Intra-Family Immunities and the Law of Torts in Ohio

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The author seeks to clarify intra-family immunity, a rapidly developing area of tort law, by tracing the evolution of parental and interspousal immunities, by an exhaustive analysis of four important Ohio cases, and by an in-depth comparison of Ohio tort law with that of several other jurisdictions. In citing modern developments and exceptions which have contributed to a gradual elimination of the various immunities, Professor Sullivan criticizes the recent judicial reasoning which has attempted to justify their existence. Raising several germane and, as yet, unanswered questions essential to an understanding of the immunity area, the author sets forth his views on the future of tort litigation in Ohio.

The radical change in tort law during the last two decades has wrought an expansion of liability in personal injury litigation. Many viewpoints which once were solely the opinions of academic scholars as to what the law should be have become either generally accepted rules or at least the trend of authority. For example, in most American jurisdictions, the unborn child is now allowed to sue for prenatal injuries.\(^1\) Courts with greater frequency allow recovery for intentional\(^2\) or negligent infliction of mental suffering when unaccompanied by contemporaneous physical injury.\(^3\) The child trespasser is now distinguished from the ordinary trespasser and is thus given protection in some of the industrial states which had previously refused to recognize the attractive nuisance doctrine.\(^4\) The doctrines of res ipsa loquitur and informed consent\(^5\) have extended recovery in medical malprac-

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1 See PROSSER, TORTS § 56 (3d ed. 1964).
3 PROSSER, op. cit. supra note 1, § 55, at 348-49.
tice litigation. Since 1950, several states have held that a wife may recover for loss of consortium against one who negligently injures her husband, and, of course, the most noteworthy example of the expanding nature of tort principles in the post-war era has been in the area of products liability.

However, not the least of the substantive changes in tort law has resulted from a re-examination by courts as well as legislatures of the policy factors which had previously exempted from liability otherwise tortious defendants. In the past twenty years, governmental and charitable bodies have experienced curtailment and in some cases elimination of immunity from tort liability. The desire by courts to meet changing conditions has resulted in many illogical distinctions in dealing with these various immunities, especially in the numerous post-war decisions concerning the intra-family immunities. Many of these decisions have created in the law of torts what a Connecticut court referred to as a "conglomerate of paradoxical and irreconcilable judicial decisions." It is the purpose of this article to evaluate, within the context of the changing nature of tort liability, the Ohio Supreme Court decisions which have involved the problem of intra-family immunity.

I. POST-WAR TORT LIABILITY IN OHIO

As in other states, tort law has not remained static in Ohio during the post-war period. The Ohio Supreme Court has not hesitated on occasion to overturn common law precedent and to espouse newer and more liberal views after it determined that an extension of liability in a particular area was both desirable and publicly ac-

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8 At the 1964 proceedings of the American Law Institute relating to the adoption of RESTATEMENT (SECOND), TORTS, § 402A (1965), Dean Prosser, its chief author, spoke in favor of the strict liability in tort theory:

I would venture to predict that in another 50 years this has fair chances of becoming a majority rule in the United States, because this is next to the liability for prenatal injuries — this is the speediest development in the law of torts that I have encountered in my lifetime, as well as being one of the most spectacular. 41 ALI PROCEEDINGS 351 (1965).


ceptable. Between 1948 and 1958, Ohio recognized: the right of the unborn viable child to sue after birth for its negligently inflicted prenatal injuries, the right of a patient to sue a charitable hospital for the negligent conduct of its employees, the right of a person to recover for an invasion of privacy, and the right of an ultimate consumer to recover against a manufacturer for personal injuries, even in the absence of privity of contract, if an express warranty can be found on the basis of the wording of a label on a sealed package.

Although such decisions were hailed by the proponents of expanded liability, the Ohio Supreme Court evidenced a slower and at times a more conservative attitude towards new developments in other fields of tort law than did courts in other states. Eight years after the court held that an express warranty might be discovered on a package label, it finally (and logically) reached the conclusion that a manufacturer might be sued by a third party not in privity with it on the basis of an implied warranty. After the removal of the charitable hospital immunity, the court soon announced that such removal was not to be interpreted as a general abolition of all charitable immunity; municipal governmental immunity, for instance, has withstood the attacks of its critics in Ohio despite a gradual overturn in other jurisdictions. The right of privacy, recognized by the court in 1956, was not to be extended in 1964 to a case in which minor children of an allegedly promiscuous man asserted that they were injured by the public notoriety attaching to the extramarital affair between the defendant and their father. In the same action, the court refused to grant to such children the right to sue the defendant for alienation of their father’s affection even though Ohio has for years recognized a spouse’s right...

16 Ibid.
18 Gibbon v. YWCA, 170 Ohio St. 280, 164 N.E.2d 563 (1960).
19 This trend is discussed in Hack v. City of Salem, 174 Ohio St. 383, 387-88, 189 N.E.2d 857, 860 (1963).
21 Kane v. Quigley, 1 Ohio St. 2d 1, 203 N.E.2d 338 (1964).
to maintain such a suit. This latter case was consistent with an earlier denial by the court to review a lower court decision in which a child was denied damages for loss of consortium resulting from the defendant's negligent infliction of injury to the father.

Such expansions or contractions of the ambit of tort liability by the Ohio Supreme Court are relevant to an understanding of the Ohio intra-family immunity suits of the same era, four of which will be the subject of this article. The conflicting policy factors raised and debated in the cases mentioned above are essentially the same ones that confronted the court when it ruled on intra-family immunities: (1) should court decisions strictly follow the doctrine of stare decisis and common law precedent and resist venturing into the establishment of new legal principles for charitable institutions, city governments, and manufacturers, as well as for family members; (2) would a judicial change in a particular case adversely affect an established relationship formerly given preferred status by the law on public policy grounds, such as a charity and its beneficiary, a doctor and his patient, or a husband and his wife; (3) if a court were to allow a child to sue for its prenatal injuries, an adult for mental disturbance, or a minor for the tortious acts of its parent, would such a court be in fact encouraging fraudulent and collusive suits which would result in unconscionable raids on insurance companies; (4) what would be the effect on the already overcrowded trial court dockets if courts were to allow consumers to sue manufacturers on a warranty theory, a patient his doctor for failure to warn of residual effects of an operation, or a wife her husband for real or fanciful wrongs; and (5) should not any radical departure from the established public policy of the state, such as removing municipal tort immunity, expanding the concept of consortium, or allowing a husband to sue his spouse, more properly be considered within the province of the legislature rather than the courts.

The extent to which Ohio has participated in the trend toward expanded tort liability in this post-war era has, of course, depended upon the answers which the Ohio Supreme Court, either expressly or impliedly, has given to these questions. Such answers have also influenced the present status of the law in this state concerning intra-family immunities.

22 Id. at 4, 203 N.E.2d at 340.
II. EVOLUTION OF INTRA-FAMILY IMMUNITY

A. Parental Immunity

Early in 1952, the Ohio Supreme Court in Signs v. Signs\(^{24}\) rendered its first decision on the family immunity issue. In this case a seven-year-old boy sued a partnership of which his father and another man were the only members. It was alleged that the boy was burned by a fire originating in a negligently maintained gasoline pump that was used in the partnership business. The trial court entered judgment on the pleadings in favor of the defendant, but this was reversed by the court of appeals.\(^{25}\) The Ohio Supreme Court, in unanimously affirming the appellate decision, stated in the syllabus: "A parent in his business or vocational capacity is not immune from a personal-tort action by his unemancipated minor child."\(^{26}\)

However, the opinion written by Judge James Stewart was much broader than the rule stated in the syllabus. He analyzed the entire periphery of the parental immunity question, pointing out that parental protection from suit by an unemancipated child was not based on old common law precedent which would have bound the court in the area of interspousal immunity. The immunity was introduced in the United States by an 1891 Mississippi case which held that a daughter could not sue her mother for false imprisonment.\(^{27}\) The decision was based on the need for preserving domestic tranquility, a principle which the court stated was founded upon sound public policy.\(^{28}\) No common law precedent was cited by the Mississippi court, and Judge Stewart was not impressed,\(^{29}\) although the decision had generally been followed in the United States.\(^{30}\) Noting that even in jurisdictions that supported this immunity rule, it had been severely criticized in dissenting opinions, the judge cited many exceptions which had developed to the rule.\(^{31}\) Three jurisdictions had allowed a child's suit against the parent for negligence when the

\(^{24}\) 156 Ohio St. 566, 103 N.E.2d 743 (1952).
\(^{25}\) Id. at 567, 103 N.E.2d at 744.
\(^{26}\) Id. at 566, 103 N.E.2d at 744.
\(^{27}\) Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891).
\(^{28}\) Id. at 711, 9 So. at 887.
\(^{29}\) 156 Ohio St. at 577, 103 N.E.2d at 748-49.
\(^{30}\) Id. at 569, 103 N.E.2d at 745. The judge further stated, however, that "of late [the rule] ... has been viewed with suspicion and has been limited." Ibid.
\(^{31}\) Id. at 569-73, 103 N.E.2d at 745-47.
parent was acting in a business rather than in a parental capacity.\textsuperscript{32} Decisions from other jurisdictions have established that a minor child can sue his parent for a malicious tort\textsuperscript{33} or the wrongful death of the other parent,\textsuperscript{34} and that he can sue the parent's employer for the negligence of the agent-parent.\textsuperscript{35}

In some of these cases, the existence of liability insurance protected the parent's personal assets from depletion by the payment of adverse judgments.\textsuperscript{36} Judge Stewart did not accept the assertion that this factor should affect the outcome of a tort controversy, arguing rather that legal issues should be decided on the merits, irrespective of whether a defendant was indemnified.\textsuperscript{37} He quoted at some length from Dean Prosser's writings\textsuperscript{38} in which both interspousal and parental immunity in tort were criticized.\textsuperscript{39} This noted authority stressed that the earlier historical bar to interspousal suits, which had been created at common law and which was based on the legal identity of spouses, had no application to the parent and child relationship.\textsuperscript{40} He stated that the chief reason offered by modern courts in support of interspousal immunity is the public interest in maintaining domestic tranquility.\textsuperscript{41}

Thus, courts deciding this latter type of suit should not be confronted with the difficult problem of interpreting the effect of married women's acts which have relieved the modern wife of many of these common law legal impediments. Prosser further pointed out that property suits had always been allowed between parent and child and that there was good reason to believe that a personal tort action between them would also lie in England.\textsuperscript{42} American courts which had denied recovery in such suits, had done so in reliance upon a variety of unconvincing reasons, such as an analogy of this type of action and the interspousal one, the danger of fraud and collusion, and the preservation of the equal distribution of the fam-

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\bibitem{32} Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905 (1930); Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939); Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932).
\bibitem{34} Minkin v. Minkin, 336 Pa. 49, 7 A.2d 461 (1939).
\bibitem{35} Wright v. Wright, 229 N.C. 503, 50 S.E.2d 540 (1948).
\bibitem{36} Cases cited note 32 \textit{supra}.
\bibitem{37} Signs v. Signs, 156 Ohio St. 566, 573, 103 N.E.2d 743, 747 (1952).
\bibitem{38} PROSSER, \textit{TORTS} § 99 (1st ed. 1941).
\bibitem{39} 156 Ohio St. at 573-75, 103 N.E.2d at 747-48.
\bibitem{40} PROSSER, \textit{op. cit. supra} note 38, § 99, at 905-06.
\bibitem{41} \textit{Ibid}.
\bibitem{42} \textit{Id.} § 99, at 905.
\end{thebibliography}
ily exchequer among the other family members. But the principal argument advanced by the American courts against allowing parent and child tort action had been, as in interspousal personal tort actions, the preservation of domestic tranquility. Logically, however, as Prosser pointed out, this same argument would have barred emancipated children's suits against their parents in tort or tort actions between siblings, but it had not done so. Nor had it barred suits between parent and child concerning their property rights.

Judge Stewart, impressed with this final point, stated:

It seems absurd to say that it is legal and proper for an uneman
cipated child to bring an action against his parent concerning the child's property rights yet be utterly without redress with reference to injury to his person.

It is difficult to understand by what legerdemain of reason, logic or law such a situation can exist or how it can be said that domestic harmony would be undisturbed in one case and be upset in the other.

Judge Stewart finally turned his attention to the supposed danger of fraud and collusion inherent in this type of action when one of the parties was insured. If, as he had previously argued, the existence of insurance is not a valid reason for the removal of immunity where a parent was indemnified, it cannot logically be used as an argument in support of recognition of immunity. He noted that a very similar problem had confronted the insurance industry earlier in the century with the advent of the automobile. In cases involving the liability of an operator of an automobile to his injured guest, it had been feared that recovery would open the door to fraudulent and collusive suits because of the existence of liability insurance. However, the Ohio courts continued to impose negligence liability on drivers until the legislature passed the guest statute limiting liability to cases in which the host was guilty of willful or wanton misconduct. Similarly, if there were a general feeling that parent and child litigation had created a climate for

43 Id. § 99, at 906.
44 Ibid.
45 Id. § 99, at 907.
46 Ibid.
47 156 Ohio St. at 576, 103 N.E.2d at 748.
48 Ibid.
49 Id. at 573, 103 N.E.2d at 747.
50 Id. at 576, 103 N.E.2d at 748.
51 OHIO REV. CODE § 4515.02.
52 156 Ohio St. at 576, 103 N.E.2d at 748.
fraudulent and collusive actions, the judge pointed out that the legislature could abolish the child's right of action by statute, and if the general assembly failed or was unwilling to act, the insurance companies could always exclude such family coverage. Thus it can be seen that the opinion of Judge Stewart was much broader than the actual decision which held only that the child could sue the parent for negligence in the latter's business or vocational capacity.

The opinion is important because identical reasoning will lead irresistibly to the conclusion that the two historical pillars which have been used to support not only parental immunity but also interspousal immunity are basically unstable. If the public interest in maintaining domestic tranquility is not affected when an unemancipated minor sues his father for a personal tort, then family harmony should likewise be unaffected if one spouse sues the other. It was not long before the Ohio Supreme Court actually did reach this result.

B. Interspousal Immunity

In June of 1952, four months after the Signs case, the court decided Damm v. Elyria Lodge No. 465. The plaintiff-wife sued a fraternal lodge, an unincorporated association, of which her husband was a member. She joined the officers and trustees of the lodge, but not her husband, as co-defendants. In her petition it was alleged that she fell and was injured on the premises of the lodge while attending a social function. Negligence on the part of the lodge was alleged in placing and maintaining an obstruction over which she fell and in failing to give warning of the hazard. After the suit was filed, the plaintiff's husband died, and the widow attempted to file a supplementary petition apprising the court of this fact. The case reached the Ohio Supreme Court after the court of appeals affirmed the trial court which had granted a motion to strike the supplemental petition and had sustained a demurrer to the original petition on the ground that it did not state facts sufficient to constitute a cause of action.

Judge Matthias adopted the plaintiff's statement of the question to be decided: "May the wife of a deceased member of a voluntary

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53 Id. at 576-77, 103 N.E.2d at 748.
54 Id. at 566, 103 N.E.2d at 743 (syllabus).
55 158 Ohio St. 107, 107 N.E.2d 337 (1952).
56 Id. at 108, 107 N.E.2d at 338-39.
57 Id. at 108-09, 107 N.E.2d at 339.
association maintain an action in tort against the association for a
tort committed against her during her husband's lifetime?" 58

The court unanimously held that the wife could maintain such
an action. 59 First, the procedural question raised by the defendant
as to whether a representative type action could be authorized on
these facts was answered in the affirmative. 60 Although the associa-
tion was not a legal entity for purpose of suit, it was a group of
individuals who were engaged in a common purpose and who were
too numerous for it to be practical to join them in a single action.
Thus, under the Ohio statute, 61 joinder of the officers and trustees
as representatives of the group could be utilized, even though no
personal judgment was sought against such representatives.

Secondly, since the petition included all the other members of
the lodge, including the plaintiff's husband by representation, the
defendant argued that such an action constituted a suit in tort by a
wife against her husband, which was not permitted under Ohio
law. 62 The court distinguished State v. Phillips 63 which contained
dictum to the effect that the various statutes enacted by the general
assembly conferring rights upon married women which they did not
possess at common law were not intended by the legislature to jus-
tify interspousal actions in tort. 64 Judge Matthias pointed out that
the issue in Phillips was whether a wife could be convicted of lar-
ceny when she had appropriated her husband's personal property,
and that therefore the decision actually was limited to the criminal
liability of the wife under modern law. 65 It in no way dealt with
the precise issue which was presently before the court: "the right of
a wife to recover damages for a tort committed by her husband." 66

After quoting from Dean Prosser's text on the historical basis
of interspousal immunity, 67 as had Judge Stewart in the Signs case,
Judge Matthias enumerated the various Ohio statutes which have
granted married women a separate legal identity and the power to

58 Id. at 109, 107 N.E.2d at 339.
59 Id. at 121, 107 N.E.2d at 344.
60 Id. at 109-10, 107 N.E.2d at 339.
61 Ohio Rev. Code § 2307.21 is the present law.
62 158 Ohio St. at 111, 107 N.E.2d at 340.
63 85 Ohio St. 317, 97 N.E. 976 (1912).
64 158 Ohio St. at 112, 107 N.E.2d at 340.
65 Id. at 112-13, 107 N.E.2d at 340.
66 Id. at 113, 107 N.E.2d at 340-41.
own and control property. The judge cited both article 1, section 16 of the Ohio Constitution which grants to every person in Ohio the right to have justice administered by the courts and Williams v. Marion Rapid Transit, Inc., which had relied upon this constitutional provision. The Williams case, decided in 1949, had recognized for the first time in Ohio the constitutional right of a child to recover for negligently inflicted prenatal injuries. He also pointed to the language in the statute which had removed the general disqualification of a wife as a witness against her husband in criminal proceedings as additional evidence of Ohio's recognition of a wife as a separate legal entity.

As in all intra-family immunity actions, Judge Matthias also had to answer the objection that the allowance of interspousal tort actions for personal injuries would interfere with the preservation of domestic tranquility and family harmony. In so doing, he relied upon Judge Stewart's opinion in Signs as well as upon Dean Prosser's text. Judge Matthias noted that the Signs decision refused to follow the majority rule in the United States in the parent and child area and recognized instead a modern trend towards liberalizing the immunity rule. He found the same liberalizing trend in the husband and wife litigation. It was noted that Prosser had impliedly argued that it was illogical to say that domestic tranquility was not disturbed when a wife sued her husband to enforce her property rights but that family accord would be seriously injured when she brought a personal tort action against him.

Judge Matthias concluded that the Ohio constitution and the various statutes discussed in the opinion had so modified the interspousal immunity rule that the plaintiff in the instant case might even maintain this action against her husband individually; there-

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68 158 Ohio St. at 115, 107 N.E.2d at 341-42, citing present OHIO REV. CODE §§ 2307.03-08. See also OHIO REV. CODE §§ 2307.09, 2323.09.
69 152 Ohio St. 114, 87 N.E.2d 334 (1949).
70 158 Ohio St. at 116, 107 N.E.2d at 342.
71 OHIO REV. CODE § 2945.42 (formerly OHIO GEN. CODE § 13444-2).
72 158 Ohio St. at 117, 107 N.E.2d at 342-43.
73 Id. at 117-19, 107 N.E.2d at 343.
74 Id. at 117-18, 107 N.E.2d at 343.
75 Id. at 118-19, 107 N.E.2d at 343, citing PROSSER, op. cit. supra note 38, § 99, at 903.
76 Judge Matthias cited an impressive list of cases from jurisdictions representing the minority viewpoint which allowed the wife to recover against her husband for intentional as well as negligent torts. 158 Ohio St. at 120, 107 N.E.2d at 344.
fore, she could certainly maintain such action against the unincorporated association of which he was a member.\footnote{\textit{Id}. at 121, 107 N.E.2d at 344.}

C. Establishment of the Minority View

A few observations are of interest concerning the \textit{Signs} and \textit{Elyria Lodge} cases. Both decisions were supported by a unanimous vote of the judges and, although, of course, the decisions must be limited to the facts of each particular case, the court was adopting what was then a definite minority viewpoint in the United States. The two cases indicate that the membership of the Ohio Supreme Court in 1952 did not hesitate to chart a new course in the law when it felt that such a result was required by modern conditions. Nor had there been any reluctance on its part in 1949, when the court recognized the right of a child to sue for prenatal injuries.\footnote{\textit{Avellone v. St. John's Hosp.}, 165 Ohio St. 467, 135 N.E.2d 410 (1956).} Similarly, in 1956, charitable hospital immunity was to be removed\footnote{\textit{Rogers v. Toni Home Permanent Co.}, 167 Ohio St. 244, 147 N.E.2d 612 (1958).} and in 1958 warranty recovery against a manufacturer was to be extended.\footnote{\textit{Id}.} Thus, the two intra-family suits, along with these other decisions, were further examples of the post-war expansion of tort liability and the influence of the same on Ohio law.

Even though it was thought by some writers that the intra-family bar was abolished in Ohio in both parental and interspousal actions as a result of the \textit{Signs} and \textit{Elyria Lodge} cases,\footnote{\textit{In reference to the holding in \textit{Signs}, Robert C. Bensing, formerly of the faculty of the Western Reserve Law School asserted: The writer does not believe that the inclusion of the phrase "business or other vocational capacity" is a limitation on the infant's right to bring suit against his parent, but that the court completely departed from the majority rule. This impression is based upon a reading of the opinion in the \textit{Signs} case and the court's reference to the \textit{Signs} case in \textit{Damm v. Elyria Lodge}, 158 Ohio St. 107, 117, 107 N.E.2d 337, 343 (1952). Bensing, \textit{Domestic Relations, Survey of Ohio Law} — 1952, 4 W. RES. L. REV. 224, 226 n.16 (1953).} it must be noted that neither case was a typical fact pattern in this type of tort litigation. Most of the post-war cases that have reached the appellate courts in both parental and interspousal suits appear to have
arisen out of automobile accidents in which the injured family member was a passenger, and it has been suggested by one authority that many if not most of these were brought because the owner or operator was insured. The scarcity of British precedent in the parent and child litigation may well be explained, with the exception of one case, by the fact that automobile ownership had not been as prevalent in Great Britain as it has been in the United States.

The Signs case was returned to the Ohio Supreme Court in 1954 after a trial on the merits. This time, the court ruled that, based on the facts developed at the trial, the minor plaintiff could not recover. Finding no negligence on the part of the partnership, the court held that even though the father might not in his business or vocational capacity be immune from personal tort liability to his unemancipated minor child, a parent was not subject to more extensive liability merely because it was his own child that was injured on the premises rather than the child of someone else. This holding is consistent with analogous cases in which the Ohio courts have maintained a strict attitude toward children injured on the premises of others.

(1) Subsequent Court Decisions.—In 1961, the Ohio Supreme Court without opinion refused to review the dismissal of an ordinary negligence case in which a minor child sought damages from his father for serious injuries sustained when struck by an automobile driven by the father, absent malice, and with no question of business capacity, agency, or the like. This decision was in accord with the weight of authority, for, despite many inroads into the general parental immunity rule in the post-war era, no court as of 1961 had allowed a simple negligence suit by a child against its parent when both parties were alive.

Wisconsin, in the 1963 case of Goller v. White, became the first jurisdiction ostensibly to deny parental immunity from liability for simple negligence. Although the suit was brought against a foster parent for injuries sustained by the child while he was riding on the drawbar of a tractor driven by the father, the Wisconsin court apparently treated the case as though a natural parent had

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64 Young v. Rankin, [1934] Sess. Cas. 499.
68 20 Wis. 2d 402, 122 N.W.2d 193 (1963).
been sued. Finding that the father's insurance contract did not extend to this accident, the court nevertheless held the parent personally liable. The family discord argument was rejected because of the fact that Wisconsin had for thirty-five years recognized the right of the wife to sue her husband and this had resulted in no adverse effects on family harmony.\(^8\) The court "abolished" parental immunity in all cases except when the act involved a right of parental authority over the child or the exercise of ordinary parental discretion while providing food, clothing, housing, medical and dental services, and other care.\(^8\) Thus Wisconsin has given the parent only a qualified immunity which is limited to matters that are inherently associated with domestic matters or which affect necessary parental disciplinary control. In 1966, Wisconsin logically held that the effect of the Goller decision was to annul the child's immunity as well as the parent's, with the end result that the parent could likewise sue his unemancipated minor.\(^9\) This case and others that recently have allowed similar actions stand for the proposition that the abolition of parental immunity is not just a one-sided proposal in favor of the minor child.\(^9\) If the minor can sue the parent for a personal tort, logically the parent should be able to sue the minor. This is an important factor when one considers the numerous accidents in which minors are involved and the fact that financial responsibility laws generally result in the minor driver being protected by insurance coverage.\(^9\)

(2) **Exceptions to the Immunity Doctrine.**—Since the Signs decision in 1952, the courts of such leading states as Pennsylvania,\(^9\) New Jersey,\(^9\) New York,\(^9\) and Rhode Island,\(^9\) along with a number of other states,\(^9\) have refused to abrogate parental immunity. However, so many exceptions have developed to the general immunity rule that, as recently pointed out by two legal writers, it has

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\(^8\) Id. at 410, 122 N.W.2d at 196.
\(^9\) Id. at 413, 122 N.W.2d at 198.
\(^9\) Ertl v. Ertl, 30 Wis. 2d 372, 141 N.W.2d 208 (1966) established that a parent could sue the child driver of a negligently operated automobile which struck the parent.
\(^9\) Gaudreau v. Gaudreau, 215 A.2d 695 (N.H. 1965). Cf. Balts v. Balts, 142 N.W. 2d 66 (Minn. 1965), wherein the court warned that its decision should not be construed as abrogating either interspousal or parental immunity.
\(^9\) Authorities are collected in Annot., 3 A.L.R.2d Later Case Service 37 (1965).
been eroded to the point in some jurisdictions at which it is now merely a rule that the parent and child may sue each other in tort unless the injury was caused by ordinary negligence. In a number of jurisdictions since 1952, the child has been allowed to sue the parent in either the latter's business or vocational capacity or both in accordance with the Signs decision. Similarly, the emancipated child has been allowed to sue his parent in his parental capacity. Several states have allowed the child's action when they have found the parent's conduct intentional, or in automobile cases when such conduct amounted to what the law deems willful or wanton misconduct, generally involving intoxication. Several states in this same period, although adhering to the general immunity rule when the parties are living, have permitted the suit against a deceased parent's estate. In a related area, suits between siblings have recently been allowed with greater frequency.

D. Husband-Wife Litigation

In the years following the Elyria Lodge case, the courts of Ohio do not appear to have been inundated with husband and wife litigation in tort any more than they were in the parent and child area. In Lowman v. Lowman, a divorce action decided in 1956, the plaintiff-wife filed an amended petition to nullify a previously executed separation agreement. It was alleged that during the separation period while the divorce was pending the husband had struck the plaintiff several times and had thrown her into an automobile

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89 Trevarton v. Trevarton, 151 Colo. 418, 378 P.2d 640 (1963); Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952); cf. Cody v. J. A. Dodds & Sons, 252 Iowa 1394, 110 N.W.2d 255 (1961). In the latter case, the negligent father was a member of a partnership, but the partnership could be sued as a separate legal entity in Iowa.
105 166 Ohio St. 1, 139 N.E.2d 1 (1956).
with such force that she sustained serious injuries.\textsuperscript{106} The court refused to set aside the separation agreement on the sole basis of this claim, choosing instead other grounds to invalidate the agreement.\textsuperscript{107} Chief Justice Taft said: "Plaintiff would have a cause of action against defendant for any injuries which may have been inflicted upon plaintiff's person by the willful or negligent acts of defendant."\textsuperscript{108} He concluded that any such cause of action would not be affected by the separation agreement.\textsuperscript{109} This holding certainly appears to have been based on the proposition that interspousal immunity — or at least the husband's immunity in tort — was not recognized in Ohio.

One of the arguments that is sometimes presented to disallow interspousal personal tort actions is the lack of necessity of such suits because other remedies such as divorce or criminal actions are available to the injured party.\textsuperscript{110} But in the Lowman case, essentially a divorce proceeding, Chief Justice Taft stated that the wife's remedy for any existing personal injuries would be in a personal injury suit,\textsuperscript{111} a procedure which would not be consistent with lower court authority prior to the Elyria Lodge case.\textsuperscript{112} In 1939, the court of appeals held, subsequent to recognition of interspousal immunity by the lower Ohio courts, that a defendant-husband could not be sued after divorce for an injury sustained by the wife in an automobile accident occurring the day before they were married.\textsuperscript{113} The court stated that the effect of the marriage was to extinguish any cause of action that might otherwise have existed in the wife and that once it was extinguished, the divorce action would not revive it.\textsuperscript{114}

In a 1963 court of appeals case, LeCrone v. Ohio Bell Tel. Co.,\textsuperscript{115} it was noted that the husband's immunity in personal tort
actions had been abolished by the *Elyria Lodge* case. The plaintiff had brought an action against the telephone company, alleging that while she and her husband were separated pending a divorce, the husband had the telephone company connect her private telephone line with an extension in his residence which was located in another part of the community. The inference was that the husband was thereby enabled to intercept the wife's private phone conversations. It was necessary to determine whether the plaintiff-wife had a cause of action against her husband for invasion of privacy before liability could be imposed upon the defendant-telephone company for knowingly aiding in that tort. Judge Duffey observed that the opinion in the *Elyria Lodge* case upheld a husband's personal liability to the wife for both intentional and negligent torts, and Judge Taft's opinion in *Lowman* was cited as additional support for the husband's liability for "willful or negligent acts." Judge Duffey admitted that privacy cases might present special problems when the parties were living together as man and wife; in the instant case, however, not only were the parties separated, but the wife also intended to obtain a divorce. Judge Duffey concluded that the wife had presented a prima facie case against the husband for invasion of her privacy. It was further held that the telephone company could be held severally liable for aiding in the commission of this tort, and the trial court ruling which had granted the defendant-company's motion for a directed verdict at the close of the plaintiff's case was accordingly reversed.

That the *LeCrone* case must logically rest on the proposition that interspousal immunity no longer existed in Ohio may be seen by comparing it with a recent federal district court decision in Iowa, a state that recognizes interspousal immunity. The plaintiff brought an action against his former wife and two other women for damages based on an alleged conspiracy to injure plaintiff's person, reputation, and property. It appeared that the women made statements to a Catholic priest in support of the wife's plan to obtain permission from the church authorities for separate maintenance.
and to receive ecclesiastical approval to initiate divorce proceedings. The court held not only that the statements were absolutely privileged as far as all three women were concerned but also that, in any event, the wife could not be joined in a conspiracy action unless the plaintiff could sue her individually. Under Iowa law, the court noted that one spouse could not sue the other for tort, including slander; therefore, she could not be joined with the other two defendants. But in the *LeCrone* case, in which the right of privacy was involved, the court in effect held that the defendant-telephone company was a joint tortfeasor with several liability as an aider of the husband in his intentional invasion of the wife's privacy. Under the new Ohio provisions on joinder of parties and causes of actions, enacted after the *LeCrone* case and in light of Judge Duffey's position regarding the husband's lack of immunity, there would appear to be no procedural or substantive reason at present why the husband and the telephone company could not be joined in such an action.

### III. Recent Developments

There are other significant developments in Ohio law, subsequent to the *Signs* and *Elyria Lodge* cases, which have had a bearing on family immunities. In 1955, the general assembly passed legislation which provided that an unincorporated association could be sued as a separate legal entity and that its assets were to be subject to any judgment obtained in such an action. In addition, the law specifically provided that such a judgment was not enforceable against the property of a member of such an association. In 1961, the Supreme Court of Ohio interpreted the effect of this

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124 *Id.* at 41.
127 131 Ohio Laws 1677 (1965). The general assembly repealed *Ohio Rev. Code* § 2309.06 which related to causes of actions united in the same petition affecting all parties. This former statute, as interpreted by *Huggins* v. *Morrell & Co.*, 176 Ohio St. 171, 198 N.E.2d 448 (1964), had been held to have a *restraining* effect on *Ohio Rev. Code* § 2307.191, the permissive joinder of parties statute enacted in 1963.
129 *Ohio Rev. Code* § 1745.01.
130 *Ohio Rev. Code* § 1745.02.
statute in a case involving a veterans' organization. Judge Zimm-
merman, speaking for the majority, pointed out that these statutory
provisions were merely cumulative and that a plaintiff could follow
the previous procedure and sue the individual members of the as-
sociation "collectively and conjointly." (It will be recalled that
in the Elyria Lodge case the officers were sued in their representative
capacity.) In addition, the judge stated that under the new statutes
a party could sue the unincorporated association as an entity and in
the name by which it was commonly known. He emphasized an
important point that was not commented on in the earlier intra-
family immunity suits: When a suit is brought against an unincor-
porated association organized and functioning in the business world,
the principles of partnership law apply, and the individual members
would incur personal liability for any adverse judgment rendered
against the association. However, if the suit were against an
unincorporated fraternal or social group, agency principles would
obtain, and only those members who actively participated in the
event which resulted in the tortious act would be personally liable.

In the Elyria Lodge case, the plaintiff's husband was not an
officer of the Elks Lodge nor an active participant in the acts which
resulted in injuries to the wife. Therefore, he would not have been
subject to a personal judgment even if he had been joined as a de-
fendant. Thus the husband as an Elk member was only in a tech-
nical sense involved in his wife's litigation. Conversely, in the
Signs case, the unincorporated association was a business partnership
composed of the minor plaintiff's father and another business asso-
ciate. As a result, if there had been an adverse judgment against
the two partners and either the firm's assets or any liability coverage
possessed by the association had not been sufficient to satisfy the
judgment, the individual assets of the partners, including the fa-
ther's, could have been attached. This emphasizes the fact that
Signs was in reality a more radical step in the direction of removing
intra-family immunity than was the Elyria Lodge case.

In other jurisdictions prior to 1965, greater inroads on intra-
family immunity have occurred in the interspousal area rather than

\[\text{\textsuperscript{132}}\text{ Lyons v. American Legion Post No. 650 Realty Co., 172 Ohio St. 331, 175 N.E.2d 735 (1961).}\]
\[\text{\textsuperscript{133}}\text{ Id. at 333, 175 N.E.2d at 735.}\]
\[\text{\textsuperscript{134}}\text{ Id. at 334, 175 N.E.2d at 736.}\]
\[\text{\textsuperscript{135}}\text{ Ibid.}\]
\[\text{\textsuperscript{136}}\text{ Id. at 336, 175 N.E.2d at 736.}\]
in parent and child suits. Formerly, the general rule other than in Wisconsin was that an unemancipated child could not maintain an action in damages against his parent for personal injuries resulting from the parent's ordinary negligence. However, thirteen jurisdictions by judicial decision have recognized interspousal suits on a negligence theory or have indicated that this type of action would be allowed. Three additional states have authorized by statute interspousal tort actions, including those sounding in negligence.

It must be admitted that these sixteen jurisdictions are in the minority because a majority of states by decision and five others by statute still bar interspousal litigation for personal tort based on negligence.

Nevertheless, the majority jurisdictions have developed exceptions to the general interspousal immunity rule similar to those in the parent and child field and more frequently have allowed suit against a deceased spouse's estate on the grounds that death has intervened "to forever circumvent all possibility of marital discord." Others will allow suit against the spouse's employer where the wife has been injured by the husband in the course of his employment, generally while operating the employer's automobile. Still other decisions recognize the action when the tort occurred

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140 N.C. GEN. STAT. § 52-5 (Supp. 1965); N.D. CENT. CODE § 14-07-05; N.Y. GEN. OBLIGATIONS LAW, under which interspousal tort suits are recognized but only if the defendant is uninsured. N.Y. INS. LAW § 167(3).
141 The majority rule has been set forth in PROSSER, TORTS § 116, at 882 (3d ed. 1964).
prior to marriage, even though the suit is continued during coverture.\textsuperscript{146} Of course, some jurisdictions will permit the action when the husband is guilty of an intentional tort committed against the wife.\textsuperscript{146} Even a common law state such as Maine, which forbids interspousal personal tort actions, will, in cases involving a two-car collision, allow a defendant-motorist, when sued by a plaintiff-wife, to implead the plaintiff's husband for contribution where it might be found that the husband was partly responsible for the accident.\textsuperscript{147} It must also be noted that although some states will not allow the interspousal suit, under existing direct action statutes, a party may sue the spouse's insurance carrier directly.\textsuperscript{148} Some jurisdictions will permit the wife to sue the husband but illogically deny the husband a similar right.\textsuperscript{149} In a 1965 Michigan decision involving the reevaluation of the issue of interspousal immunity, the court noted that presently thirty-two jurisdictions entertain interspousal personal tort actions in one form or another.\textsuperscript{150} Thus, when it is considered that a substantial minority of states allow interspousal suits outright and that others allow them under numerous exceptional circumstances, the modern post-war assault against all the immunities appears to have met with greater success in interspousal suits than in parent and child litigation.

It was with this background that the Ohio Supreme Court was again confronted with the intra-family immunity issue in 1965 and 1966. The membership of the court had changed substantially since 1952, as only two members, Chief Justice Taft and Judge Zimmerman, remained of the court that had rendered the \textit{Signs} and the \textit{Elyria Lodge} decisions. The first of these recent cases involved the issue of interspousal immunity. In \textit{Lyons v. Lyons},\textsuperscript{151} the plaintiff alleged that he suffered bodily injuries when struck by an automobile driven by his wife. It was further alleged that since the accident the parties had moved to Arizona and were residents of that state at the time of suit. The defendant-wife by answer raised the

\begin{itemize}
\item \textsuperscript{146} O'Grady v. Potts, 193 Kan. 644, 396 P.2d 285 (1964); Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953).
\item \textsuperscript{147} Bedell v. Reagan, 159 Me. 292, 192 A.2d 24 (1963).
\item \textsuperscript{149} E.g., Scholtens v. Scholtens, 230 N.C. 149, 52 S.E.2d 350 (1949); Fehr v. General Acc. Fire & Life Assur. Corp., 246 Wis. 228, 16 N.W.2d 787 (1944).
\item \textsuperscript{150} Mosier v. Carney, 376 Mich. 532, 543, 138 N.W.2d 343, 355 (1965).
\item \textsuperscript{151} 2 Ohio St. 2d 243, 208 N.E.2d 533 (1965).
\end{itemize}
defense of interspousal immunity in that the parties were living together as husband and wife at the date of the accident. Judgment on the pleadings was entered for the defendant but was reversed by the court of appeals on the authority of the Elyria Lodge case. The cause then came before the supreme court on a motion to certify.

Judge O'Neill, speaking for a unanimous court, stated: "The question presented is whether one spouse may maintain an action for personal injuries resulting from the negligence of the other spouse, where the parties were married and living together as husband and wife at the time of the alleged injury."  

It was held that such a spouse could not maintain such an action for three reasons: (1) the public policy of Ohio is to promote domestic tranquility and to encourage family harmony, which policy might be adversely affected by allowing interspousal personal tort actions;  

(2) the allowance of such an action would create a climate for fraudulent and collusive suits resulting in unconscionable raids on insurance companies;  

and (3) the removal of interspousal immunity would constitute such a departure from well-established policy that any such change should come by legislative as opposed to judicial action.  

Judge O'Neill distinguished the fact pattern from that of the Elyria Lodge case, wherein there was no danger of marital disharmony because the Elk member-husband was dead and the lodge was an impersonal organization. There was no danger of fraud and collusion because the husband was not a party defendant and thus had no opportunity to control the litigation. The judge stressed that the Elyria Lodge case was not a true interspousal suit but rather was an action against an unincorporated association at a time when such an organization could not be sued as a separate legal entity.  

He admitted that both the Signs case and the Elyria Lodge case contained language that would permit recovery in the present action, but such language had not been written into the syllabus of either case and he did not feel bound to follow it.  

Perhaps one of the more significant statements made in the Lyons opinion, as far as future intra-family suits are concerned, is the statement by Judge O'Neill pointing out the differences between

152 Id. at 244, 208 N.E.2d at 535.
153 Ibid.
154 Ibid.
155 Id. at 246-47, 208 N.E.2d at 536-37.
156 Id. at 245-46, 208 N.E.2d at 536.
157 Id. at 246, 208 N.E.2d at 536.
the two earlier actions — both of which were against unincorporated associations — and a true intra-family suit.\textsuperscript{168} Regarding the latter situation, he said: "The duty of support replaces the duty of compensation for injuries sustained by one because of the negligence of the other."\textsuperscript{169}

This appears to be an echo of similar language used by Judge O'Neill in 1964, when, in an opinion\textsuperscript{160} denying two children a recovery against a third person in an action based on alienation of their father's affection, he stated: "A child may indeed expect that his parent will have affection for him. This may be a moral obligation, but no legal obligation exists. The sole legal obligation imposed upon the parent is that of support."\textsuperscript{161}

These two statements, even standing by themselves, may well forecast similar holdings in future actions involving parental as well as interspousal actions. But this is not all. The decisions restating and retaining municipal tort immunity,\textsuperscript{162} the confusing distinctions created by the court in the charitable immunity area,\textsuperscript{163} the long delay in recognizing the implied warranty theory\textsuperscript{164} in products liability litigation, and the Lyons\textsuperscript{165} decision all reflect a more conservative attitude on the part of the present Ohio Supreme Court than was evidenced in the Signs and Elyria Lodge cases.

IV. Justifications for Intra-Family Immunity

The venturesome spirit, albeit of a limited nature, displayed on occasion by the court in the late 1940's and early 1950's appears to have been supplanted in the 1960's by one of a more defensive tenor.

Judge O'Neill did more in Lyons than distinguish the Elyria Lodge and Signs cases. He reconstructed and put back in place the

\textsuperscript{168} Id. at 245, 208 N.E.2d at 536.
\textsuperscript{169} Id. at 246, 208 N.E.2d at 536.
\textsuperscript{160} Kane v. Quigley, 1 Ohio St. 2d 1, 203 N.E.2d 338 (1964).
\textsuperscript{161} Id. at 3, 203 N.E.2d at 339.
\textsuperscript{162} Maloney v. City of Columbus, 2 Ohio St. 2d 213, 208 N.E.2d 141 (1965); Hyde v. City of Lakewood, 2 Ohio St. 2d 155, 207 N.E.2d 547 (1965); Hack v. City of Salem, 174 Ohio St. 383, 189 N.E.2d 857 (1963).
\textsuperscript{163} In Gibbon v. YWCA, 170 Ohio St. 280, 164 N.E.2d 563 (1960), the court held that Avellone v. St. John's Hosp., 165 Ohio St. 467, 135 N.E.2d 410 (1956) was not to be interpreted as extending liability to other charitable institutions. In Blankenship v. Alter, 171 Ohio St. 65, 167 N.E.2d 922 (1960), the court affirmed a judgment against a Catholic bishop for injuries sustained by a patron at a church bingo party. Note, Immunity of Non-Hospital Charities Re-examined, 21 Ohio St. L.J. 247 (1960).
\textsuperscript{164} Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966).
\textsuperscript{165} Lyons v. Lyons, 2 Ohio St. 2d 245, 208 N.E.2d 533 (1965).
two “pillars” of family immunity that Judge Stewart had previously demolished in the earlier parent and child suit, *Signs v. Signs.*\(^{166}\) In addition to the domestic tranquility and fraud and collusion arguments, he added a third “pillar,” namely, the avoidance of judicial legislation.

The domestic tranquility argument loses its persuasiveness when it is recalled that intra-family contract actions and tort actions involving property are allowed. It is difficult to support the position that more family bitterness will result from a law suit over a negligently inflicted traffic accident similar to the one in the *Lyons* case than from a suit regarding a misappropriated insurance policy, the profits of a business, or the contesting of a will.\(^{167}\) Inasmuch as most of the modern intra-family suits involve an insured motorist as a defendant, the typical case is in reality a direct action against the other member's insurance company. In a case where liability is clear, payment of the claim to the other family member should in fact promote family harmony by protecting the family from economic loss.

The second “pillar” supporting family immunity rebuilt by Judge O'Neill is the argument that there is a danger of fraud and collusion between the spouses which could result in unconscionable raids on insurance companies.\(^{168}\) This “pillar” contradicts the previous one. Under the domestic tranquility argument, the fear is put forth that intra-family tort actions will encourage broken homes and family discord, but here the claim is made that allowing such actions — when insurance is involved — will create an illicit spirit of complete togetherness among the family members.

Three jurisdictions in this country have cited Judge Stewart's answer to this argument, so well presented in the *Signs* case in 1952.\(^{169}\) Since *Lyons*\(^{170}\) was a unanimous decision, apparently none of the judges on the 1965 court agreed with Judge Stewart’s approach to the fraud issue in the *Signs* case. It is unfortunate that neither Chief Justice Taft nor Judge Zimmerman explained his apparent change in attitude concerning the fraud and collusion argument.

Fraud and collusion may be practiced by the insured and the insurance adjuster, by a doctor and his patient, or by intimate friends,

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166 *Signs v. Signs,* 156 Ohio St. 566, 103 N.E.2d 743 (1952).
168 2 Ohio St. 2d at 245, 208 N.E.2d at 535.
business partners or even an individual without the assistance of anyone. Chief Justice Traynor of the California Supreme Court, one of the foremost jurists in the country, espoused Judge Stewart's viewpoint on this problem in a case in which the court held that an unemancipated minor could sue his minor brother or sister or parent for an intentional tort.\textsuperscript{171} Justice Traynor wrote: "Courts will not immunize tortfeasors from liability . . . because of the possibility of fraud, but will depend upon the legislature to deal with the problem as a question of public policy.\textsuperscript{172}

In another case in 1960 involving an action between minor brothers,\textsuperscript{173} Justice I'Anson of the Virginia Supreme Court of Appeals stated:

Court should not immunize tort-feasors because of the possibility of fraud or collusion. It is more important to protect an infant in his person than to avoid the possibility of fraud and collusion by the denial of such protection. If actions were barred because of the possibility of fraud many wrongs would be permitted to go without redress.\textsuperscript{174}

Some of the wrongs that the Virginia court might have mentioned are: tortious prenatal injuries, negligent infliction of mental disturbance, and intra-family actions based on negligent injuries.

The third "pillar" of family immunity, namely, if there is to be substantial change in the public policy of the state, it should emanate from the legislature, had previously been relied upon by lower courts in Ohio\textsuperscript{175} in the pre-Elyria Lodge days. Professor Leon Green, the noted tort authority, responded to this argument rather convincingly a number of years ago in the process of commenting on the reluctance of courts to act in a related area of the law, namely, the extension to a wife of the right to sue for loss of consortium.\textsuperscript{176} Tort law, according to Professor Green, has been and will continue to be developed by courts on a case by case basis.\textsuperscript{177} He noted that legislation in the tort field very often created more problems for the courts than it solved, citing as examples guest statutes, traffic codes,

\textsuperscript{172} 45 Cal. 2d at 431-32, 289 P.2d at 225.
\textsuperscript{173} Midkiff v. Midkiff, 201 Va. 829, 113 S.E.2d 875 (1960).
\textsuperscript{174} Id. at 883, 113 S.E.2d at 878. (Emphasis added.)
\textsuperscript{175} Tanno v. Eby, 78 Ohio App. 21, 68 N.E.2d 813 (1946); Leonardi v. Leonardi, 21 Ohio App. 110, 153 N.E. 93 (1925); Finn v. Finn, 19 Ohio App. 302 (1924).
\textsuperscript{176} Green, Protection of the Family, 10 Hastings L.J. 237 (1959).
\textsuperscript{177} Id. at 245.
heart balm acts, and dram shop legislation.\textsuperscript{178} In Green's opinion, the average state legislature is generally confronted with too many other governmental problems and functions to be able to devote much time to tort legislation.\textsuperscript{179}

In the \textit{Mosier} case,\textsuperscript{180} previously referred to, Justice Smith of the Michigan Supreme Court, in a concurring opinion, said:

Albeit, I am in sympathy with the basic tone of the opinion of Justice KELLY who thinks that this new branch of tort liability could be better delineated by the legislature. I differ, however, in his conclusion that because there are so many ramifications we would be better off doing nothing in the cases before us and leaving the whole question to the legislature. Of course, the legislature may or may not act. Courts do not have the same options; they must render judgments between the parties. Cases may not be assigned to committees. Therefore, when, as here, parties call upon us for decision, the matter being within our jurisdictional competence, we must decide.\textsuperscript{181}

The Ohio Supreme Court in 1956 did not find this judicial legislation argument insurmountable, for it took it upon itself to overturn charitable hospital immunity.\textsuperscript{182} In 1966, the last of the four family immunity cases to be discussed in this article reached the Ohio Supreme Court. In \textit{Teramano v. Teramano},\textsuperscript{183} the plaintiff, an unemancipated eleven-year-old boy, alleged that he was severely injured when his defendant-father drove his car without warning at a high rate of speed into the driveway of the family residence, striking the boy and causing severe bodily injuries. The language of the complaint claimed "the whole, sole and proximate cause of the accident and the resulting injuries were due to the negligence and willful misconduct of the defendant while . . . under the influence of intoxicating beverages."\textsuperscript{184}

The \textit{Teramano} plaintiff in his petition was apparently trying to bring his facts within either the business or vocational exception of \textit{Signs}, or the willful and wanton exception\textsuperscript{185} recognized in other

\textsuperscript{178} Id. at 246-48.
\textsuperscript{179} Id. at 245-48.
\textsuperscript{180} Mosier v. Carney, 138 N.W.2d 343 (Mich. 1965).
\textsuperscript{181} Id. at 359.
\textsuperscript{182} Avellone v. St. John's Hosp., 165 Ohio St. 467, 135 N.E.2d 410 (1965).
\textsuperscript{183} Teramano v. Teramano, 6 Ohio St. 2d 117, 216 N.E.2d 375 (1966), reversing 1 Ohio App. 2d 504, 205 N.E.2d 586 (1965).
\textsuperscript{184} 6 Ohio St. 2d at 120-21, 216 N.E.2d at 378.
\textsuperscript{185} It was alleged in the complaint that the father was physically handicapped and that his car was specially modified to make it possible for him to drive, that he was engaged in his employment at the time of the mishap, and further that he knew or could have known that operating his automobile at such a rate of
jurisdictions. However, although the petition alleged that such conduct was "willful and negligent," it did not specifically use the term "wanton," or allege a conscious intention to injure. The plaintiff attempted to correct this omission in his opening statement in the trial court. After referring to the facts alleged in the petition, counsel stated that the evidence would show the requisite conscious intent, i.e., that the father was aware that children often exited into the driveway and had agreed with his wife and others to drive carefully past this exit so as not to endanger emerging children. At the conclusion of the opening statement, the trial court granted judgment for the defendant on the theory that an unemancipated child may not sue his parent for negligence. The court of appeals reversed, holding that where willful and wanton misconduct is pleaded, a recovery could be had in Ohio by a child against his parent.

When the case reached the Ohio Supreme Court, two basic issues were presented: (1) whether these facts raised an issue of willful and wanton misconduct; and (2) whether recovery should be allowed if such facts did raise that issue.

The court held that, based on the alleged facts in the petition and in the opening statement, the plaintiff could not recover and reversed the appellate court decision. Judge Brown, writing the majority opinion, stated that the plaintiff did not make out a case of willful or malicious tort. He thus avoided a discussion of that extremely nebulous concept, willful and wanton misconduct, which has most frequently arisen in Ohio in cases concerning application of the guest statute. Judge Brown concluded that in the parent and child cases in which recovery has been allowed, the basis has been either what he termed "an abandonment of the parental relationship," or that the cases have involved a dual relationship between

speed — particularly while under the influence of alcohol — . . . failure to keep said automobile under control, and failure to warn of his approach, could be dangerous to persons at said place, and particularly dangerous to this Plaintiff, who, as Defendant knew, constantly used said rear porch exit. Third amended petition filed in Cuyahoga County Court of Common Pleas, Teramano v. Teramano 736, 196 (June 12, 1962).

186 6 Ohio St. 2d at 118, 216 N.E.2d at 376.
187 Ibid.
188 1 Ohio App. 2d 504, 205 N.E.2d 586 (1965).
189 6 Ohio St. 2d at 117, 216 N.E.2d at 375.
190 Id. at 120, 216 N.E.2d at 377.
191 Id. at 118, 216 N.E.2d at 376. (Emphasis added.)
the parent and child, such as master and servant or carrier and passenger.\textsuperscript{192} In the latter cases, the family relationship is merely incidental and "becomes so logically irrelevant as to prevent immunity from attaching."\textsuperscript{193} The judge stated that Signs fitted into this latter category, concluding that numerous authorities have allowed a child's action against the parent only in two instances: (1) where the act is done by the parent in his business or vocational capacity (similar to Signs); or (2) where the parent's conduct shows a malicious intent to injure.\textsuperscript{194} This intention is clear when rape or murder are involved or when punishment is inflicted with malice because, as the opinion stated, "a person is presumed to intend the ordinary consequences of his voluntary act."\textsuperscript{195}

This latter point was supported by the Oregon case of Cowgill \textit{v.} Boock,\textsuperscript{196} a wrongful death action against the estate of a father who, while grossly intoxicated, had required his minor son against his will to accompany him on a wild automobile ride which ended in both their deaths. The Oregon court held that the decedent father was guilty of willful misconduct, stating:

Of course, the father did not actually intend to kill his son, but he was nevertheless responsible for the consequences which flowed from his wrongful act. . . . The father knew or ought to have known of the danger in driving at a high speed at nighttime over this mountainous highway when he and his brother were both drunk.\textsuperscript{197}

Although driving while intoxicated will not usually of itself be sufficient to constitute willful and wanton misconduct in Ohio,\textsuperscript{198} intoxication and the various aggravating circumstances present in the Cowgill case would probably qualify under Ohio law as a case of willful and wanton misconduct.\textsuperscript{199} Therefore, the case of presumed intent that Judge Brown referred to in the Teramano opinion is in reality the same as the concept of willful and wanton misconduct. Judge Brown concluded that the plaintiff's proffered evidence demonstrated neither a malicious intent nor an abandonment of the
Based on this reasoning, the trial court's dismissal of the action was upheld.

Judge Herbert dissented, in the belief that the issue of whether there was willful or wanton misconduct or an abandonment of the parental relationship should have been left to the jury. He noted at the outset that there may even be serious doubt whether parental personal tort immunity should extend beyond the privilege of parental disciplinary control, but he limited his dissent to the question of the right of trial by jury on the facts in this case.

Although in Teramano the plaintiff lost because the facts pleaded and presented in the opening statement would be "no evidence" of "malicious intent or abandonment of the parental relationship," and under a strict application of the rule of stare decisis the case would be no authority beyond this bare holding, nevertheless, the syllabus, which is "the law of Ohio," reads as follows: "A malicious intent to injure existing in the conduct of a parent toward his minor unemancipated child evidences abandonment of the parental relationship. Malicious intent to injure in such cases may be actual or implied."

Thus, in addition to the business and vocational exception recognized by the Signs case in 1952, the court in Teramano, at least according to the syllabus, added another exception to the parental immunity rule: An unemancipated minor child may now sue his parent for a personal tort when there is present a malicious intent to injure the child. Of necessity, this new exception must be subject to a reasonable right of disciplinary control. It has become even more important that the parent be entitled to this qualified control as various jurisdictions — including Ohio by statute — gradually withdraw the common law protection afforded parents from personal tort liability to injured third parties for the torts committed by minor children. On the other hand, the right of discipline should be more severely limited than it has been in the past so that

the courts may more readily deal with the numerous child-beating and abuse cases that have arisen in recent years.\textsuperscript{207}

V. FUTURE TORT LITIGATION IN OHIO

Although at first blush problems involving conflicts of law may seem far removed from intra-family immunities, on closer analysis it seems clear that conflicting principles may well play an important part in the future of Ohio law in this field. Most tort litigation today is concerned with automobile accidents in which more than one vehicle is involved.\textsuperscript{208} The same has been true of most of the recent cases relating to the intra-family immunity.\textsuperscript{209}

The tremendous improvement in interstate highways throughout the nation has and will continue to bring an increasing number of non-residents into Ohio and will encourage Ohio citizens to travel outside the state. Unfortunately, an inevitable result will be an increase in Ohio automobile accident cases in which either the parties are residents of different states or the litigation involves a tort occurring in another state which very possibly has different intra-family immunity laws. No immunity case has yet reached the supreme court involving the typical automobile accident case in which one family member was injured due to the negligence of another member of the family.

The existence of the Ohio guest statute\textsuperscript{210} may have prevented such cases from reaching the supreme court. Signs and Elyria Lodge involved injuries on premises; Lyons and Teramano involved parties who were injured by automobiles, but in neither of these two cases was the particular plaintiff in or on the vehicle, which would have raised an issue under the guest statute. A review of the cases in neighboring states shows that a number of them treat various aspects of the immunity problem in a different manner than does Ohio.\textsuperscript{211} When it is recalled that over thirty-two jurisdictions recog-
nize some form of interspousal action and that others have greatly limited the parental immunity rule, it is not unlikely that a question of conflicts of law in this area may well be raised in Ohio courts between members of an Ohio family involved in an out-of-state accident or non-residents involved in an Ohio accident.

Traditionally, when problems of this nature have arisen, most courts have followed the old territorial tort theory. According to this theory, as applied to intra-family immunity questions, the capacity of one family member to sue another is determined by the law of the state in which the tort occurs. A contrary approach taken by some writers, as well as by a growing number of courts, treats the immunity question as one of family law rather than substantive tort law and seeks to apply the law of the litigant's domicile. As a matter of fact, in the Lyons case it was argued that the husband and wife had moved to Arizona after the accident, were presently domiciled in that state, and that therefore Arizona law should apply. The opinion, espousing the territorial tort idea, stated that the law of the place of the injury was applicable to the immunity question. Since Ohio was the place of injury as well as the actual forum, Ohio law was applicable. However, it was pointed out that the law of Arizona was not pleaded and so must be presumed to be the same as Ohio's. Thus, a true conflicts problem was not presented. Similarly, the issue was not actually

GAVITIONS LAW § 3-313, interspousal tort suits are recognized but not if the defendant is insured. N.Y. INS. LAW § 167 (3); Kleinfelter, Interspousal Immunity in Pennsylvania—a Concept in Evolution, 69 DICK. L. REV. 143 (1962). In applying Pennsylvania law, a federal district court held that a minor son and a widow of the deceased might sue the administrator for injuries sustained by the son in an automobile accident. Davis v. Smith, 126 F. Supp. 497 (E.D. Pa. 1954), aff'd, 253 F.2d 286 (3d Cir. 1958).


213 Cases cited notes 63-66 supra.


215 Law review articles are collected in Balts v. Balts, 142 N.W.2d 66, 68 n.4 (Minn. 1966); RESTATEMENT (SECOND), CONFLICT OF LAWS § 390: (Tent Draft No. 9, 1964).


217 Lyons v. Lyons, 2 Ohio St. 2d 243, 208 N.E.2d 533 (1965).

218 Id. at 243-44, 208 N.E.2d at 534-35.

219 Id. at 244, 208 N.E.2d at 535.

220 Ibid.

221 Ibid.
litigated in the Signs, Elyria Lodge, and Teramano cases, all of which involved family members domiciled in Ohio.

It is apparent that the last word on intra-family immunities in Ohio has not been written. These four intra-family immunity cases leave many questions unanswered. In the Lyons case, the syllabus, which Judge O'Neill stresses to be the controlling law in Ohio, states: “A spouse may not maintain an action against the other spouse for personal injuries resulting from the negligence of the other spouse where the married persons are living together as husband and wife at the time of the injury.”

This syllabus does not directly prohibit or allow an action against a deceased spouse’s estate for negligent injury even though the parties were living together as husband and wife at the time of the injury. It certainly would not prevent a legal action against one of the parties to compensate for a tort committed during coverture or, for that matter, prevent a cause of action for an antenuptial tort or a suit against the spouse’s employer on the basis of respondeat superior for the tort of one of the spouses. It is even questionable whether it would prevent such a suit as was presented in Lowman v. Lowman in light of the fact that Chief Justice Taft indicated that the wife could sue for an intentional or negligent tort committed while she was living apart from her husband. Nor would the syllabus appear in any way to prohibit a wife living apart from her husband from suing him for invasion of privacy in a factual situation similar to LeCrone v. Ohio Bell Tel. Co.

In none of these situations does the syllabus in the Lyons case prevent a recovery, but the three “pillars” of family immunity — domestic tranquility, fraud and collusion, and judicial legislation — might well do so.

In the parent and child area, these four cases do not indicate whether an emancipated child may maintain an action against a

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222 Id. at 246, 208 N.E.2d at 536.
223 Id. at 243, 208 N.E.2d at 534.
224 Cases cited note 143 supra.
225 Cases cited note 145 supra.
226 Cases cited note 147 supra.
227 Cases cited note 146 supra.
228 Lowman v. Lowman, 166 Ohio St. 1, 139 N.E.2d 1 (1956).
229 Id. at 9-10, 139 N.E.2d at 6-7.
231 See Logan v. Reaves, 209 Tenn. 631, 354 S.W.2d 789 (1962).
parent for injuries occurring while the child was unemancipated.\textsuperscript{232} Nor is there a clue as to whether an unemancipated minor child may sue a deceased parent's estate for a negligently caused injury.\textsuperscript{233}

Furthermore, Ohio has not yet ruled on the status of a person who stands in loco parentis. This latter question is an important one, considering the large number of children who are placed by the court in foster homes throughout the state.\textsuperscript{234}

In addition, the four cases do not indicate what the Ohio Supreme Court's attitude would be in a suit by a parent against an unemancipated minor child.\textsuperscript{235} Probably in the case of small children, the parents' own negligence in failing properly to supervise the tortiously inclined child would be a factor in preventing any recovery; however, most of the actions that have arisen in recent years have involved older children injuring their parents while operating motor vehicles.\textsuperscript{236} None of the four cases provides a clue as to the Court's attitude toward suits between siblings. Most of the more recent decisions in other jurisdictions have allowed such actions,\textsuperscript{237} although this very likely represents the minority view.

Two factors stand out about these four principal immunity cases. First, they do not present typical factual patterns as compared with other modern leading cases concerning intra-family immunities. Such cases have involved automobile accidents in which the injured party had been a passenger. Second, there is a striking unanimity of the judges' opinions in the four cases. Only one of the twelve judges who voted in these cases filed a dissenting opinion, and this related to a procedural matter rather than to a disagreement with the law enunciated by the majority opinion.\textsuperscript{238} Thus it would appear that the law relating to the particular facts of these cases is settled.

However, in light of the many exceptions which have recently been developed in intra-family law in other jurisdictions and in view of the many questions which remain unanswered in Ohio, it is evident that there is much yet to be decided by the Ohio Supreme Court in the field of intra-family immunity.

\textsuperscript{232} Lyons v. Lyons, 2 Ohio St. 2d 243, 208 N.E.2d 533 (1965).
\textsuperscript{233} Cases cited note 103 supra.
\textsuperscript{234} PROSSER, TORTS § 116, at 886 (3d ed. 1964).
\textsuperscript{236} Ibid.
\textsuperscript{237} Cases cited note 104 supra.
\textsuperscript{238} Teramano v. Teramano, 6 Ohio St. 2d 117, 120, 216 N.E.2d 375, 378 (1966).