

MINOR CHILD HAS NO CAUSE OF ACTION AGAINST PARENT FOR  
EMOTIONAL HARM CAUSED BY ABANDONMENT

*Burnette v. Wahl*, 284 Or. 705, 588 P.2d 1105 (1978)

In *Burnette v. Wahl*<sup>1</sup> the Oregon Supreme Court refused to extend the scope of parents' liability to their minor children to include money damages for emotional and psychological injuries resulting from parental abandonment and desertion.

Five minor children sought money damages from their mothers for emotional and psychological injuries, unaccompanied by physical harm, allegedly caused by the mothers' failure to perform their parental duties.<sup>2</sup> The circuit court sustained defendants' demurrers and dismissed the complaints. On appeal the Oregon Supreme Court affirmed the dismissals and *held*: Minor children have no cause of action to recover money damages from their parents for solely emotional and psychological injuries resulting from neglect of parental care.<sup>3</sup>

Oregon statutory law establishes a parental duty to support children who are unable to maintain themselves<sup>4</sup> and makes it a crime to abandon a child under the age of fifteen,<sup>5</sup> to leave unattended a child under the age of ten so as to endanger its health or welfare,<sup>6</sup> or to fail to provide support for a child under eighteen years of age.<sup>7</sup> Legislative

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1. 284 Or. 705, 588 P.2d 1105 (1978).

2. *Id.* at 707, 588 P.2d at 1107.

3. *Id.* at 710-17, 588 P.2d at 1108-12.

4. OR. REV. STAT. § 109.010 (1977). "Duty of support. Parents are bound to maintain their children who are poor and unable to work to maintain themselves. . . ." *Id.*

5. Section 163.535 provides:

Abandonment of a child.

(1) A person commits the crime of abandonment of a child if, being a parent . . . charged with the care or custody of a child under 15 years of age, he deserts the child in any place with intent to abandon it.

(2) Abandonment of a child is a Class C felony.

*Id.* § 163.535.

6. Section 163.545 provides:

Child neglect.

(1) A person having custody or control of a child under 10 years of age commits the crime of child neglect if, with criminal negligence, he leaves the child unattended in or at any place for such period of time as may be likely to endanger the health or welfare of such child.

(2) Child neglect is a Class A misdemeanor.

*Id.* § 163.545.

7. Section 163.555 provides:

Criminal nonsupport.

(1) A person commits the crime of criminal nonsupport if, being the parent . . . law-

recognition of a child's rights to parental support and physical care is also evident in various laws designed to protect or vindicate these rights.<sup>8</sup> For each statute, however, the cause of action for parental neglect is a public, not a private, one.<sup>9</sup>

Oregon tort law acknowledges two civil actions potentially analogous to the one advanced in *Burnette*. In *Pakos v. Clark*<sup>10</sup> the Oregon Supreme Court recognized the tort of intentional or reckless infliction of severe emotional distress,<sup>11</sup> but denied recovery to plaintiff because

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fully charged with the support of a child under 18 years of age, born in or out of wedlock, he refuses or neglects without lawful excuse to provide support for such child.

. . . .

(3) Criminal nonsupport is a Class C felony.

*Id.* § 163.555.

8. *See, e.g., id.* § 108.040 (both parents liable for family expenses and child's education); *id.* § 108.110 (parent or state agency may apply for court order requiring other parent to provide for child's support); *id.* § 418.135 (public officials required to cooperate in locating parents of children receiving public assistance and in prosecuting parents for nonsupport); *id.* § 418.460 (state-aided institutions that care for children committed by juvenile court must collect funds from parents for child support); *id.* § 419.513 (juvenile court may require parent to contribute toward child's support).

9. *See* notes 4-8 *supra* and accompanying text. For a discussion of other states' statutes declaring a child's right to parental physical and emotional care, see Comment, *The Rights of Children: A Trust Model*, 46 *FORDHAM L. REV.* 669, 729 (1978).

10. 253 Or. 113, 453 P.2d 682 (1969).

11. Traditionally, courts have been reluctant to permit recovery for mental or emotional harm in the absence of physical injury because of the inherent vagueness of the tort. Courts prefer to avoid problems with measurement of damages, proof of proximate cause, separation of legitimate from fraudulent claims, and identification of trivial injuries and serious wrongs. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 *MICH. L. REV.* 874, 875-78 (1939). *See, e.g.,* *Morgan v. Hightower*, 291 Ky. 58, 163 S.W.2d 21 (1942); *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 45 N.E. 354 (1896); *Adams v. Brosius*, 69 Or. 513, 139 P. 729 (1914); *Gatzow v. Buening*, 106 Wis. 1, 81 N.W. 1003 (1900).

Courts in most jurisdictions now recognize emotional or mental suffering, unaccompanied by physical injury, as an injury for which damages might be recovered if certain conditions are satisfied. One of these conditions is proof of outrageous conduct on the part of the alleged tortfeasor. *See, e.g.,* *Guillory v. Godfrey*, 134 Cal. App. 2d 628, 286 P.2d 474 (1955); *Richardson v. Pridmore*, 97 Cal. App. 2d 124, 217 P.2d 113 (1950); *Medlin v. Allied Inv. Co.*, 217 Tenn. 469, 398 S.W.2d 270 (1966). Another condition is that the defendant's conduct be wilful and malicious, done with the intention to inflict psychological harm, or occur under circumstances in which that harm was a reasonably foreseeable consequence. *See, e.g.,* *Savage v. Boies*, 77 Ariz. 355, 272 P.2d 349 (1954); *Wilson v. Wilkins*, 181 Ark. 137, 25 S.W.2d 428 (1930); *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282 (1952); *Barnett v. Collection Serv. Co.*, 214 Iowa 1303, 242 N.W. 25 (1932); *Small v. Lonergan*, 81 Kan. 48, 105 P. 27 (1909); *Lyons v. Zale Jewelry Co.*, 246 Miss. 139, 150 So. 2d 154 (1963); *Smith v. Aldridge*, 356 S.W.2d 532 (Mo. App. 1962); *LaSalle Extension Univ. v. Fogarty*, 126 Neb. 457, 253 N.W. 424 (1934); *Morris v. MacNab*, 25 N.J. 271, 135 A.2d 657 (1957); *Kuzma v. Millinery Workers Union*, 27 N.J. Super. 579, 99 A.2d 833 (1953); *Halio v. Lurie*, 15 A.D.2d 62, 222 N.Y.S.2d 759 (1961); *Samms v. Eccles*, 11 Utah 2d 289, 358 P.2d 344

defendants' insulting conduct could not be reasonably regarded as extreme or outrageous and plaintiff's emotional distress could not be characterized as severe.<sup>12</sup> In *Rockhill v. Pollard*,<sup>13</sup> however, the state's highest court granted recovery for intentional infliction of emotional harm, holding that a jury could have reasonably found defendant's conduct to be outrageous<sup>14</sup> and plaintiff's resulting emotional distress to be severe.<sup>15</sup>

Courts in several jurisdictions also recognize the tort of alienation of affections and hold that a child's recovery against the third party who alienated the parent's affections may include damages for the child's emotional harm.<sup>16</sup> Although the Oregon legislature has abolished

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(1961). Finally, the plaintiff's emotional distress must be severe. *See, e.g.,* Knierim v. Izzo, 22 Ill. 2d 73, 174 N.E.2d 157 (1961); Browning v. Slenderella Systems, 54 Wash. 2d 440, 341 P.2d 859 (1959); Alsteen v. Gehl, 21 Wis. 2d 349, 124 N.W.2d 312 (1963).

In most jurisdictions, plaintiffs cannot recover for negligently inflicted emotional harm unless it is accompanied by a physical injury. *See, e.g.,* Beaty v. Buckeye Fabric Finishing Co., 179 F. Supp. 688 (E.D. Ark. 1959); Bowman v. Williams, 164 Md. 397, 165 A. 182 (1933); Laney v. Rush, 152 S.W.2d 491 (Tex. Civ. App. 1941). Some jurisdictions, however, allow recovery for negligently inflicted emotional harm if it results from conduct that infringed upon a legal right. *See, e.g.,* Larson v. Chase, 47 Minn. 307, 50 N.W. 238 (1891); Hinish v. Meier & Frank Co., 166 Or. 482, 113 P.2d 438 (1941).

12. 253 Or. at 131-32, 453 P.2d at 691. In adopting these elements as essential to recovery for emotional or mental suffering in the absence of physical injury, the court relied on § 46 of the *Restatement (Second) of Torts*, which provides: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress." RESTATEMENT (SECOND) OF TORTS § 46 (1965). The "outrageous conduct" must be "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* Comment d. Further, the emotional distress must be "so severe that no reasonable man could be expected to endure it." *Id.* Comment j.

In *Pakos* one defendant, a police officer, allegedly described plaintiff as "crazy as a bedbug" and threatened to commit him to an insane asylum and place his children with juvenile authorities. Another defendant, the sheriff's administrative assistant, allegedly puffed out his cheeks and bulged his eyes at plaintiff seven or eight times during the course of their conversation. The court found their conduct not to be so outrageous as to permit plaintiff to recover. 253 Or. at 119-21, 453 P.2d at 685-86. Plaintiff testified that because of defendants' conduct, he became frustrated, frantic, upset, and so nervous that he could not talk. The court concluded that this emotional injury was not severe. *Id.* at 130-32, 453 P.2d at 690-91.

13. 259 Or. 54, 485 P.2d 28 (1971).

14. *Id.* at 55-58, 485 P.2d at 29-30. Defendant-doctor engaged in rude and callous treatment of plaintiff-mother and her unconscious baby, both victims of an automobile accident.

15. *Id.* at 63, 385 P.2d at 32. Plaintiff's emotional distress resulted in nervousness, sleeplessness, and loss of appetite.

16. *See, e.g.,* Daily v. Parker, 152 F.2d 174 (7th Cir. 1945); Russick v. Hicks, 85 F. Supp. 281 (W.D. Mich. 1949); Johnson v. Luhman, 330 Ill. App. 598, 71 N.E.2d 810 (1974); Miller v. Monsen, 228 Minn. 400, 37 N.W.2d 543 (1949). The court in *Daily v. Parker* described the child's

alienation of affections as a cause of action,<sup>17</sup> the Act, which is not retroactive,<sup>18</sup> took effect seven months after plaintiffs in *Burnette* filed their complaint.<sup>19</sup> Even before the legislature nullified the cause of action, however, Oregon courts had not applied it to injuries to minor children.

In neither tort would the common-law doctrine of parental immunity from civil suits brought by minor children for personal injuries<sup>20</sup> bar recovery. In accordance with the general trend,<sup>21</sup> Oregon had aban-

emotional harm as "injuries to feelings and damages which arise from [his] rights to the comfort, the protection and the society of the father." 152 F.2d at 176.

Courts also consider the minor child's loss of emotional nurturing in determining damages in wrongful death actions, in which defendant's negligent driving caused the parent's death. *Hal v. Gillins*, 13 Ill. 2d 26, 147 N.E.2d 352 (1958); *Prauss v. Adamski*, 195 Or. 1, 244 P.2d 598 (1952). Courts, however, deny recovery for impairment of emotional nurturing when defendant's driving merely injured the parent. *Halberg v. Young*, 41 Hawaii 634 (1957); *Hankins v. Derby*, 211 N.W.2d 581 (Iowa 1974); *Plain v. Plain*, 307 Minn. 399, 240 N.W.2d 330 (1976).

17. 1975 Or. Laws ch. 562. "There shall be no civil cause of action for alienation of affections." *Id.* § 1.

18. "Sections 1 and 2 of this Act shall not apply to any actions commenced before the effective date of this Act." *Id.* § 3.

19. Brief for Appellant at 14 n.3, *Burnett v. Wahl*, 284 Or. 705, 588 P.2d 1105 (1978).

20. Courts originally grounded this immunity on society's interest in the preservation of family harmony and repose. *Hewellette v. George*, 68 Miss. 703, 9 So. 885 (1891). Closely following *Hewellette* were *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S.W. 664 (1903), and *Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905). In developing this principle, courts elaborated upon several other bases for its support, including respect for parental autonomy in disciplining and controlling their minor children, *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12 (1932); *Matarese v. Matarese*, 47 R.I. 131, 131 A. 198 (1925), an unwillingness to deplete the family exchequer in favor of one child, *Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905), the possibility that the parent might reclaim through inheritance whatever money the child recovered, *Austin v. Ortiz*, 187 F.2d 496 (1st Cir. 1951); *Barlow v. Iblings*, 261 Iowa 713, 156 N.W.2d 105 (1968), the danger of fraud and collusion, especially if the parent owns liability insurance, *Parks v. Parks*, 390 Pa. 287, 135 A.2d 65 (1957), and analogy to judicial denial of a cause of action between husband and wife, *Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905).

For discussion of the development of the doctrine of parental immunity, see Comment, *Tort Actions Between Members of the Family—Husband & Wife—Parent & Child*, 26 Mo. L. Rev. 152 (1961); 41 MARQ. L. REV. 188 (1957).

21. Erosion of the rule of absolute parental immunity began as courts, acknowledging that not all interactions between parent and child occur within the customary bounds of the family relationship, carved out exceptions to the rule. Courts now permit a minor child to recover damages from its parents for injuries sustained while the parent was acting in a business capacity. See, e.g., *Dunlap v. Dunlap*, 84 N.H. 352, 150 A. 905 (1930); *Signs v. Signs*, 165 Ohio St. 566, 103 N.E.2d 743 (1952); *Worrell v. Worrell*, 174 Va. 11, 4 S.E.2d 343 (1939); *Borst v. Borst*, 41 Wash. 2d 642, 251 P.2d 149 (1952); *Lusk v. Lusk*, 113 W. Va. 17, 166 S.E. 538 (1932). *Contra*, *Barlow v. Iblings*, 261 Iowa 713, 156 N.W.2d 105 (1968). In addition, a minor child may bring action against the estate of a deceased parent, see, e.g., *Davis v. Smith*, 126 F. Supp. 497 (E.D. Pa. 1954), *aff'd*, 253 F.2d 286 (3rd Cir. 1958); *Brennecke v. Kilpatrick*, 336 S.W.2d 68 (Mo. 1960); *Dean v. Smith*,

doned the doctrine at least for intentional torts,<sup>22</sup> although Oregon courts have been generally reluctant to compensate for emotional injury unaccompanied by physical harm.<sup>23</sup>

In *Burnette v. Wahl*<sup>24</sup> the Oregon Supreme Court acknowledged a minor child's statutory right to receive support and care from its parents,<sup>25</sup> but refused to grant the child a civil cause of action for damages against its parents for emotional injuries caused by abandonment.<sup>26</sup>

In considering whether to create a tort from the statutory right,<sup>27</sup> the

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106 N.H. 314, 211 A.2d 410 (1965), or against an adoptive parent or person acting *in loco parentis*, see, e.g., *Brown v. Cole*, 198 Ark. 417, 129 S.W.2d 245 (1939); *Treschman v. Treschman*, 28 Ind. App. 206, 61 N.E. 961 (1901); *Clasen v. Pruhs*, 69 Neb. 278, 95 N.W. 640 (1903). Another exception to the parental immunity doctrine arises when the parent wilfully, wantonly, intentionally, or maliciously injures the child. See, e.g., *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955) (en banc); *Wright v. Wright*, 85 Ga. App. 721, 70 S.E.2d 152 (1952); *Nudd v. Matsoukas*, 7 Ill. 2d 608, 131 N.E.2d 525 (1956); *Mahnke v. Moore*, 197 Md. 61, 77 A.2d 923 (1951); *Rodebaugh v. Grand Trunk W. Ry.*, 4 Mich. App. 559, 145 N.W.2d 401 (1966); *Henderson v. Henderson*, 11 Misc. 2d 449, 169 N.Y.S.2d 106 (Kings County Ct. 1957). Finally, parental immunity is inapplicable when the child is completely emancipated, regardless of the child's age. See, e.g., *Perkins v. Robertson*, 140 Cal. App. 2d 536, 295 P.2d 972 (1956); *Brumfield v. Brumfield*, 194 Va. 577, 74 S.E.2d 170 (1953).

In 1963 Wisconsin completely abrogated the parental immunity rule, even when the child's injuries result from parental negligence, unless the negligent conduct occurred during the exercise of parental authority or discretion. *Goller v. White*, 20 Wis. 2d 402, 122 N.W.2d 193 (1963). Several courts have followed Wisconsin's lead, abrogating parental immunity either totally or with limited exceptions similar to Wisconsin's. See *Streenz v. Streenz*, 106 Ariz. 86, 471 P.2d 282 (1970); *Gibson v. Gibson*, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); *Schenk v. Schenk*, 100 Ill. App. 2d 199, 241 N.E.2d 12 (1968); *Silesky v. Kelman*, 281 Minn. 431, 161 N.W.2d 631 (1968); *Briere v. Briere*, 107 N.H. 432, 224 A.2d 588 (1966); *France v. A.P.A. Transport Corp.*, 56 N.J. 500, 267 A.2d 490 (1970); *Gelbman v. Gelbman*, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969). See also *Hebel v. Hebel*, 432 P.2d 8 (Alaska 1967) (court chose not to establish parental immunity rule); *Peterson v. Honolulu*, 51 Hawaii 584, 462 P.2d 1007 (1970) (same).

22. *Chaffin v. Chaffin*, 239 Or. 374, 397 P.2d 771 (1964) (minor child may recover damages from parent if parent's wilful, wanton, or malicious conduct reveals cruel mind or wicked intent); *Cowgill v. Boock*, 189 Or. 282, 218 P.2d 445 (1950) (administrator of child's estate recovered against father for child's death resulting from father's wilful misconduct in forcing child to be a passenger in truck he drove while intoxicated).

23. *Rostad v. Portland Ry., Light & Power Co.*, 101 Or. 569, 201 P. 184 (1921); *Adams v. Brosius*, 69 Or. 513, 139 P. 729 (1914); *Maynard v. Oregon R.R.*, 46 Or. 15, 78 P. 983 (1904). A notable exception to this reluctance is the Oregon Supreme Court's recognition of the relatively new tort of intentional infliction of emotional harm. See notes 10-15 *supra* and accompanying text.

24. 284 Or. 705, 588 P.2d 1105 (1978).

25. *Id.* at 707-10, 588 P.2d at 1107-08.

26. *Id.* at 710-16, 588 P.2d at 1108-12.

27. *Id.* The court found only one article in the legal literature dealing with a child's right of action against a parent for emotional harm. Rejecting money damages as a means of compensating the deprived child, that author advocated "remedies more appropriate to the character of the

majority assumed that the Oregon legislature did not intend to create a civil cause of action because it did not explicitly provide for one.<sup>28</sup> The court further noted that recognition of this type of tort liability would be inconsistent with Oregon's legislative policy of reuniting children with their parents whenever possible,<sup>29</sup> because tort litigation might hinder achievement of this goal.<sup>30</sup>

The court also rejected plaintiffs' contention that defendants' liability could be based on the tort of intentional infliction of severe emotional distress.<sup>31</sup> Although plaintiffs alleged that defendants intentionally deserted them, plaintiffs failed to demonstrate that the purpose of the desertion was to inflict emotional harm or that the desertion would cause a reasonable person to conclude that emotional harm was almost certain to result.<sup>32</sup> The majority observed that if it granted abandoned children a cause of action on these facts, it would have to grant a simi-

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right . . . in emotional nurturing actions, such as psychological care." *Id.* at 715, 588 P.2d at 1111 (quoting Comment, *supra* note 9, at 732).

28. The majority reasoned that in spite of the legislature's demonstrated awareness of the need to protect the rights of children, *see* notes 4-8 *supra*, it failed to provide children with a civil action against their parents, thus indicating a lack of intent to do so. 284 Or. at 710-12, 588 P.2d at 1108-09. The court further maintained that had the legislature wanted children to have a civil cause of action against their parents, it would have explicitly provided one, as it had done in the past for persons already the subjects of statutory protection. *Id.*

29. *Id.* at 712-13, 588 P.2d at 1109-10.

30. *Id.* *See* OR. REV. STAT. § 418.485 (1977) (state policy generally aims to strengthen family life); *id.* § 418.745 (preservation of family life must be attempted even in cases of child abuse); *id.* § 419.474(2) (child within jurisdiction of state's juvenile court should be cared for at home). 284 Or. at 712-13, 588 P.2d at 1110.

In response to plaintiffs' argument that criminal sanctions provided by statute, *see* notes 5-7 *supra*, also interfere with the same policy, the majority simply asserted that no plan established by a legislature over a period of years can be perfectly consistent. 284 Or. at 714, 588 P.2d at 1110. Furthermore, examination of the overall statutory scheme revealed a remedy for the neglected child when reestablishment of the family unit proves to be impossible—"a proceeding to terminate parental rights in order that a new family unit for the child may be formed." *Id.* at 713, 588 P.2d at 1110.

The legislature's overriding desire to preserve the family unit is also apparent in its provision for the termination of parental rights only when "the parent or parents are unfit by reason of conduct or condition seriously detrimental to the child and integration of the child into the home of the parent or parents is improbable in the foreseeable future due to conduct or conditions not likely to change." OR. REV. STAT. § 419.523(2) (1977). The court deemed it inappropriate, therefore, "to step in and to establish a new cause of action in a field of social planning to which the legislature has devoted a great deal of time and effort in evolving what appears to be an all-encompassing plan." 284 Or. at 714, 588 P.2d at 1110.

31. 284 Or. at 716, 588 P.2d at 1111.

32. *Id.*

lar cause of action to children of divorced parents.<sup>33</sup>

The majority summarily rejected the analogy to the tort of alienation of affections,<sup>34</sup> concluding that “[t]he statement of the argument is its refutation.”<sup>35</sup> An offended spouse or child normally has a cause of action against the third party who enticed away the departing spouse or parent; apparently, in the court’s view a spouse or parent cannot alienate his own affections. In addition, the majority noted that the legislature had abolished the cause of action since this case was filed,<sup>36</sup> suggesting that policy concerns did not justify its revival in a new form.

In an extended dissent,<sup>37</sup> Justice Linde<sup>38</sup> contended that the children’s right to civil recovery in this case should derive from the parents’ breach of their statutory duty as set out in section 163.535 of the Oregon Revised Statutes, which makes abandonment of a child a felony.<sup>39</sup> Justice Linde argued that when the legislature remains silent on the question of whether to allow or deny a civil cause of action for violations of a statute, the court should read it to create a right of action if the plaintiff belongs to the class for whose protection the statute was created and if the civil remedy contributes to achievement of the statute’s goals.<sup>40</sup> In addition, he maintained that the statute merely defines the rights and duties of a preexisting parent-child relationship and thus reinforces, rather than replaces, parental civil obligations.<sup>41</sup>

Justice Linde also disagreed with the majority’s position that creation of a civil cause of action would interfere with the legislative policy of

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33. *Id.*

34. See note 16 *supra* and accompanying text.

35. 284 Or. at 717, 588 P.2d at 1112.

36. *Id.* at 717, 588 P.2d at 1112.

37. *Id.* at 723, 588 P.2d at 1115.

38. In his concurring opinion, Justice Tongue maintained that the court should have denied the children’s cause of action on the theory that intrafamily tort immunity ought to exist for emotional harm. *Id.* at 717, 588 P.2d at 1112. Justice Lent, in his dissent, argued that the court should allow deserted children to recover money damages from their parents for emotional harm because the emotional harm resulting from abandonment is costly to the community. *Id.* at 717-22, 588 P.2d at 1112-15. The offending parents, he reasoned, should bear at least part of the financial burden.

39. See note 5 *supra*.

40. 284 Or. at 724-25, 588 P.2d at 1116. Justice Linde cited several United States Supreme Court and Oregon Supreme Court cases in which proscriptive or prescriptive statutes were considered as sources of civil liability. See *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1 (1977); *Cort v. Ash*, 422 U.S. 66 (1975); *Brown v. Transcon Lines*, 284 Or. 597, 588 P.2d 1087 (1978); *Farris v. United States Fidelity*, 284 Or. 453, 587 P.2d 1015 (1978); *Davis v. Billy’s Con-Teena, Inc.*, 284 Or. 351, 587 P.2d 75 (1978); *O’Toole v. Franklin*, 279 Or. 513, 569 P.2d 561 (1977).

41. 284 Or. at 729, 588 P.2d at 1118.

preserving the family unit. He reasoned that parental desertion already had disrupted the family and that the remedy provided by the legislature—criminal penalties for the parents—would hardly promote family harmony.<sup>42</sup> Finally, Justice Linde noted that denial of this civil action out of deference to a legislative policy of encouraging family harmony would oblige courts to deny minor children a cause of action against their parents for physical abuse.<sup>43</sup> That result would contradict Oregon law, which permits children to bring civil actions against their parents for intentional torts resulting in physical harm.<sup>44</sup>

On the basis of existing tort law, the majority correctly refused to recognize a minor child's civil causes of action against its parents for emotional and psychological injuries caused by abandonment. Before permitting recovery for emotional harm unaccompanied by physical injury, courts require proof that the harm was caused intentionally, that the conduct was outrageous, and that the injury was severe.<sup>45</sup> Plaintiffs failed to prove these elements in this case to justify their recovery for intentional infliction of severe emotional distress. The court's refusal to broaden the tort of alienation of affections to include a cause of action against the deserting party is also warranted, particularly in light of the Oregon legislature's recent abolition of this tort in its customary form.

On the other hand, the majority's rejection of a statutory basis for a child's cause of action against its parents is unwarranted. The majority's primary reason for its refusal to recognize a right of action in the child was its respect for the legislative policy of maintaining the family unit. As Justice Linde noted, however, the parent's conduct in deserting its child already has destroyed family harmony; neither the child's civil action nor criminal prosecution of the parent will injure it further.<sup>46</sup>

The majority raised more legitimate policy concerns in its consideration of the difficulties inherent in awarding compensation for emotional harm unaccompanied by physical injury—particularly, the inadequacy of methods to measure damages and distinguish trivial injuries from

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42. *Id.* at 729-30, 588 P.2d at 1118-19.

43. *Id.* at 730, 588 P.2d at 1119.

44. See notes 10-15 *supra* and accompanying text.

45. See note 11 *supra*.

46. See note 42 *supra* and accompanying text. See also 41 MARQ. L. REV. 188 (1957) (discusses inconsistencies of a public policy that permits criminal sanctions against parent but forbids civil actions by child).

serious wrongs.<sup>47</sup> As Justice Linde observed in dissent, however, use of a statutory basis would limit the cause of action to violations of the statute itself.<sup>48</sup> This limitation would greatly facilitate restricting recovery to deserving plaintiffs. Children of divorced parents, for example, or children who merely feel that their parents do not give them adequate attention, would not have a cause of action. Furthermore, courts have been able to measure the value of a minor child's emotional nurturing by a parent in wrongful death and alienation of affection cases.<sup>49</sup>

The Oregon Supreme Court was unduly reluctant to grant minor children a civil cause of action against their parents for emotional harm caused by abandonment. This right of action could readily arise from parental breach of a statutory duty without contradicting legislative policy or producing an unmanageable new source of litigation.

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47. See note 11 *supra*.

48. 284 Or. 705, 730 n.5, 588 P.2d 1105, 1119 n.5 (1978).

49. See note 20 *supra* and accompanying text. In *Prauss v. Adamski*, 195 Or. 1, 244 P.2d 598 (1953), the court's assessment of damages suffered by minor children of a deceased mother in a wrongful death action included:

not only . . . the loss of financial assistance which the beneficiaries might reasonably be expected to have received from the deceased had her career not been shortened . . . , but also the loss of other things which have a pecuniary worth, such as the loss of a mother's care and attention to the physical, moral, and educational welfare of her children. . . .

The measure of damages is the monetary value of such services.

*Id.* at 23-24, 244 P.2d at 608.

See also *Hinish v. Meier & Frank Co.*, 166 Or. 482, 113 P.2d 438 (1941), in which the court noted that "the law has never denied recovery to one entitled to damages simply because of uncertainty as to the extent of his injury and the amount which would properly compensate him." *Id.* at 506, 113 P.2d at 448.

