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Torts--Parental Liability for the Intentional Tort of Minor Child

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By disallowing the testimony of the officer, Kentucky follows the nearly universal rule based on the common sense belief that statements made as much as six hours after the act almost always lack spontaneity in the sense of arising from and being prompted by the act. By allowing the testimony of the employer, Kentucky follows the current trend of decisions in this limited type of *res gestae* situation. This is the first time the Kentucky court has been confronted with so close a situation.[13] It may be argued that Kentucky has extended the doctrine too far, but when a trial court is satisfied, as it was in the principal case, that the evidence of spontaneity is sufficient under the circumstances, ordinarily its exercise of discretion should not be disturbed.[14]

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TORTS—PARENTAL LIABILITY FOR THE INTENTIONAL TORT OF MINOR CHILD—Plaintiff brought action for damages against parents of minor children who had allegedly committed assault and battery Defendants sons allegedly pursued plaintiff in an automobile, forced him to stop, dragged him from his automobile and injured him to the extent that he was hospitalized. Plaintiff alleged that the defendants knew their sons had dangerous tendencies of a malicious nature; that by lack of parental discipline they failed to prevent their sons from beating others; and that because of this negligence plaintiff was injured. One defendant imposed a demurrer, which was sustained. The plaintiff appealed. *Held*: Reversed and remanded. A cause of action is stated by alleging that defendants knew their sons had inflicted injuries on other boys, and that defendants were negligent in failing to exercise parental authority over their sons, thus making plaintiff's injuries possible. *Bieker v. Owens*, 350 S.W.2d 522 (Ark. 1961).

The common law rule is that a parent is not liable for the torts of his minor child.[1] Three exceptions are made to this rule: (1) when the parent employs the child and the child commits a tort in the course of employment, (2) when the parent participates in the

[13] *Res gestae* in sex crimes is a limited field. The closest Kentucky cases on this point are Hopper v. Commonwealth, 311 Ky. 655, 225 S.W.2d 100 (1949) (statements made several days after the event held inadmissible) and Cornwell v. Commonwealth, 291 S.W.2d 563 (Ky. 1956) (utterances made a few minutes after the act held admissible).

[14] In State v. Finley, 85 Ariz. 327, 338 P.2d 790, 794 (1959), the court said that "each case must depend upon its own facts and much must be left to the sound discretion of the trial court."

[1] Prosser, Torts §101 (2d ed. 1955).

child's act by ratifying or consenting to it and (3) when the parent's negligence in failing to control the child makes the injury possible.[2] In the *Bieker* case, the court applied this last exception.

Conversely, the civil law rule is that a parent is liable for the torts of his minor child.[3] Two exceptions are made to this rule: (1) a parent is not liable if he was unable to prevent the minor's act and (2) a parent is not liable if the child was not legally responsible because of his age.[4]

Many states, apparently dissatisfied with the common law rule, have enacted statutes which provide that a parent will be liable for damage inflicted by his child, regardless of parental fault. Usually these statutes limit liability to a fixed amount for intentional damage to property,[5] although a few allow recovery for intentional injury to persons.[6] This legislation represents a trend toward the civil law approach. Absent this statutory liability, however, the common law rule with its three exceptions is the prevailing view.

Kentucky follows the common law rule with its three exceptions, but further limits the liability of a parent whose negligence in failing to control his child makes an injury possible. In *Haunert v. Speier*[7] the defendants son, a minor, assaulted the plaintiff. The plaintiff alleged that defendants knew their son had previously engaged in this type of conduct. The court held that the plaintiff failed to state a cause of action because he did not allege that defendants son had insufficient discretion to appreciate the consequences of his act. Contrary to the civil law rule with its exceptions, this holding

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[2] 67 C.J.S. *Parent and Child* §66 (1950); 39 Am. Jur. *Parent and Child* §55 (1942).

[3] Stone, *Liability for Damage Caused by Minors, A Comparative Study,* 5 Ala. L. Rev. 1, 6 (1952).

[4] Louisiana patterned its code after the civil law, but failed to include the two exceptions. La. Civ. Code art. 2318 (West's Supp. 1961) provides that the father is responsible for damage occasioned by his minor children. The second exception was added by the case of Johnson v. Butterworth, 180 La. 586, 157 So. 121 (1934), so that now a parent is liable for damage inflicted by his minor children regardless of whether he was able to prevent it, but is not liable where the child himself is relieved by law.

[5] Cal. Civ. Code §1714.1 (1960); Fla. Rev. Stat. §45.20 (1953); Idaho Code Ann. §6-210 (Supp. 1961); Mich. Stat. Ann. §27.1408 (1)-(2) (Supp. 1959); Mont. Rev. Code §61-112.1 (1961); Nev. Rev. Stat. §43-301 (1957); N.M. Stat. Ann. §22-21-1 (Supp. 1961); Okla. Stat. tit. 23, §10 (Supp. 1962); Tenn. Code Ann. §§37.1001, 37.1003 (Supp. 1962); Tex. Civ. Stat. art. 5923-1 (1962); W Va. Code §5482 (2)-(3) (1961); Wis. Stat. Ann. §331.035 (1958).

[6] Ariz. Rev. Stat. Ann. §12-661 (West's Supp. 1961); La. Civ. Code art. 2318 (West's Supp. 1961); and R.I. Gen. Laws §9-1-3 (1956). Typical of these is Ariz. Rev. Stat. Ann. §12-661 (West's Supp. 1961), which provides that any act of malicious or willful misconduct of a minor which results in any injury to the person or property of another shall be imputed to the parents having custody or control of the minor for all purposes of civil damage.

[7] 214 Ky. 46, 281 S.W 998 (1926).

imposes liability upon a parent for damages occasioned by his child when the child is too young to be competent, but departs from liability as soon as the child reaches the age of competancy It is unfortunate that Kentucky denies recovery against a parent simply because his child is legally competent. Where the parent is negligent in controlling his child, should not he also be responsible?

The principal case is significant because it is one of the few times when a wronged party has sued on the theory of negligence of the parent. The main reason for this dearth of decisions is that wronged parties experience difficulty in establishing a prima facie case of negligence sufficient to present the issue of parental liability to the jury The plaintiff must show (1) the parent knew or should have known of the child's propensity to harm others, and (2) the parent failed to exercise ordinary care in controlling the child.[8] This places an unreasonable burden on the plaintiff for these facts lie predominantly within the knowledge of the defendant. During childhood a parent's supervision, or lack of it, is always partly responsible for the child's behavior. This responsibility alone is not enough on which to predicate liability, for liability is dependent upon a specific act of negligence at a particular time. But this responsibility should be enough to reduce the plaintiff's burden of establishing a prima facie case. Since the defendant is in a better position to know the facts, why not shift the burden of going forward with the evidence to him? This could be accomplished by drawing an analogy to the *res ipsa loquitur* doctrine. This would closely resemble the civil law rule which holds the parent of a competent child liable unless he shows that he could not have prevented the injury, but would not be as harsh.

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[8] What knowledge is required to put a parent on notice that his child is likely to harm others? It has been held that knowledge must be of some substantial misbehavior or propensity for misbehavior. Gissen v. Goodwill, 80 So.2d 701 (Fla. 1955). It has also been held that knowledge of acts of misbehavior or a bad disposition are insufficient. Capps v. Carpenter, 129 Kan. 462, 283 Pac. 655 (1930). What is the difference between a bad disposition and a propensity to misbehave?

Where a parent knows that his child may inflict damage, how may this child be controlled? When does a child become incorrigible? A recent California case held that a parent may have a duty to warn those coming in contact with an incorrigible child. Ellis v. D'Angelo, 116 Cal. App. 2d 310, 253 P.2d 675 (1953). This is a practical solution where the child bites the baby-sitter, but where the child is old enough to drive an automobile and injuries someone miles away, the practicality is removed.

These close questions can seldom be solved as a matter of law, but are rightfully questions for the jury. As in all questions of negligence, the test is whether the parent exercised reasonable care under the circumstances.