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Torts - Infant's Liability for Battery - Parent's Liability for Child's

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TORTS—INFANT'S LIABILITY FOR BATTERY—PARENT'S LIABILITY FOR CHILD'S TORTS—Plaintiff, a baby sitter, suffered injuries when she was pushed violently to the floor by her four-year-old charge. Plaintiff brought an action against the child alleging battery and negligence, and against the parents alleging negligence in failing to warn plaintiff of the boy's habit of violently attacking people. The lower court sustained demurrers to all three counts. On appeal, *held*, reversed on the first and third counts. An infant may be charged with battery, and a parent may be negligent in failing to warn of an infant's violent tendencies. *Ellis v. D'Angelo*, 116 Cal. App. (2d) 310, 253 P. (2d) 675 (1953).

An infant is liable for his torts provided he has the requisite state of mind for the commission of the tort.[1] The California statute[2] is usually interpreted in light of this common law rule, and an infant will not be liable even for compensatory damages without the requisite state of mind.[3] The intent needed for battery is only an intent to bring about the physical contact. Perhaps a child of four can have such an intention, but it would seem that the better rule is the one suggested by Bohlen:[4] where the defendant is incapable of forming a culpable intention (and surely a four year old is incapable of doing so), he should be immune from liability where fault is a factor, and be subject only to strict liability.[5] The question of parental liability is a much more litigated subject and presents a somewhat unusual picture in California. The general rule in Anglo-American law, aside from statute,[6] is that the mere relationship of parent and child will not be enough to render a parent liable for his child's torts.[7] Of course, a parent may be held liable for his own negligence;[8] but the

[1] See annotations in 57 L.R.A. 673 (1902); 35 L.R.A. (n.s.) 574 (1912); PROSSER, TORTS 1086 (1941); 43 C.J.S., Infants §87, p. 202 (1945).

[2] "A minor . . . is civilly liable for a wrong done by him, but is not liable in exemplary damages unless at the time of the act, he was capable of knowing that it was wrongful." Cal. Civ. Code (Deering, 1949) §41. Montana, North Dakota, Oklahoma, and South Dakota have almost identical statutes; Louisiana and Georgia are the only other states with statutes on the subject. 5 VERNIER, AMERICAN FAMILY LAWS §275 (1931).

[3] 5 VERNIER, AMERICAN FAMILY LAWS §275 (1931).

[4] Bohlen, "Liability in Tort of Infants and Insane Persons," 23 MICH. L. REV. 9 at 31 (1924).

[5] There seem to be only three reported cases where an infant under seven years has been held liable for a battery: Judge Cowen in Hartfield v. Roper, 21 Wend. (N.Y.) 615 at 621 (1839), refers to an early English case [Y.B. 35 Hen. VI, 11b (1456)], where a four year old was held liable in trespass for putting out an eye; McGee v. Willing, 31 Phila. Leg. Int. 37 (1874), where the judge in the charge to the jury held a boy less than six years old could be liable for assaulting his nurse with a hammer; Victoria v. Palama, 15 Hawaii 127 (1903), where the court in determining liability of a parent, held that a seven year old is liable in trespass for shooting another with a gun. For a full summary and evaluation of the law in the field, see Bohlen, "Liability in Tort of Infants and Insane Persons," 23 MICH. L. REV. 9 (1924), still the classic work on the subject.

[6] See annotation in 155 A.L.R. 96 (1945).

[7] Chastain v. Johns, 120 Ga. 977, 48 S. 343 (1904); 67 C.J.S., Parent and Child §66, p. 795 (1950); PROSSER, TORTS 912 (1941). The fact that parents have been held liable on a master-servant theory, where the minor is in position of an agent or a servant, does not conflict with the general rule. See annotation in 155 A.L.R. 94 (1945).

[8] PROSSER, TORTS 914 (1941); Wigmore, "Parent's Liability for Child's Torts," 19 ILL. L. REV. 202 (1924); 17 CORN. L.Q. 178 (1931).

difficulty comes in determining the nature of this negligence. The cases usually break down into two types. First, the parent has intrusted the child with an instrument, which is either dangerous per se, or which the parent should have reason to know will be used dangerously by the child.[9] Second, the parent has failed to exercise reasonable care to restrain the child, despite knowledge of the child's vicious or violent conduct.[10] The courts once were reluctant to impose such a duty on parents, but now most feel free to do so.[11] California heretofore was one of the most reluctant and earned for itself the reputation of being a state where parents enjoy a "freak lack of responsibility."[12] This reputation arose from two early cases,[13] where it was held that a parent is not liable for injuries caused by his son's having a loaded pistol in his possession, even though the parent willfully and negligently allows his son to have the gun. The remaining California cases on the subject[14] have concerned the negligent use of automobiles by the child. Where there was no allegation of knowledge of the minor's negligence,[15] the California courts have refused to hold the parent liable unless a statute imposes liability.[16] The principal case thus makes an unusual picture in the California pattern. A parent is not negligent if he allows his child to use a potentially dangerous instrument, such as an auto, or an instrument dangerous in itself, such as a pistol. But he is liable if he acts with knowledge of "facts showing traits in the child making it dangerous to let him have a loaded pistol. . . ."[17] Such a distinction seems unwarranted, for the negligence is the delivery of a dangerous instrument into incompetent hands. Whether the child is incompetent or not would depend just as much upon his age and maturity as his "traits." The court in the principal case also seems to

[9] See annotations in 12 A.L.R. 812 (1921); 44 A.L.R. 1509 (1926).

[10] Condel v. Savo, 350 Pa. 350, 39 A. (2d) 51 (1944), 155 A.L.R. 81 at 87 (1945); 2 TORTS RESTATEMENT §316 (1934); PROSSER, TORTS 200 (1941). This latter type of negligence is an exception to another general rule in torts, i.e., one is not usually under an affirmative duty to prevent another from causing harm. Harper and Kime, "The Duty to Control the Conduct of Another," 43 YALE L.J. 886 at 887 (1934). Thus, some courts rather treat this type of negligence as an implied acquiescence or encouragement of the child's misconduct. Ryley v. Lafferty, (D.C. Idaho 1930) 45 F. (2d) 641; Harper and Kime, supra, at 895. But it is now recognized that an affirmative legal duty to prevent another from doing harm may arise when certain socially recognized relations exist. Harper and Kime, supra, at 887. And the parent-child situation is one such relationship. Id. at 895; PROSSER, supra, at 200.

[11] Ibid.

[12] Spence, "Parental Liability," INS. L.J. 787 (Oct. 1948).

[13] Hagerty v. Powers, 66 Cal. 368, 5 P. 622 (1885) (minor was eleven years old); Figone v. Guisti, 43 Cal. App. 606, 185 P. 694 (1919) (minor was seventeen years old).

[14] With the exception of Hudson v. Von Hamm, 85 Cal. App. 323, 259 P. 374 (1927), where there was no allegation of the parent's negligence; knowledge that the child liked to climb about furniture was not enough to show dangerous conduct.

[15] In Rocca v. Steinmetz, 61 Cal. App. 102, 214 P. 257 (1923), where there was such an allegation, the parent was held liable as the owner of the car.

[16] Crittenden v. Murphy, 36 Cal. App. 803, 173 P. 595 (1918). The present day version of the statute is Cal. Vehicle Code (Deering, 1935) §352(a), which imputes the minor's negligence where the parent has signed the application for the license of the minor.

[17] Principal case at 319. This is the court's rationalization of Hagerty v. Powers, note 13 supra, and Figone v. Guisti, note 13 supra.

by-pass the essence of parental liability where no dangerous instruments are involved, viz., unreasonable failure to restrain a child known to be vicious.[18] Thus, the parent's negligence here was merely failure to disclose knowledge of the child's violent tendencies. However, it seems doubtful that the court means that a parent may escape liability merely by informing people that his child is a menace. On the other hand, if a parent has reasonably attempted to restrain a vicious child but has failed to disclose his violent tendencies, the court may very well mean to hold such a parent liable—thus imposing a double duty upon parents: duty to restrain and duty to disclose. Finally, one can only wonder if the court really meant simply to restate the old rule, since every authority the court expressly relies upon makes the negligence merely the unreasonable failure to restrain.[19] It is clear that California is moving toward some goal of imposing more responsibility upon parents, but it remains conjectural as to which goal it is headed; only time and another unruly child will tell.

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[18] Note 10 supra.

[19] E.g., 2 TORTS RESTATEMENT §316 (1934); Condel v. Savo, note 10 supra; Norton v. Payne, 154 Wash. 241, 281 P. 991 (1929); Ryley v. Lafferty, note 10 supra; Zuckerberg v. Munzer, 277 App. Div. 1061, 100 N.Y.S. (2d) 910 (1950).