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seem that the alleged contemnor could hardly meet his burden of proof. In violation of support orders, it is generally recognized that in the proceedings instituted to coerce payment of the ordered sums the burden is upon the alleged contemnor to prove his inability to comply with the order. 53 A. L. R. 2d 591. Since inability to pay is a complete defense, it is very important for the alleged contemnor to plan his defense adequately. The best way to plan a defense, however, is with the able assistance of an attorney, who would best know how to present the case to the judge and how to arrange an equitable solution with the State's Attorney.

If the contemnor is indigent, then it does not seem possible for him to employ effective counsel. And, the fact that he may be indigent does not insure that he can convince the judge of his inability to pay. Coercive imprisonment is remedial, of course, only when the defendant is able to comply. *Maggio v. Zeitz*, 333 U.S. 56, 76 (1948). And, as the Supreme Court said, "... to jail one for a contempt for omitting an act he is powerless to perform...would...make the proceeding purely punitive, to describe it charitably." 333 U.S., at 72. This is true because imprisoning a defendant incapable of performance cannot possibly cause him to take action to benefit the complainant.

The Maryland Rules of Procedure, Rule P4, § a, allows the institution of constructive contempts by "the court on its own motion, by the State's attorney or by any person having actual knowledge of the alleged contempt." After the proceeding is instituted, the defendant is issued a show cause order requiring him to show cause why he should not be held in contempt. Md. Rule P4, § b. It is clear that simply citing the defendant to show cause why he should not be held in contempt is not the equivalent of adjudicating him in contempt. *Gatuso v. Gatuso*, 16 Md. App. 632, 299 A. 2d 113, 115 (1973). The court may, also, appoint the State's Attorney or any other member of the Bar to prosecute the case. *State v. Roll*, *supra*, 298 A. 2d, at 878. So many of these procedures partake of the nature of a criminal proceeding that it

seems illusory to call the action a "civil" contempt. Courts should be more concerned with the constitutional rights of defendants than they are with mere forms or labels attached to proceedings.

The *Argersinger* ruling should be extended to the case of a civil contemnor

since such action has many of the attributes of a criminal action, except for the name civil. The only problem would seem to be statutory authority for the appointment of counsel in Maryland. The next issue of THE FORUM will pose such a solution.



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Parental Responsibility in Maryland for Torts of Minor Children

by Robert Lankin

At common law, the parent - child relationship alone is an insufficient basis

for holding the parent liable for the torts of his minor child. *Kerrigan v. Carroll*, 168 Md. 682, 179 A. 53 (1935). Under the common law, however, there are many examples where the parent becomes liable for the intentional torts of his minor children. Liability is often based on the parent's knowledge or imputed knowledge concerning the vicious propensities of the child to do acts which would injure persons or property. The mere knowledge however, of this disposition is not of itself sufficient to impose liability upon the parent. *Condel v. Savo*, 350 Pa. 350, 39 A.2d 51 (1944). The

liability results from the parent's failure to restrain the child where he knows that the child is likely to injure others. *Ryley v. Lafferty*, 45 F.2d 641 (D. Ida. 1933). Liability is also often based on an agency "respondeat superior" theory. In this situation, the parent may be held liable for his minor child's tort, where the child was acting within the scope of his employment and the parent is the employer. *Hawes v. Haynes*, 219 N.C. 535, 14 S.E. 503 (1941). The parent may also be held liable under this theory where he consents to or ratifies the child's tort. *Statz v. Poke*, 266 Wis. 231, 62 N.W.2d 556 (1954).

The dangerous instrumentalities doctrine is another basis for the liability of the parent for the torts of his child. In these cases, liability has been found where the parent permits his child to use a chattel which is likely to be so used that it will cause harm to others, because of the child's immaturity. *Gerlat v. Christianson*, 108 N.W.2d 194 (Wis., 1961). Under this doctrine, the parent is not actually liable for the child's tort, but for his own negligence in making it possible for the child to use the dangerous instrumentality. The parent's responsibility for the tort arises from the act of creating the risk by placing the instrumentality in the hands of his child whose use of the item will cause a significant risk to third parties. Before the liability attaches, the parent's negligence in permitting the child to have such an instrumentality must be shown and the injury must be shown to be reasonably foreseeable. *Dickens v. Barnham*, 69 Colo. 349, 194 P. 356 (1920).

In the determination of liability under the dangerous instrumentalities doctrine, four factors must be taken into account: (1) the nature of the instrumentality, (2) the facts constituting the child's incompetency, (3) the parent's knowledge of those facts and (4) the parent's failure to act in a reasonable manner so as to prevent the minor child's tort. 19 *Ala.L.Rev.* 123 (1966). In applying these factors, the parent's knowledge of the child's incompetency is imputed from the parent's familiarity with facts of the child's incompetency, because of the close relationship. *Stoelting v. Hauck*, 32 N.J. 87, 159 A.2d 385 (1960). The

greater the incompetency and the more dangerous the instrumentality, the greater the probability that knowledge of the parent's incompetency will be found. *Johnson v. Glidden*, 80 So.2d 701 (Fla. 1955).

While the common law does not provide for parental liability for the torts of their minor children solely on the basis of the parental relationship, statutory law in effect in forty-six states does provide for such liability. In Maryland, Article 26 § 71A of the *Md. Annot. Code* provides for the recovery from parents for damages "willfully or maliciously caused or committed by the minor child of such parent." Recovery is allowed not only for property losses, but also for medical expenses. There is a \$1,000 limitation on parental liability.

In most of the states which have such parental liability statutes in effect, the statutes were passed in the last twenty years. Michigan was one of the first states to enact such a statute; publication of the favorable results of the Michigan Act in an article in the *Family Circle* magazine, reprinted in 68 *Reader's Digest* 161:1 (1956) was influential in the passage of similar acts in other states. This article reported significant reductions in juvenile crime in major Michigan cities after its enactment. More recently however, writers have questioned the significance of these statutes in the rates of juvenile crime. (See Freer, "Parental Liability [sic] for Torts of Children" 53 *Ky.L.J.* 254 at p. 265.)

The constitutionality of these statutes has been attacked in five reported cases. In four out of the five cases, the statutes have been upheld as a proper exercise of the police power of the state. Only in the Georgia case of *Corley v. Lewless*, 227 Ga. 745, 182 S.E.2d 776 (1971) did the court decide that the statute was unconstitutional. The reason it gave was that liability without fault is a violation of due process; it did not indicate why it is in fact such a violation. It is clear that the court does not mean this literally because there are several important examples of liability without fault in the law. Workman's Compensation and products liability are just two examples. (See 23 *Mercer L.Rev.* 681 at page 682.)

The strongest argument in favor of constitutionality was made by the Maryland Court of Special Appeals in the case of *Matter of Sorrell*, 20 Md. App. 180, 315 A.2d 110 (1974). In this case, a juvenile master found the two Sorrell children guilty of punching and injuring another child. The parents of the Sorrell children appealed a judgment against them for the damages caused by their children. The Court of Special Appeals cited *Williamson v. Lee Optical Co.*, 348 U.S. 483, 99 L.Ed. 563, 75 S.Ct. 461 (1955) in finding the statute a valid exercise of the police power of the state. In that case it was held that state legislation imposing regulations under the police power is valid if it might have been thought by the legislature that the particular measure was a rational way to correct it. The court also cited *Atlantic Coast Line v. Goldsboro*, 232 U.S. 548, 58 L.Ed. 721, 34 S.Ct. 364 (1914) which stated that "the exercise of the power is fair when the purpose is a proper public one and the means employed bear a real and substantial relation to the end sought and are not arbitrary or oppressive." 323 U.S. at 558. The court also stated its agreement with an argument made by the court in *Kelly v. Williams*, 346 S.W.2d 434 (Tex. Civil Appeals 1961), another case upholding the constitutionality of a parental liability statute. The argument was that there is a legislative determination that it is better that the parents be required to pay for the damages of their children even though they be faultless, than to let the damage pass on to the innocent victim. As this determination bears a real and substantial relation to the end sought and is not arbitrary or oppressive, it is therefore a proper exercise of the police power of the state.

It does not appear likely that the present United States Supreme Court will overrule these state statutes as an unconstitutional infringement of due process. A more liberal court, however, could easily find that the rational basis for this legislation is overwhelmed by the public policy against punishing one person for the injuries of another, in the absence of the commercial relationship found in the Workmen's Compensation or products liability areas.