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Liability for Leaving a Firearm Accessible to Children

William C. Gargiulo

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THERE ARE A NUMBER of different reasons why the unhampered use of firearms is important to Americans; for some it is hunting, target shooting, or gun collecting, for others, the security resulting from having a firearm around the house.[1] Furthermore, the rifle over the fireplace is a traditional expression of American independence. Whatever the reason, when a private citizen decides to exercise his right to possess a firearm, he must accept the correlative duty attached to that right. Enmeshed in the right to possess a firearm is the duty of care. At common law the liability for injury or damage to real or personal property resulting from a breach of duty owed to a plaintiff is based upon some moral or social fault.[2] This concept of implied "oughtness," a violation of which is the essence of culpability, asserts that one ought not intentionally to cause harm to another, in the absence of a justifying privilege, nor ought one act in a manner which exposes others to an unreasonable risk of harm.[3] Accordingly, the common law imposes a duty of care on all to refrain from such conduct.[4] Thus, the duty of care applies not only to using a firearm, but also to safeguarding the firearm from reasonably anticipated improper use by others. The liability of a person for permitting, or for leaving, a firearm accessible to children has been based upon failure to exercise the required duty of care in regard to a *dangerous instrumentality*.[5]

It is the objective of this note to consider whether or not the doctrine of absolute liability should be extended to hold that when a person permits a child to have a firearm, or leaves one accessible to him, he is absolutely liable for any injury or damage to real or personal property that occurs after the firearm has been discharged by the child. The following facts, presented as they were reported in a newspaper,[6] will illustrate the problem:

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1 For a complete discussion of present firearms regulations see Note, 17 Case W. Res. L. Rev. 569 (1965).

2 Prosser, Torts 14 (2d ed. 1955).

3 Harper and Fleming, Law of Torts 785 (1956).

4 Harper and Fleming, *op. cit. supra* note 3.

5 *See* below, near text of note 22 of this article, which examines the liability of a person for permitting or leaving a firearm accessible to children, based upon violation of a statute. As to pleading an action for firearm misuse, see, Oleck, Negligence Forms of Pleading, Forms 44, 47, 101 (1957 rev.).

6 *The Plain Dealer* (Cleveland, Ohio), July 5, 1968 at 1, col. 2.

A 20 year old mother (*A*) was killed by a blast from a 20-gauge shotgun. A witness explained that the shot was fired by a two-year-old child as his mother attempted to take the gun from him.

The shooting occurred in the bedroom of the home of the victim's boyfriend (*B*). *B* explained that he and *A* had walked into the bedroom and were unknowingly followed by the two-year-old child. *B* said he and *A* were standing next to a dresser when the child slipped behind them and grabbed the loaded gun from the bed. *B* said he did not notice the child until the boy's mother came into the room and attempted to take the gun. The gun discharged.

The weapon belonged to *C*, a roommate of *B*; *C* kept the gun for the protection of the household.

Considering only those factors pertinent to this discussion, the issues are (1) should the court look at the facts of the case and say it is a question for the jury to decide whether or not *C*, the owner of the gun, was negligent in leaving a loaded firearm on a bed, or (2) should the court rule as a matter of law that *C* is absolutely liable for the injury to *A* because he was the owner of a firearm that was left accessible to a child, and that that firearm in the possession of the child discharged, causing injury to another.

The principle of absolute liability, varying as it does from the usual policy of the common law that moral or social fault is a necessary characteristic of conduct which may constitute the basis of tort liability, necessarily is of limited extent.[7] Notwithstanding the natural limitation, the principle is being extended, both by common law and by statute, into other fields.[8] The extension is taking place, and probably will continue, as new social viewpoints impose greater responsibilities upon defendants.[9] In recent years, whenever a person permitted or left a firearm accessible to a child and the child discharged the firearm causing injury, the "social viewpoint" appeared to be that such a person was absolutely liable. However, the courts have been unable to say outright that the defendant was liable without *any* negligence.

Extending Absolute Liability in the Common Law

Unwilling to say outright that a person who permits or leaves a firearm accessible to a child is liable without negligence for any injury caused by the child when he discharges the weapon, the courts approach

[7] Harper and Fleming, *op. cit. supra* note 3 at 778 which notes that the fact-types of conduct which are included under the head of absolute liability are (1) liability for the collection of dangerous quantities of substances not naturally on land; (2) liability for blasting operations; (3) liability for trespassing animals; (4) liability incident to the keeping of dangerous animals; (5) liability for the operation of aircraft; (6) liability for some types of nuisance; (7) liability for some types of misrepresentations; (8) liability for the escape of fire originating on defendant's premises, and (9) poison sprays, insecticides, herbicides, defoliants. *Also see* Prosser, *op. cit. supra* note 2 at 315.

[8] Prosser, *op. cit. supra* note 2 at 344.

[9] *Id.* at 345.

this result by falling back upon the concept of the scope of the original risk which the person created. By doing this the courts are in accord with the common law concept that legal liability should accompany moral or social fault. Thus, the courts conclude that if a firearm is entrusted to a child, it easily may be foreseen that he may shoot himself or another.[10] The person who entrusted the firearm to a child actually recognized (or should have recognized) the unreasonableness of his conduct with respect to others.[11]

Accordingly, leaving a loaded firearm in an unlocked drawer where it was readily found by his twelve-year-old grandson, who proceeded to shoot the plaintiff, his cousin, subjected a grandfather to negligence liability. The court stated that the duty imposed upon one possessing a loaded firearm encompasses all those persons who might suffer harm or injury from the fireman's discharge, and includes use not only by the possessor himself, but by a child where the possessor knows or has reason to know that the child may be likely to use the firearm in such a manner as to create an unreasonable risk of harm to others.[12] The language of the court appears to be a tautological expression of absolute liability.

A deeper probe into the court's reasoning for imputing liability to the grandfather, other than the neglect of a wrongdoing child, was the application to the facts of the legal theory of *dangerous agency*. The court said that a higher degree of care is required in dealing with a dangerous agency than in the ordinary affairs of life or business; every reasonable precaution suggested by experience and the known danger ought to be taken.[13] Any loaded firearm is a highly dangerous instrument, and since its possession or use is attended by extraordinary danger, any person having it in his possession or using it is bound to exercise extraordinary care.[14] The court then confirmed its inference of absolute liability by adding that a person handling or carrying a loaded firearm in the immediate vicinity of others is liable for its discharge, even though the discharge is accidental and unintentional.[15] The legal theory of dangerous agency is absolute liability hidden in verbiage that says that when

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[10] *Id.* at 268.

[11] Mantino v. Piercedale Supply Co., 338 Pa. 435, 13 A. 2d 51 (1940); Milton Bradley Co. v. Cooper, 79 Ga. App. 302, 53 S.E. 2d 761 (1949); Anderson v. Settergren, 100 Minn. 313, 111 N.W. 279 (1907).

[12] Kuhns v. Brugger, 390 Pa. 331, 135 A. 2d 395 (1957). This case overruled *Swanson v. Crandall,* 2 Pa. Super. 85, 39 Weekly Notes of Cases, Pa. 24 (1896) which held that there was no negligence on the part of a person leaving a gun accessible to a child. *Accord,* Davis v. Mack, 15 Ohio Op. 4, 29 Ohio L. Abs. 210 (1939); Souza v. Irome, 219 Mass. 273, 106 N.E. 998 (1914).

[13] Kuhns v. Brugger, 390 Pa. 331, 135 A. 2d 395 (1957).

[14] *Id.*

[15] *Id.*

one deals with or disposes of an item dangerous in its nature, he must foresee or ought to foresee that harm to another might occur.[16]

After a court establishes the rule that negligence is established by showing that the defendant permitted a child to have a dangerous firearm, or that he left such a firearm in a place where he should have foreseen that it would come into the possession of a child, the court will liberalize the rule rather than apply the doctrine of absolute liability. For example, a father placed his rifle in a corner in the kitchen, the cartridges for the rifle were left in his sweater pocket, and the sweater was placed on a chair in the kitchen. While the father was sleeping during the afternoon hours (he having a night job), his thirteen year old son, who was not forbidden to use the rifle, nor instructed on its use, took the rifle and was playing with the breech mechanism when the rifle discharged, injuring a playmate. In an action against the father, the court said that although no negligence of the defendant contributed to this injury, his negligence was in the manner in which he disposed of the rifle.[17] He failed to take reasonable precautions in that he left the rifle easily accessible to those too young to be entrusted with it.[18]

A more liberal view, yet one that did not consider the doctrine of absolute liability, was demonstrated on the following facts, which brought judgment for the plaintiff. The action was for injuries due to a shot fired by an eight year old boy. Evidence indicated that the rifle belonged to the boy's older brother, that the father permitted the older brother to take care of the rifle, and the older brother left it where the younger boy could get it. The issue was: does the evidence support a verdict against the father? The court held the evidence to warrant an inference that the father was negligent and that his negligence was the cause of the injury to the plaintiff.[19]

A court has even gone so far as to declare that the defendant *owed the public a duty* not to permit his minor son to gain or to have possession of a gun.[20] The defendant in this case was the father of a thirteen year old boy, and allowed his son to get possession of a loaded rifle. The son discharged the rifle, injuring the plaintiff.

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[16] "In principle, a manufacturer or other person owning or controlling a thing that is dangerous in its nature or is in a dangerous condition, either to his knowledge or as a result of his want of reasonable care in manufacture or inspection, who deals with or disposes of that thing in a way that he foresees or in the exercise of reasonable care ought to foresee will probably carry that thing into contact with some other person, known or unknown, who will probably be ignorant of the danger, owes a legal duty to every such person to use reasonable care to prevent injury." Lummus, J., Carter v. Yardley and Co., 319 Mass. 92, 64 N.E. 2d 693 (1946).

[17] Sojka v. Dlugosz, 293 Mass. 419, 200 N.E. 554 (1936).

[18] *Id.*

[19] Dickens v. Barnham, 69 Colo. 349, 194 P. 356, 12 A.L.R. 809 (1921).

[20] Salisbury v. Crudale, 41 R.I. 33, 102 A. 731 (1918).

The actual judgments reached in each of the cases reviewed so far do indeed conform to the modern sense of justice and can be praised; *i.e.*, the general view is that the possessor of a firearm who permitted or left his firearm accessible to a child ought to be held liable for the injury caused when the child discharged the firearm.[21] However, it is difficult to praise the language of those decisions that imply that absolute liability is to govern. One wonders why the courts, in cases concerning the possessor of a firearm, should bind themselves solely to the moral and social *fault concept* that liability lies when the defendant's conduct creates a foreseeable and unreasonable risk to others. In determining liability, is it too much to ask of a court that they consider *all* the relevant legal theories, rather than play a game of logic with only *one*?

Extending Absolute Liability by Statute

Most courts are reluctant to extend statutory construction to absolute liability where the legislature has not in fact said that a violator is strictly liable. The courts will, however, declare that a statute was designed for the protection of others, and that the statute fixes the legal duty so that the violation of the statute constitutes conclusive evidence of negligence, or negligence *per se*.[22] Consequently, permitting a child to have a firearm in violation of a statute can be held to be negligence *per se*. The negligence *per se* concept basically is a statutory construction, implying the imposition of an absolute duty for violation of which there is no recognized excuse. Such statutory construction falls properly under the head of absolute liability, rather than within basis of negligence.[23] Thus, some writers conclude that negligence need not be established in order to determine liability for accidental injury caused by firearms, where the person charged is violating the law in using the firearm, or in permitting another to use his firearm, in a manner which produces an injury.[24]

Although *Schatter v. Bergen*[25] deals with the indiscriminate use of an air gun, the case well illustrates the majority view concerning statutory violations. In the *Schatter* case the parents violated a city ordinance, which in part provided that it was unlawful for any person to

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[21] For a discussion of cases based on the premise that an infant is liable for his own tort when a parent permits or leaves a firearm accessible to him see Hagerty v. Powers, 66 Cal. 368, 5 P. 622 (1885); Figone v. Guisti, 43 Cal. App. 606, 185 P. 694 (1919); Lacker v. Ewald, 11 Ohio Dec. 337, 8 Ohio N.P. 204 (1901); Lopez v. Chewiwie, 51 N.M. 421, 186 P. 2d 512 (1947); Frellesen v. Colburn, 156 Misc. 254, 281 N.Y.S. 471 (1935).

[22] Prosser, *op. cit. supra* note 2 at 153 n. 91.

[23] *Id.*, at 159.

[24] Mirabel and Levy, Law of Negligence 677 (1962).

[25] Schatter v. Bergen, 185 Wash. 375, 55 P. 2d 344 (1936).

shoot or discharge an air gun, and that it was unlawful for a parent to permit the use of, or provide a child with, an air gun, by giving their minor son an air gun. While the child was playing with the gun, the gun discharged, injuring plaintiff by striking his eye. Upon these facts the court ruled that a person's negligent act or omission, setting in operation a train of occurrences resulting naturally in injury to another, is deemed proximate cause thereof; *e.g.,* violation of a city ordinance is negligence *per se.*[26] Any person violating the provisions of the ordinance is subject to civil liability for any injury resulting as a natural and probable consequence of the violation.[27]

Reaffirming the concept of negligence *per se* for statutory violation is implicit in the ruling of the court in the *Kuhns* case, which asserted that the violation of a statute prohibiting anyone from wantonly or playfully pointing a firearm at another may be regarded as negligence *per se,* even though the violator be a minor.[28]

A statute which states that *no person* shall sell, barter, furnish, or give to a minor under the age of seventeen years, an air gun, musket, rifle, shotgun, revolver, pistol or other firearm, or ammunition therefor, or being the owner or have charge or control thereof knowingly permit it to be used by a minor under such age,[29] can easily be construed as providing that one who permits a child to use a firearm is absolutely liable for any harm that might result when the child discharges the weapon. Yet, such statutes have been applicable only to *sellers* of firearms, and then, only under the legal theory of negligence *per se.*

A recent (December 7, 1967) Ohio case tested the extension of the statute to someone other than a seller of firearms.[30] The defendant permitted her ten year old son to use an air gun. Defendant knew that other children visited her home to play with her son. A playmate took and discharged the gun, at the plaintiff, another playmate, and damaged his eye. The defendant was held liable under the above statute. The Ohio Supreme Court said that that part of the Ohio Code which forbids the owner or one having control of an air gun to knowingly permit its use by a minor under seventeen imposes a specific rule of conduct designed to protect others; and violation of such statute is negligence *per se.*[31] The court added that the defendant's earlier negligence, *i.e.,* permitting her son to have the air gun, may be found to be a proximate cause of

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[26] *Id.*

[27] *Id.*

[28] Kuhns v. Brugger, *supra* note 13.

[29] *See, e.g.,* Ohio Rev. Code § 2309.06 (1962); Ind. Burns' Stat. § 10-4704 (1956 Repl.); Mass. Ann. Laws, ch. 148 § 39, 47 (1965); N.Y. Consol. Laws, Penal L. § 265.06 (1967); Penn. Purdon's Stat. tit. 18 § 4628 (1963).

[30] Taylor v. Webster, 12 Ohio St. 2d 53, 231 N.E. 2d 870 (1967); *also see* note, 19 Case W. Res. L. Rev. 802 (1968).

[31] *Id.*

the injury if, according to human experience and in the natural and ordinary course of events, the defendant could reasonably have foreseen that the intervening act was likely to happen.[32]

Statutory construction which leads to the concept of negligence *per se* further allows the courts to fall back upon the legal theory of *proximate causation*, rather than to step forward for reasons of sound social policy. The very reason that such a statute is passed is that the legislature contemplates that anyone younger than the minimum statutory age does not, *as a matter of law*, have the maturity,[33] mental capacity,[34] disposition[35] and experience[36] to properly understand the dangers of using a firearm. Does it not follow that when a person violates a statute intended to protect children, he should be held absolutely liable? Where a statute is interpreted as intended to protect the class of persons in which the plaintiff is included, against the risk of the type of harm which has in fact occurred, the weight of authority holds that an unexcused violation is negligence *per se* and that the court must so direct the jury.[37] The standard of conduct has been fixed by the legislature, and "jurors have no dispensing power by which to relax it." [38] One wonders if negligence *per se* is absolute liability. If it is the public policy of the state to protect children from injury to themselves and others, then the statute should be construed to impose on violators nothing less than absolute liability.

The Law in Ohio

The development of the law in Ohio, as to the liability of a person for permitting or leaving a firearm accessible to a child, has not extended to the legal theory of absolute liability. The Ohio courts, like others, have been unwilling to say outright that a defendant in such cases is liable without negligence. This survey, however, indicates the growing social policy that when a person possesses a firearm, he should be held absolutely liable for any injury that occurs when he permits or leaves the firearm accessible to children.

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[32] *Id.*

[33] Kuhns v. Brugger, *supra* note 13.

[34] Meers v. McDowell, 110 Ky. 226, 62 S.W. 1013 (1910); Bollinger v. Rader, 153 N.C. 488, 69 S.E. 497 (1910); *see* 67 C.J.S. 800, n. 21 (1950); also see 73 Case & Comment 42 (1968).

[35] Norton v. Payne, 154 Wash. 241, 281 P. 991 (1929); Condel v. Savo, 350 Pa. 350, 39 A. 2d 51 (1944); Hulsey v. Hightower, 44 Ga. App. 455, 161 S.E. 644 (1931); Ryley v. Lafferty, District Court of Idaho, 45 F. 2d 641 (1930); 67 C.J.S. 799, n. 16 (1950); also see Jacobs, Law of Accident, 303 (1937).

[36] Siebert v. Morris, 252 Wis. 460, 32 N.W. 2d 239 (1948).

[37] Prosser, *op. cit. supra* note 2 at 161.

[38] *Id.* at n. 70 (quotation from Cardozo).

(1) A firearm is a dangerous agency, and as such is so recognized in the law.[40] Ohio is committed to the proposition that a rule of strict accountability for the exercise of due care must be enjoined upon those who handle firearms.[41]

(2) A parent is not liable for the tort of a child.[42] A parent can be made liable for his child's tort based upon the elements of his own negligence; it is incumbent upon the plaintiff to show by some evidence that the parent was negligent in permitting his child to be in possession of a dangerous agency.[43] The court said in this decision that even though the accident was grave and sad, there must be evidence to support the defendant's liability, for the court cannot legislate. The rules respecting the nonliability of the parent for the tort of the child have been well established by the law.[44]

(3) Where a person permitted a minor to keep a firearm which the minor accidentally discharged, injuring another, the court stated that a person is chargeable with negligence if from all the facts and circumstances he should have foreseen the probable danger.[45] The rule for such liability is based upon the ground of negligence of a person in permitting the minor to have possession of a dangerous and deadly weapon, when from his youth and inexperience it might reasonably be anticipated that an injury would result.[46]

(4) Permitting a child to have a firearm, or leaving a firearm accessible to him, must be the *proximate cause* of injuries or damage caused by the child's use of the firearm. A father was held not liable for the wrongful act of his child in willfully and maliciously shooting a dog, simply by reason of the fact that he carelessly and negligently left his gun "exposed," when the father was not connected with the child's wrongdoing actively or passively.[47] *Note:* This case has not been overruled by any court in Ohio; however, statutes passed since, make the holding a nullity.[48]

(5) Statutory violations as to guns are negligence *per se*.[49]

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[40] Huber v. Collins, 38 Ohio Abs. 551, 50 N.E. 2d 906 (1942).

[41] *Id.*

[42] Joseph v. Peterson, 108 Ohio App. 559, 160 N.E. 2d 420 (1959).

[43] *Id.*

[44] *Id.*

[45] Davis v. Mack, 15 Ohio Op. 4, 29 Ohio L. Abs. 210 (1939).

[46] *Id.*

[47] Lacker v. Ewald, 11 Ohio Dec. 337, 8 Ohio N.P. 204 (1901).

[48] Ohio Rev. Code § 2309.05 *et seq.* (1962).

[49] Poe v. The Canton-Mansfield Dry Goods Co., 36 Ohio App. 395, 173 N.E. 237 (1929); Neff Lumber Co. v. First Nat. Bank of St. Clairsville, 122 Ohio St. 303, 171 N.E. 237 (1930); Taylor v. Webster, *supra* note 30.

Conclusion

Sound social policy dictates that when a person possesses a firearm and permits or leaves it accessible to a child, he must accept the responsibility for any injury which might result when the child discharges the weapon. Liability should be imposed not because of the moral and social fault conception, but because possession of a firearm, though lawful, has such a high potential of danger to others in our complex society. Why not say that a possessor of a firearm "must keep it at his peril, and if he does not do so is *prima facie* answerable for all the damage . . ." [50] that might result?

A workable way to evaluate law is to view it as a means to an end. Accordingly, the first step in determining what the law of a person's responsibility ought to be for permitting or leaving a firearm accessible to a child, is to make a rational choice of a valid *end.* The rational choice seems to be absolute liability because that will best protect society. However, the courts are reluctant to extend absolute liability in the common law or in the construction of statutes, because of the "feeling" that that would be judicial legislation. Rather than legislate, when faced with a defendant who was a possessor of a firearm that became accessible to a child who discharged the weapon causing injury, the courts weave a blanket of tautological verbiage around "foreseeability" and "negligence *per se*" in order to find the defendant liable for the injury.

Thus it must be concluded that legislatures will have to dictate that when a person possesses a firearm and permits or leaves it accessible to a child, he must accept the responsibility for any injury which might result when the child discharges the weapon. Only then may particular statutes and decisions, considered as means, be selected or rejected. When this is done, the enactment, interpretation and administration of such legislation may be consciously directed toward the legal theory of absolute liability.

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[50] Blackburn, J., Fletcher v. Rylands, L.R. 1 Ex. 265 (1866) *affirmed in* Rylands v. Fletcher, L. R. 3 H.L. 330 (1868).