), guardian(s), and/or minor child.
- Sec. 4. The purpose of this Act is to:
- a) partially compensate tort victims; and
 - b) impose upon parents and/or guardians the responsibility to control their children's acts.

213. See *supra* notes 151-60 and accompanying text.

214. See *supra* notes 94-127 and accompanying text.

B. *Improvements Offered by the Model Act*

One difficulty encountered with many parental responsibility statutes is determining who may be sued.²¹⁵ Statutes often are worded in terms of "parents"²¹⁶ and do not specifically authorize an action against guardians. The Model Act removes this ambiguity by using "parent or parents, or guardian or guardians" in section 1. Furthermore, section 2(c) limits the potential judgment to "[o]nly one recovery . . . per pair of parents or guardians"

Another major problem with existing parental responsibility statutes is determining what constitutes "willful or malicious" behavior by the minor. Contained within this issue is the question of whether an actual intent to damage or injure on the part of the child must be shown, or whether proof of an intentional initial act is sufficient to establish parental vicarious liability.²¹⁷ The Model Act addresses these problems in two ways. First, the "nonnegligently" standard in sections 1(a) and (b) avoids confusion over what entails "malicious" or "willful" conduct; any injury producing behavior that cannot be classified as "negligent" may result in parental liability.²¹⁸ Second, the use of the phrases "*inflicted* nonnegligently" and "*committed* nonnegligently" in sections 1(a) and (b) emphasize that the actual injury or damage must be performed nonnegligently.²¹⁹ The mere showing of a nonnegligent initial act will not suffice to impose parental liability.

A further ambiguity in existing statutes is the use of the language "damage to property." The Model Act imposes parental liability for the child's nonnegligent "damage to, or deprivation of the use of, property." This definition is broad enough to include property damage, burglary, and larceny.²²⁰

The purpose of the Model Act is explicitly stated in section 4. This ensures that courts cannot overemphasize, underemphasize,

215. See *supra* note 209.

216. *E.g.*, MICH. COMP. LAWS ANN. § 600.2913 (Supp. 1981).

217. See *supra* notes 130-50 and accompanying text.

218. It is intended that "nonnegligently" would include all reckless, knowing, and purposeful behavior.

219. See generally *Motorists Mut. Ins. Co. v. Bill*, 56 Ohio St. 2d 258, 383 N.E.2d 880 (1978) (requiring both the subsequent damage and the initial act to have been done intentionally).

220. See generally *Lamb v. Randall*, 95 N.M. 35, 618 P.2d 379 (1980) (theft of property held excluded from coverage of parental responsibility statute covering damage to or destruction of property). For a general discussion of *Lamb*, see text accompanying notes 151-55 *supra*.

or ignore the avowed aims of the Act.²²¹

The purposes of the Model Act are clearly implemented by section 2's treatment of recoverable damages. The Model Act's damage provisions represent a compromise between ideals and reality. While compensating tort victims is a strong motivating factor behind many parental responsibility statutes,²²² parents cannot always be expected to control their children's acts completely. The Model Act, therefore, limits recovery to one-half the actual damages suffered for all damage amount in excess of \$2,500. This recovery limitation is an improvement on the prevailing practice of limiting recoverable damages to a certain maximum dollar amount. With the present average statutory recovery limit being approximately \$2500,²²³ few victims can be adequately compensated. Under the Model Act, tort victims will receive more compensation than if recovery were limited to a maximum dollar amount. Moreover, damages less than \$2,500 are recoverable in full. In addition, the knowledge that they are liable in full for damages up to and including \$2,500, and for one-half of any damage claim in excess of \$2,500 will induce parents to exercise more control over their minor children.²²⁴ A final advantage of the damage recovery proposal is its encouragement of the full use of attorneys. Instead of much of the statutorily limited damages being consumed by legal fees, the proposed system allows the use of contingency fee arrangements, thereby guaranteeing that the tort victim recovers a fair portion of the damages. Section 2(d), finally, provides for the specific award of attorneys' fees if the trial judge deems such an award necessary. Such provisions should encourage individuals to seek redress, thereby further prodding parents to exercise control and obtain insurance.

Finally, many state parental responsibility statutes do not expressly permit the statutory remedy to be supplemented with concurrent common law relief.²²⁵ Section 3 of the Model Act ensures that the act, being in derogation of the common law, will not be so

221. See *supra* notes 118-24 and accompanying text.

222. See *supra* notes 97 & 122-24 and accompanying text.

223. See *supra* note 56.

224. The operation of the damage recovery proposal can be readily illustrated with a hypothetical plaintiff who has incurred \$5,000 in damages due to defendant's child's tortious behavior. After receiving a favorable judgment, plaintiff would be able to recover \$3,750—100% of the first \$2,500 and 50% of all damages in excess of \$2,500. If the court believed defendant's failure to control his or her child was particularly egregious, an award of attorneys' fees and costs would be justified.

225. See *supra* notes 90-93 and accompanying text.

strictly construed as to limit *all* parental liability for children's torts solely to the statutory limit. Should the victim, therefore, be able to establish the elements of a common law claim, full recovery may be possible.²²⁶

VIII. CONCLUSION

The right to relief for child-inflicted tort damage is often difficult to establish under available common law actions. This difficulty inspired the passage of parental responsibility statutes.²²⁷ These statutes are justified by the economic rationales of least cost prevention²²⁸ and shock reduction loss spreading.²²⁹ The imposition of vicarious liability induces the least cost preventing parents to take precautionary measures against their children's tortious acts. Parental responsibility statutes also reduce the shock of the loss occasioned by tortious activity by spreading those losses to others through the parents' loss spreading activity.

Most parental responsibility statutes limit recovery to intentional torts only.²³⁰ In addition, damages are usually limited to a certain maximum dollar amount.²³¹ Such a limitation of damages does not further the compensatory goal of the statutes.

Commentators,²³² legislators,²³³ and judges²³⁴ have enunciated the various purposes behind parental responsibility statutes. The purposes that are most fully justified by the economic rationales are compensation of the tort victim and the imposition of a parental duty to control children.

Interpretation of the express wording of parental responsibility statutes affects the substantive rights of the parties.²³⁵ These interpretive problems are especially obvious in cases involving insurance coverage under the statutes.²³⁶ This Note attempts to deal with these problems by presenting a Model Parental Responsibility

226. It should be noted that double recovery—under both a common law claim and a statutory claim—is impermissible. Plaintiff will obviously be limited to a 100% common law recovery should this be available.

227. See *supra* note 11 and accompanying text.

228. See *supra* notes 19-25 and accompanying text.

229. See *supra* notes 26-36 and accompanying text.

230. See *supra* notes 46-51 and accompanying text.

231. See *supra* notes 55-58 and accompanying text.

232. See *supra* notes 97-110 and accompanying text.

233. See *supra* notes 111-17 and accompanying text.

234. See *supra* notes 118-24 and accompanying text.

235. See *supra* note 129 and accompanying text.

236. See *supra* notes 172-206 and accompanying text.

ity Act.²³⁷ Adoption of provisions similar to those of the Model Act will remove many interpretive difficulties associated with existing parental responsibility statutes. The result should be a uniformly applied system of statutory vicarious parental liability that effectively meets the needs of the parties involved.

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237. See *supra* text accompanying notes 215-25.

