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Along with the evolution of the family unit, society has willingly accepted the premise that parents have absolute power over their unemancipated children. In ancient times, parental authority was unconditional and parents were granted the power of life and death over their minor children. As late as the eighteenth century, Americans recognized a parent's right to unquestioned authority and by the late nineteenth century, the American courts developed the doctrine of parent-child tort immunity. The doctrine was designed to exempt parents from personal liability for tortious acts they committed against their minor child. As the doctrine of parental immunity evolved, the courts began to articulate several rationales in justification of its application. Because the application of the doctrine often resulted in harsh inequities, the courts were then forced to carve out exceptions.

Twentieth century courts have moved to protect individual rights and, as a result, the child in modern society enjoys a better legal status then did his predecessor. Several states have recognized the need to reexamine the parent-child immunity doctrine and have abrogated the doctrine in favor of the "reasonable parent" standard.

This discussion of parent-child tort immunity will include five sections: 1) a historical look at the parent-child relationship; 2) a discussion of the rationales behind the doctrine of parent-child immunity; 3) the exceptions carved out by the courts; 4) the doctrine as it stands in Louisiana law; and 5) the abrogation of the doctrine and adoption of the reasonable and prudent parent standard.

Historical Relationship Between Parent and Child

As far back as Roman times the father, or *paterfamilias*, as head of the family unit, had complete authority over the members of the family. This absolute authority was called *potestas* and extended not only to the right to sell an unemancipated child but included the power of life or death. While Roman law allowed for compensation for personal injuries tortiously committed, it was impossible for a *paterfamilias* to incur any liability for wrongful injury to his child. Additionally, an unemancipated Roman child was incapable of owning property and any property a child acquired would automatically revert to the ownership of the father. Therefore, even if a child were able to bring an action against the father, any compensation would revert back to the *pater-*

familias. In effect, the father had a "de facto" immunity by virtue of the fact that the child was unable to own any property.[1]

Eventually, the absolute power of the *paterfamilias* was restricted. The parent no longer had the power of life or death over his child. Only the very poor were allowed to sell their children. Legal sanctions for child abuse were enacted, but they were rarely imposed.

With the emergence of Christianity in the Middle Ages, the status of the child improved ever so slightly. The child could own separate property and society began to recognize the need for moral and legal sanctions against abusive parents.

In Colonial America, the child was viewed as stained and sinful. It was the duty of every parent to be stern in order to rid his child of vices, particularly the sins of pride and disobedience.[2] The belief in near-absolute parental authority was strongly evidenced by laws in Massachusetts and Connecticut, which provided that a child who was stubborn or rebellious or cursed and struck his parents could be executed.[3] While parents were encouraged to strictly discipline the evil child, the law did provide penalties if a parent acted unreasonably in the exercise of discipline. In reality the parent had few bounds and incurred no liability unless he acted with malice or inflicted permanent injury.

For example, the 1837 case of *Johnson v. State*[4] described a parent who punched his child, pushed her head against the wall, tied her to the bed for two hours, and hit her with cowhide. The court declared that the reasonableness of the actions was a question of fact for the jury to decide. Fifty years later, the North Carolina Supreme Court would declare that a father who hit his daughter thirty times with a small limb, choked her until her tongue hung out of her mouth, and threw her violently to the ground dislocating her thumb, could not be found criminally liable.[5] A bizarre South Carolina statute[6] enacted in 1712 seems to permit a parent to correct his children by stabbing them and provides that if a child is accidentally killed, the parent would not be criminally responsible.[7]

In those cases where a parent was held legally accountable for injuries inflicted upon his or her child, the penalties afforded the child little protection. The parent was either separated from the child, leaving the

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1. G. Leslie, The Family in Social Context 168-70 (2d ed. 1973).
2. Hollister, Parent-Child Immunity: A Doctrine in Search of Justification, 50 Fordham L. Rev. 489, 491 (1982).
3. The Family in History 42 (C. Rosenberg ed. 1975).
4. 21 Tenn. 282, 284 (1837).
5. State v. Jones, 95 N.C. 588, 591-92 (1886).
6. S.C. Code Ann. § 16-3-40 (Law. Co-op. 1976).
7. Hollister, supra note 2, at 492 n.26 (1982).

family with no means of support, or fined. If the child had not died, fines were more often imposed rather than jail terms.[8]

In *Fletcher v. People*,[9] the court imposed a $300 fine when a parent doused a child with kerosene to rid him of vermin and then kept the child in the cellar for several days in the dead of winter. In *State v. Washington*,[10] the court fined a parent $20 for beating a child with a switch and thereby permanently scarring him. A Texas jury, in *Snowden v. State*,[11] imposed a $25 fine for aggravated assault and battery.[12]

THE SIX RATIONALES

In view of the absolute authority a parent exercised over his minor child, it was impossible to imagine that a child would have any cause of action against a tortious parent. In 1891, however, such a claim was before the Mississippi Supreme Court and it first articulated the doctrine of parent-child tort immunity. In *Hewlette v. George*,[13] a minor daughter, who was married but separated from her husband and had returned to her mother's home, attempted to sue the estate of her deceased mother for wrongful confinement to an insane asylum. The daughter claimed damages for the amount expended in obtaining her release, the value of her time in confinement and mental suffering, shame, mortification and injury to character.[14]

The court reversed the trial court judgment in favor of the daughter and held that while the daughter's damages were real, by returning to the mother's home after her separation, she was under the care and guidance of her parent and could not maintain an action against her mother. The court reasoned:

> The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The state, through its criminal laws, will give the minor child protection from parental violence and wrong-doing, and this is all the child can be heard to demand.[15]

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8. Id. at 492.
9. 52 Ill. 395 (1869).
10. 104 La. 443, 29 So. 55 (1900).
11. 12 Tex. Crim. 105 (1882).
12. Hollister, supra note 2, at 492 n.30.
13. 68 Miss. 703, 9 So. 885 (1891).
14. Id.
15. Id. at 711, 9 So. at 887.

The courts did not address the issue of parental tort immunity again until 1903. In the case of *McKelvey v. McKelvey*,[16] a minor son sought to recover damages from his father and stepmother for cruel and inhumane treatment. The Supreme Court of Tennessee upheld a lower court's dismissal of the cause of action. The court relied heavily on the "peace of society" reasoning of the *Hewlette* court but added the following further justification:

> [T]he right of the father to the control and custody of his infant child grew out of a corresponding duty to maintain, protect and educate. . . . The right to control involved the subordinate right to restrain and inflict moderate chastisement upon the child. In case parental power was abused, the child had no civil remedy against the father for the personal injuries inflicted.[17]

The court further reasoned that the parent-child relationship is analogous to the husband-wife relationship:

> [T]he husband was the guardian of the wife and was bound to protect and maintain her, and on that ground the law gave him reasonable superiority and control over her person, authorized him to put gentle restraints upon her liberty if her conduct was such to require it.[18]

The court noted that the proper action by a wife for unreasonable restraint by her husband was by writ of habeas corpus. This comparison of spousal immunity to parental immunity had no legal basis and was in fact erroneous for several reasons. First, the contract of marriage is entered into voluntarily whereas children do not select their parents. Second, the relationship of husband and wife is theoretically for life, while the parental authority lasts only until the child reaches majority. Third, the parent acquires no legal right to the property of his minor child, but acts only as guardian. Finally, the wife had no legal standing. She was considered one unit with her husband and could not sue or be sued or enter into contracts. The child was considered a legal entity and could exercise his status except for the right to sue his parent for tortious misconduct.[19]

The final case to firmly entrench the parent-child tort immunity doctrine firmly in American jurisprudence was *Roller v. Roller*.[20] In this case a minor daughter brought an action against her father for the crime of rape. The father had been criminally convicted and was serving

16. 111 Tenn. 388, 77 S.W. 664 (1903).
17. Id. at 389-90, 77 S.W. at 664.
18. Id. at 391-92, 77 S.W. at 665 (citation omitted).
19. McCurdy, Torts Between Parent and Child, 5 Vill. L. Rev. 521, 523-24 (1960).
20. 37 Wash. 242, 79 P. 788 (1905).

time in the state penitentiary. The daughter sought damages of $2,000 and the family homestead in which she and her siblings were living. The court realized it could not rely on the theory that parental immunity was necessary to maintain the harmony of the family or was required to protect parental rights to discipline. Instead the court again fell into the trap of analogizing the parental immunity to interspousal immunity. It added that if the child were allowed to recover damages from the tortfeasor parent and that child predeceased the parent, the offending parent would stand to inherit from the child and thereby profit from his wrongdoing. The court further explained:

> the public has an interest in the financial welfare of other minor members of the family, and it would not be the policy of the law to allow the estate, which is looked to for the support of all the minor children, to be appropriated by any particular one.[21]

These three cases firmly established the doctrine of parent-child tort immunity in American law. In summary, the caselaw articulated six rationales that made the doctrine necessary: 1) the need to maintain domestic tranquility and harmony; 2) the need to insure the parents' right to discipline, care, and control; 3) the need to avoid the depletion of the family's assets; 4) the possibility of parental inheritance of the child's recovery; 5) the possibility of fraud and collusion among family members; and 6) the analogy to spousal immunity.[22] More than fifty years passed before a state finally abolished this bright-line doctrine in favor of an approach that considered individualized factors of the case at hand to determine if the rationales for the doctrine applied.[23] As the children continued to contest the issue, courts found it necessary to critically evaluate the rationales and to carve out exceptions.

The most plausible of the six justifications is the necessity to maintain tranquility, peace, and harmony in the family. However, as Gail Hollister points out:

> The refusal to permit the injured party to sue does not eliminate the conflict. The loss, and thus the conflict, exists regardless of the immunity: "[I]t is the injury itself which is the disruptive act." To prohibit suit in the name of domestic harmony is to

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21. Id. at 245, 79 P. 789.

22. Journal of Family Law 315, 315-16 (1984-85).

23. Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963) (cited in Hollister, supra note 2, at 512). The court stated that the doctrine would only apply where the negligent act involved an exercise of parental authority or an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medicine and dental services, and other care.

allege "that an uncompensated tort makes for peace in the family."[24]

She goes on to argue that to deny the child the right to sue the parent shifts the burden of the loss to the innocent victim instead of to the tortfeasor. Forcing the child to go uncompensated is more likely to produce disharmony. Furthermore, the existence of liability insurance in many cases would alleviate the financial burden for many parents when a child is negligently injured. Hollister also points out that the courts have always allowed a child to sue a parent in matters of property or contract disputes. There is no evidence that a tort action between parent and child would be any more disruptive than a property or contract action.

Finally, the courts do nothing to protect the harmony of the family if the rights of a third party are at stake. If a child should witness the parent's tortious injury of a third party, the court does not protect the child from testifying against the parent in the litigation. "If the fear of disharmony in the family is insufficient to prevent a third party from subjecting families to the friction inherent in litigation by requiring a child to testify against his parents, it should not be sufficient to prevent the injured child from deciding to seek compensation for his injuries."[25]

The second argument in favor of parental immunity is the necessity to protect a parent's right to control and discipline his child. Perhaps it is believed that to allow suit between parent and child would undermine the parent's authority over the child. One might legitimately argue that the parent has the privilege to discipline his child without fear of reprisal from the court. Parents, however, do not have unchecked discretion in disciplining their children. This is evidenced by the fact that a parent may be deprived of his parental rights or criminally prosecuted for overstepping the bounds of reasonableness and causing injury to his child. It is also argued that if the immunity is not allowed, parents who choose to raise their children in a less conventional manner could become victims of juries who disapprove of their methods even though they are not tortious. It should also be noted that the exercise of discipline is an intentional act—one does not accidentally discipline a child—and intentional injuries have been found to be an exception to the parental immunity rule.

The court in *Roller* declared the third justification to be the need to protect the family treasury for the innocent members of the family. While this may appear to be an altruistic motive, it is in fact unfounded

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24. Hollister, supra note 2, at 502 (quoting Falco v. Pados, 444 Pa. 372, 380, 282 A.2d 351 (1971) and W. Prosser, Handbook of the Law of Torts § 122 at 856 (4th ed. 1971), respectively).

25. Hollister, supra note 2, at 504.

for several reasons. Primarily, as was mentioned previously, the law has always allowed a child to recover damages from a parent in cases of property litigation and contract disputes with little regard for the depletion of the family coffer. The states have had no problem fining parents prosecuted for criminal wrongdoing against a child. These fines have, of course, depleted the family treasury to the detriment of the innocent siblings. This kind of liability should not be viewed differently simply because the money inures to the benefit of the state and not to the injured child. Further, if a parent were to injure a third party, he would be liable to that person for damages. In such an instance the innocent family members are not financially protected. It is unreasonable to expect a child, because of his family status, to go uncompensated for his injuries so that his siblings might be protected. No child has an automatic right to the property of his parents. It can also be argued that the injured child is not being favored over his siblings but is being equitably compensated for his damages. Finally, in some instances there are no siblings to protect. Parents should not enjoy the benefit of the immunity when the rationale does not apply.

If a child were allowed to sue a parent, the availability of liability insurance would actually work to the benefit of the family's finances by relieving the parents of expenditures for the injured child. It is recognized that the availability of insurance may increase the likelihood of fraud and conspiracy against an insurer. That possibility, however, is reduced if the insured must cooperate with the insurer in his defense. It hardly seems fair to deny all claimants because some may engage in unlawful collusion.

The fourth justification for the doctrine is the possibility that the parent might stand to benefit from his tort by inheriting from the injured child should the child predecease him. In the unlikely event that a compensated child dies before the parent, the parent is not profiting from the tort, but is having his expenditure returned. If the damages were paid by insurance, the better solution would be to deny the parent the right to inherit these particular funds instead of denying recovery to the one injured. In addition, if the child dies because of the injuries inflicted by the tortious parent, the wrongful death laws would prevent the parent from recovering.

THE EXCEPTIONS

Because the rationales used to justify parental tort immunity led to such inequity, the courts were forced to carve out exceptions to the rule. Those states that still adhere to the doctrine employ one or more of the following exceptions: 1) If the parent's misconduct is willful and wanton, the courts have reasoned that the sanction of such conduct does nothing to foster family unity and simply denies an injured child

redress. 2) If the cause of the injury is "beyond the family purpose" the jurisprudence holds that the immunity will not apply. The reasoning is that the doctrine protects only that "conduct which arises from the family relationship and is directly related to family purposes and objectives."[26] This exception encompasses those situations where the parent-child relationship is that of employer-employee. 3) Some states recognize the "public duty exception" to the immunity doctrine. This is applied when the duty the parent breaches is owed to the general public and not just to the child. 4) Death is also held to be an exception to the rule. Because the doctrine is based on the parent-child relationship and the desire to maintain the harmony of that relationship, the doctrine does not apply when a child is suing the estate of a deceased parent or the estate of a deceased child is suing the tortious parent. 5) Some states have abrogated the doctrine if the parents are divorced or separated and the non-custodial parent is the offender. 6) The courts have been forced to make an exception when a defendant third party is a negligent parent in a claim for contribution. 7) The courts in some states have refused to extend the privilege to those standing in the role of the parent (*in loco parentis*). 8) Other states have held that where the parent is protected by liability insurance, the immunity cannot be claimed; the theory is that a claim covered by insurance will not deplete the family resources or disrupt its harmony.

THE DOCTRINE IN LOUISIANA

In Louisiana, the doctrine has received both jurisprudential and legislative attention. As early as 1850, in *Bird v. Black*, the supreme court observed that

> The decisions of this court have not encouraged suits of children against their parents, unless to redress clear and palpable injustice. There are services which parents render to their children, and which it is presumed they perform until the contrary appears, which money cannot pay; and filial duty should restrain the child from exposing the faults of its parents, or worrying them with litigation, unless *compelled by extreme necessity*.[27]

This case involved a daughter who sued her mother for mismanagement of her estate while she was a minor. In disallowing the claim, the court relied on the rationale that the immunity was necessary to protect family tranquility and harmony. The court seemed to imply that if the parental misconduct was such a "clear and palpable injustice"

26. Comment, Parent-Child Tort Immunity in Illinois, 17 Loy. U. Chi. L.J. 303, 314 (1986).

27. Bird v. Black, 5 La. Ann. 189, 196 (1850) (emphasis added).

that the child was "compelled by extreme necessity" to seek relief, the action should have been allowed. Thus the court carved out the first exception to the doctrine.

The supreme court again addressed the issue in the 1935 case of *Ruiz v. Clancey*.[28] This case involved a suit brought by minor children against the administrator of their father's succession. The claim was for the loss of companionship and for grief due to the death of their mother caused by their father's negligent operation of an automobile. The defendants claimed the children had no cause or right of action, citing the Code of Practice: "Children, as long as they are subjected to paternal power, that is to say, while their fathers and mothers are living and they not emancipated, can not bring suit against them."[29] The court duly noted that the language of the article implied that an unemancipated child, through an action by a tutrix, may bring suit against the succession of a deceased parent.

The protection afforded a tortious parent was statutorily confirmed by 1960 Louisiana Acts No. 31. Upon recommendation of the Louisiana State Law Institute, the legislature transferred the provisions of Article 104, Code of Practice to the Louisiana Revised Statutes 9:571, which reads:

> The child who is not emancipated cannot sue:
>
> (1) Either parent during the continuance of their marriage, when the parents are not judicially separated; or
>
> (2) The parent who is entitled to his custody and control, when the marriage of the parents is dissolved, or the parents are judicially separated.

It should be noted that while the new statute does not carry the language "while their mothers and fathers are living," it is understood that if either parent is dead there is no "continuance of their marriage."[30]

The Fourth Circuit Court of Appeals, in *Johnson v. Housing Authority of New Orleans*,[31] held that a parent could assert the immunity against third party demands made by joint-tortfeasors. The case involved an action by a parent against his landlord for injuries sustained when his minor child fell from an open porch. The landlord claimed the parent was contributorily negligent and third-partied the parent for contribution. The court reasoned that had the child directed the action against the landlord and the parent in solido, the parent could have

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28. Ruiz v. Clancey, 182 La. 935, 162 So. 734 (1935).

29. La. Code of Prac. art. 104 (1932).

30. Id.

31. Johnson v. Housing Authority of New Orleans, 163 So. 2d 569 (La. App. 4th Cir. 1964).

successfully asserted the immunity defense. Therefore, the court held that:

> To allow the defendants [landlord] herein to prosecute their demands for indemnification or contribution against the parents would in effect be investing a wrongdoer, as against the co-tortfeasor, with a greater right than the tort victim has.[32]

In 1972, the Louisiana Supreme Court was forced to overrule *Johnson* and further compromise the doctrine in the case of *Walker v. Milton*.[33] The father of two minor children sought damages for injuries sustained by his children in an automobile accident. The mother was the driver of the vehicle that collided with a truck. The father sued the truck driver and his insurer. In turn, the truck driver sued the mother for contribution based on her contributory negligence. In this case, the court held that the statute did not destroy the substantive causes of action arising between parent and child, but only acted as a procedural bar. Therefore, contribution was allowed in favor of the joint tortfeasor-truck driver.

The final case to examine the doctrine in Louisiana was *Bondurant v. Bondurant*.[34] The mother, on behalf of her minor children, filed a tort action against the father for injuries sustained by the children while in the care of the father. The father filed an exception of no right of action claiming the parental immunity. The parents were judicially separated prior to the accident and the mother was the custodial parent at the time of the accident. The court applied the second paragraph of Louisiana Revised Statutes 9:571, which provides that a child who is not emancipated cannot sue "[t]he parent who is entitled to his custody and control, when the marriage of the parents is dissolved, or the parents are judicially separated." The court held that because the parents were judicially separated and the mother had custody of the children, the father could not claim the immunity.

In addition to the exceptions recognized in the jurisprudence, there is the exception dictated by the Louisiana Direct Action Statute.[35] The right of direct action allows a plaintiff in a tort action to bring an action for damages directly against the insurer without naming the insured tortfeasor. This works to the advantage of the plaintiff in those cases where the defendant would be personally immune from suit because the insurer is unable to assert any defenses that are personal to the insured.

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32. Id. at 570.
33. Walker v. Milton, 263 La. 555, 268 So. 2d 654 (1972).
34. Bondurant v. Bondurant, 386 So. 2d 705 (La. App. 3d Cir. 1980).
35. La. R.S. 22:655 (1978 and Supp. 1989).

In 1988, however, the legislature rewrote the statute eliminating the right of direct action with certain exceptions. One of these exceptions is intended to protect the right of a minor to sue directly the insurer of the offending parent without having to name the insured parent. The statute, effective as of January 1, 1989, reads that an action may be brought against the *insurer alone* only when "the cause of action is for damages as a result of an offense or quasi-offense between children and their parents or between married persons." In effect, this creates the fourth exception to the parent-child tort immunity doctrine by allowing suit in those cases where there is liability insurance to cover the damages caused by a parent's misconduct.

In summary, Louisiana courts have articulated at least four exceptions to the immunity doctrine: 1) if the misconduct is such a "clear and palpable injustice;"[36] 2) if the offending parent is third partied by a joint tortfeasor;[37] 3) if the offending parent is the noncustodial parent;[38] and 4) if there is liability insurance to cover the damages caused by a parent's misconduct in a direct action against the insurer.

THE REASONABLY PRUDENT PARENT STANDARD

To date, the doctrine has been totally abrogated in ten states and partially abrogated in twenty-six states. Curiously, five states never adopted the doctrine in any form.[39] The courts in those states that still adhere to the doctrine have had an increasingly difficult time justifying the immunity and have been forced to resort to exceptions to the rule. Instead, the "reasonable and prudent parent" standard should be adopted as the method of determining parental liability in tort actions. This would allow a child or a third party to recover damages if the parent failed to meet the standard of care required of all parents.

The Wisconsin Supreme Court is credited with leading the way in abolishing the immunity. In the case of *Goller v. White*,[40] the plaintiff-son filed suit against the father for injuries sustained in a tractor accident. The court allowed recovery stating that the injurious conduct of a parent could only be protected when the conduct involved ordinary parental authority over the child or parental discretion with respect to the provision of food, clothing, housing, medical, and dental services.

However, California was the first state to articulate the "reasonable and prudent parent" standard in the abolition of the doctrine. In *Gibson*

36. Bird v. Black, 5 La. Ann. 189, 196 (1850).
37. Walker v. Milton, 263 La. 555, 268 So. 2d 654 (1972).
38. Bondurant v. Bondurant, 386 So. 2d 705 (La. App. 3d Cir. 1980).
39. 40 Baylor L. Rev. 113, 117 (1988).
40. 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

v. Gibson,[41] the California Supreme Court joined other progressive jurisdictions in declaring that "parental immunity has become a legal anachronism, riddled with exceptions and seriously undermined by recent decisions of this court. Lacking the support of authority and reason, the rule must fall."[42]

Instead the court recognized that while the parent has the prerogative and duty to exercise authority over his minor child, that prerogative must be exercised within reasonable limits. The standard was defined by the court as: "The standard to be applied is the traditional one of reasonableness, but viewed in light of the parental role. Thus, we think the proper test of a parent's conduct is this: what would an ordinarily reasonable and prudent *parent* have done in similar circumstances?"[43]

CONCLUSION

It is time for Louisiana to reexamine the justification for the continued application of the immunity in even limited circumstances. The doctrine is being eroded and restricted rather than expanded. The jurisprudence is unclear as to what is the proper approach when governing parental conduct. What is needed is an effective solution that would balance both a child's right to be compensated for personal injuries and a parent's right to exercise discretion in child-raising. The "reasonable and prudent parent" standard offers that solution and should be adopted by Louisiana Courts.

Isabel Wingerter

41. 3 Cal. 3d 914, 92 Cal. Rptr. 288, 479 P.2d 648 (1971).
42. Id. at 916, 92 Cal. Rptr. at 288, 479 P.2d at 648.
43. Id. at 921, 92 Cal. Rptr. at 293, 479 P.2d at 653.