

Cleveland State University  
**EngagedScholarship@CSU**



**Cleveland-Marshall**  
College of Law Library

---

Cleveland State Law Review

Law Journals

---

1975

# Liability of Parents for the Willful Torts of Their Children under Ohio Revised Code Section 3109.09

Stuart A. Laven

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstrev>

 Part of the [Insurance Law Commons](#), and the [Torts Commons](#)

**How does access to this work benefit you? Let us know!**

---

## Recommended Citation

Stuart A. Laven, *Liability of Parents for the Willful Torts of Their Children under Ohio Revised Code Section 3109.09*, 24 Clev. St. L. Rev. 1 (1975)

available at <https://engagedscholarship.csuohio.edu/clevstrev/vol24/iss1/4>

This Article is brought to you for free and open access by the Law Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact [library.es@csuohio.edu](mailto:library.es@csuohio.edu).

# CLEVELAND STATE LAW REVIEW

Volume 24

Winter 1975

Number 1

## *Liability of Parents for the Willful Torts of Their Children Under Ohio Revised Code Section 3109.09*

Stuart A. Laven\*

TEN YEARS AGO THE OHIO LEGISLATURE ENACTED A STATUTE which imposed liability on the parents of children who willfully damaged the property of another.<sup>1</sup> Codified under Section 3109.09 of the Ohio Revised Code, the statute allowed "any owner of property" to recover in a civil action an amount not to exceed \$250 from the

\* B.A. University of Pennsylvania; J.D. Case Western Reserve University School of Law; Member, Ohio Bar.

<sup>1</sup> At common law a parent was not liable for torts committed by his child by reason of the relationship of the parent and child. *White v. Page*, 61 Ohio L. Abs. 698, 105 N.E.2d 652 (Ohio App. 1950); 41 OHIO JUR. 2d *Parent and Child* § 54 (1960). However, liability could be imposed upon the parents for the child's wrongful acts if it could be shown that the parents participated in, consented to or ratified the act; that they negligently permitted the child to conduct himself in a manner likely to cause injury; or that the child was an employee or agent of the parents and the wrongful act was committed during the course of his employment or agency. See Annot., 155 A.L.R. 85 (1945). Most civil law codes, by contrast, impose some degree of liability on parents for torts committed by their children. Comment, *Parent and Child-Civil Responsibility of Parents for the Torts of Children-Statutory Imposition of Strict Liability*, 3 VILL. L. REV. 529, 531-32 (1958).

For a good textual discussion of common law theories of liability and exceptions thereto, see HARPER & JAMES, *THE LAW OF TORTS* § 8.13, at 657 (1956); PROSSER, *THE LAW OF TORTS* § 123, at 871 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 316 (1965). See also *Chastain v. Johns*, 120 Ga. 977, 48 S.E. 343 (1904); *White v. Seitz*, 342 Ill. 266, 174 N.E. 371 (1931); *Zeeb v. Bahmaier*, 103 Kan. 599, 176 P. 326 (1918); *Steinberg v. Cauchois*, 249 App. Div. 518, 293 N.Y.S. 147 (1937); *Lane v. Chatham*, 251 N.C. 400, 111 S.E. 2d 598 (1959).

The problems surrounding the common law immunity rule and its exceptions, and the legislative attempts to abrogate the rule, have been the subject of several commentaries. Freer, *Parental Liability {sic} for Torts of Children*, 53 KY. L.J. 254 (1964); Greenwood, *Liability of a Parent for the Torts of his Minor Child*, 18 CENT. L.J. 3 (1884); Jordan, *Liability of a Parent for Child's Tort*, 11 VA. L. REG. (n.s.) 734 (1926); Waller, *Visiting the Sins of the Children*, 4 MELBOURNE L. REV. 17 (1963); Wigmore, *Parent's Liability for Child's Torts*, 19 ILL. L. REV. 202 (1924); Comment, 13 ARIZ. L. REV. 720 (1971); 25 ARK. L. REV. 368 (1971); Comment, 8 IDAHO L. REV. 179 (1971); 19 LOYOLA L. REV. 758 (1973); Note, 6 U.C.D. L. REV. 195 (1973); 7 U. RICHMOND L. REV. 571 (1973).

In the early 1950's, state legislatures began to penetrate the parents' common law immunity from intentional torts committed by their children by enacting statutes which imposed, to varying degrees, liability on the parents regardless of any fault on their part. Today more than 45 states have such statutes. For a recent summary and analysis of these statutes, see Note, *The Iowa Parental Responsibility Act*, 55 IOWA L. REV. 1037 (1970).

parents of such a child.<sup>2</sup> While Section 3109.09 was not the Legislature's first pronouncement on the subject of parental liability,<sup>3</sup> it was Ohio's first law which provided a private civil remedy for the injured party.

On its face Section 3109.09 seems uncomplicated.<sup>4</sup> Although it has been amended twice to increase the limit of liability,<sup>5</sup> the basic

<sup>2</sup> Unfortunately, there is no legislative history available which might reveal the legislature's purpose in enacting Section 3109.09 of the Ohio Revised Code [hereinafter, Ohio Revised Code Sections will be referred to as "Section," e.g., Section 3109.09]. The purposes expressed in enacting similar parental liability statutes in other states have been to curb juvenile delinquency by making parents more responsible with respect to the behavior of their children; to compensate the injured property owner; or to both curb delinquency and provide a means of compensation. While there can be no doubt that parental liability statutes have provided injured property owners with some compensation in circumstances in which no effective means of recovery would have otherwise been available, one study indicates such statutes have had little, if any, effect on reducing juvenile delinquency. See Freer, *supra* note 1.

<sup>3</sup> OHIO REV. CODE ANN. § 2151.411 (Page 1968), which became effective on September 13, 1957, provides:

*Liability of parents for acts of delinquent child.*

A parent or guardian having custody of a child is charged with the control of such child and shall have the power to exercise parental control and authority over such child. In any case where a child is found delinquent and placed on probation, if the court finds at the hearing that the parent having custody of such child has failed or neglected to subject him to reasonable parental control and authority, and that such failure or neglect is the proximate cause of the act or acts of the child upon which the finding of delinquency is based, the court may require such parent to enter into a recognizance with sufficient surety, in an amount of not more than five hundred dollars, conditioned upon the faithful discharge of the conditions of probation of such child. If the child thereafter commits a second act and is by reason thereof found delinquent, or violates the conditions of probation, and the court finds at the hearing that the failure or neglect of such parent to subject him to reasonable parental control and authority or to faithfully discharge the conditions of probation of such child on the part of such parent, is the proximate cause of the act or acts of the child upon which such second finding of delinquency is based, or upon which such child is found to have violated the conditions of his probation, the court may declare all or a part of the recognizance forfeited and the amount of such forfeited recognizance shall be applied in payment of any damages which may have been caused by such child, if there be such damages, otherwise, the proceeds therefrom, or part remaining after the payment of damages as aforesaid, shall be paid into the county treasury. The provisions of this section as it relates to failure or neglect of parents to subject a child to reasonable parental control and authority shall be in addition to and not in substitution for any other sections of this chapter relating to the failure or neglect to exercise such parental control or authority. The provisions of this section shall not apply to foster parents.

See also OHIO REV. CODE ANN. § 4507.07 (Page 1973) which imputes the negligence or willful misconduct of a minor while driving a motor vehicle to the person, usually the parent, who signed his driver's license application.

<sup>4</sup> OHIO REV. CODE ANN. § 3109.09 (Page 1972), as amended, provides:

*Liability of parents for destructive acts by their children.*

Any owner of property is entitled to maintain an action to recover compensatory damages in a civil action in an amount not to exceed two thousand dollars and costs of suit in a court of competent jurisdiction from the parents having the custody and control of a minor under the age of eighteen years, who willfully damages property belonging to such owner. A finding of willful destruction of property is not dependent upon a prior finding of delinquency of such minor.

Such action shall be commenced and heard as in other civil actions for damages.

Baldwin's Ohio Revised Code has entitled this section "Liability of parents for vandalism by their children."

<sup>5</sup> Section 3109.09 as originally enacted limited the parents' liability to \$250. Am. Sub. H.B. No. 134, 131 Laws of Ohio 689 (1965). The statute was amended in 1967 to increase the

(Continued on next page)

provisions have remained unchanged. Furthermore, this section has been the subject of only one reported Ohio decision, and this decision did not deal with an interpretation of the statute's language.<sup>6</sup> Nevertheless, its application to various fact situations is unclear and raises several issues of interpretation. This article will examine four<sup>7</sup> such issues which the practitioner may face in handling litigation under Section 3109.09:<sup>8</sup> whether the statute extends to a "taking" of property; whether the term "parents" includes others who have custody and control of a minor; whether an insurance company as a subrogated plaintiff may maintain an action under the statute; and, finally, whether parents of the minor wrongdoer are provided with coverage under their homeowners policy in an action brought against them under Section 3109.09.

(Continued from preceding page)

limit of liability to \$800 and in 1969 to increase the limit to \$2,000. Am. H.B. No. 257, 132 Laws of Ohio 973 (1967); Am. S.B. No. 10, 133 Laws of Ohio 17 (1969). The 1969 Amendment also substituted the word "compensatory" for the word "actual" in the first sentence of the statute describing the nature of the damages which could be recovered.

<sup>6</sup> *Lewis v. Martin*, 16 Ohio Misc. 18 (C.P. 1968) (Held: the 1967 amendment to Section 3109.09 increasing the limit of liability was not retroactive; and where two or more children, all covered by the provisions of Section 3109.09, combine to do damage, the parents are responsible for the amount set forth in the statute for each of such children.)

<sup>7</sup> Although the constitutionality of Section 3109.09 is not discussed in this article, it is probably the first question which an attorney defending a claim under the statute should consider. At the present time there are no reported Ohio decisions dealing with the constitutionality of Section 3109.09; nevertheless, the decision of the Georgia Supreme Court in *Corley v. Lewless*, 227 Ga. 745, 182 S.E.2d 766 (1971), and the numerous articles by commentators dealing generally with the constitutionality of statutes which impose vicarious liability on parents for acts of their children indicate that the constitutionality of Section 3109.09 should not be taken for granted. See, e.g., Note, *Torts — The Constitutional Validity of Parental Liability Statutes*, 55 MARQ. L. REV. 584 (1972); Note, *Constitutional Law — Due Process — Parental Tort Liability Solely on Basis of Parent-Child Relation Held Unconstitutional*, 23 MERCER L. REV. 681 (1972); Note, *A Constitutional Caveat on the Vicarious Liability of Parents*, 47 NOTRE DAME LAWYER 1321 (1972).

In *Corley* the plaintiff alleged that he had been injured by a rock thrown by a minor under the custody and control of his mother and uncle, and brought suit against the mother and uncle under GA. CODE ANN. § 105-113 (1968) which imposed liability on the minor's parents or persons standing in loco parentis. The Georgia statute had no monetary limit, and in holding the statute unconstitutional on the grounds it would deprive a defendant of property without due process of law, the court distinguished similar statutes which were limited to "property damage" and "contained a limitation of \$300 or \$500 on the amount recoverable" because "[s]uch recoveries are in the nature of penalties, because they do not have as their objective compensation of the injured parties." *Id.* at 749, 182 S.E.2d at 769. While Ohio's Section 3109.09 sets a \$2,000 limit on the parents' liability, it does not necessarily follow that Ohio's statute is "penal" and thus distinguishable from the *Corley* doctrine that faultless liability is unconstitutional.

On the other hand, three courts have upheld the constitutionality of parental liability statutes. See *General Ins. Co. of America v. Faulkner*, 259 N.C. 317, 130 S.E.2d 645 (1963); *Kelly v. Williams*, 346 S.W.2d 434 (Tex. App. 1961); *Mahaney v. Hunter Enterprises, Inc.*, 426 P.2d 442 (Wyo. 1967). See also *Gilbert v. Floyd*, 119 Ga. App. 670, 168 S.E.2d 607 (1969), which held GA. CODE ANN. § 105-113 constitutional prior to its amendment and prior to it being held unconstitutional in *Corley*.

<sup>8</sup> In 1969 a similar statute was enacted which imposes vicarious liability upon parents of a minor who willfully assaults a person by a means likely to produce great bodily harm. OHIO REV. CODE ANN. § 3109.10 (Page 1972). This statute, like Section 3109.09, permits the injured party to maintain a civil action to recover compensatory damages from the parents of the minor wrongdoer in an amount not to exceed \$2,000. While an analysis of Section 3109.10 has not been undertaken in this article, many of the questions relating to the construction and application of Section 3109.09 are nevertheless applicable to Section 3109.10.

## Application to a "Taking" of Property

Section 3109.09 provides a civil remedy against the parents of a minor who "willfully damages property." Certainly the language would include the acts of a minor who literally destroys or damages property; *e.g.*, a minor who maliciously destroys a person's dwelling or its contents.<sup>9</sup> However, it is not clear whether the statute includes the acts of a minor who "steals" the property of another.

The resolution of this issue has considerable practical significance. It is not uncommon for a minor to steal personal property that is never recovered, although the minor's guilt is subsequently established. Since the minor is usually uncollectible, the owner's only remedy may be an action against the minor's parents under Section 3109.09; that is, if the statute applies to a "taking of property."<sup>10</sup>

From the standpoint of the injured property owner, it makes little difference whether his property was merely stolen or physically destroyed. Both circumstances involve willful acts and result in an identical injury. It would seem unjust and illogical to permit the owner to recover from the minor's parents only when the property is physically destroyed, and thus a proper interpretation would suggest that the word "damage" be given its broadest meaning.<sup>11</sup>

<sup>9</sup> *Lewis v. Martin*, 16 Ohio Misc. 18 (C.P. 1968). It is interesting to note that Section 3109.09 requires that the minor *willfully*, as opposed to *intentionally*, damage property of another. The term "willfully" implies the necessity of showing a "purpose or design to injure." *Reserve Trucking Co. v. Fairchild*, 128 Ohio St. 519, 191 N.E. 745 (1934). Simply establishing that the minor intended to complete the physical act of destroying property, without showing a purpose or design to injure would not appear to be sufficient to impose liability on the minor's parents under Section 3109.09. This conclusion has added significance when the minor wrongdoer is "of tender years." In Ohio a child under the age of seven years is conclusively presumed to be incapable of being contributorily negligent because of his incapacity and lack of experience to appreciate the dangers which confront him. *Holbrock v. Hamilton Distributing, Inc.*, 11 Ohio St. 2d 185, 228 N.E.2d 628 (1967); 28 OHIO JUR. 2d *Infants* § 39 (1958). While there are no reported Ohio decisions directly reaching such a result, it could be argued that a child under seven years of age should likewise conclusively be presumed incapable of acting "willfully." See generally *Annot.*, 67 A.L.R.2d 570, 575 (1959). *But see Shiflet v. Segovia*, 40 Ohio App. 2d 244, ..... N.E.2d ..... (1974). On the other hand, a child's age offers no immunity when the determinative question is whether the child intended to complete the physical act which caused the damage. See *Allstate Fire Ins. Co. v. Singler*, 9 Ohio App. 2d 103, 23 N.E.2d 65 (1967), *rev'd on other grounds*, 14 Ohio St. 2d 27, 236 N.E.2d 79 (1968).

<sup>10</sup> Some parental liability statutes are more explicit. For example, Pennsylvania's statute imposes liability on the parents for a "tortious act resulting in injury to the person, or theft, destruction or loss of property of another. . . ." PA. STAT. ANN. tit. 11, § 2002 (Supp. 1974).

<sup>11</sup> The verb "damage" means "to do or cause damage." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 571 (1961). The noun "damage" has been defined by Ohio courts as the "loss, injury or deterioration caused by the negligence, design, or accident of one person, to another, in respect to the latter's person or property. . . ." 16 OHIO JUR. 2d *Damages* § 2 (1971). By stealing an individual's property one has caused a loss of the property and, by definition, has damaged the property.

This construction of Section 3109.09 is also supported by the argument that the statute is essentially remedial in nature<sup>12</sup> and should therefore be liberally construed in order to promote its object of compensating the injured property owner.<sup>13</sup> Section 3109.09 does not impose liability for a fixed sum without reference to the damage inflicted by the wrongdoer;<sup>14</sup> rather, it offers compensation commensurate with the actual loss suffered by the property owner.

However, the statute is also subject to a second, and much narrower, interpretation. It is a general rule of statutory construction that a statute in derogation of the common law must be strictly construed, and at common law an injured property owner was not permitted to recover from the parents of the minor wrongdoer unless the parents had directed or participated in the act.<sup>15</sup> Since the vicarious liability imposed by Section 3109.09 is in derogation of the common law, it can be argued that the statute must be strictly construed and cannot be extended to include acts which are not actually specified.<sup>16</sup>

<sup>12</sup> Section 3109.09 would appear to be remedial rather than "penal" because the injured party's recovery is limited to the actual damages which he suffered. On the other hand, Section 2151.411 would be classified as "penal" because the parents may be "fined" without regard to the actual damages caused by their child. Full text quoted in note 3 *supra*. See *Belmont Co. v. Brown*, 5 Ohio App. 394, 403 (1916); 50 OHIO JUR. 2d *Statutes* § 15 (1961). *But see* *Corley v. Lewless*, 27 Ga. 745, 748, 182 S.E.2d 766, 769 (1971) (parental liability statutes which limit the amount of recovery are "in the nature of penalties because they do not have as their objective compensation of injured parties").

<sup>13</sup> The Ohio Legislature has provided that remedial statutes must be construed liberally, and has abrogated the common law rule that statutes in derogation of the common law must be strictly construed. OHIO REV. CODE ANN. § 1.11 (Page 1969) provides:

Remedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice. The rule of the common law that statutes in derogation of the common law must be strictly construed has no application to remedial laws; but this section does not require a liberal construction of laws affecting personal liberty, relating to amercement, or of a penal nature.

<sup>14</sup> Compare Section 3109.09 with Section 2151.411 which essentially enables a court to "fine" the parents of a minor wrongdoer in an amount not to exceed \$500 without regard to the actual damage caused by the child.

<sup>15</sup> It was also possible to recover from the parents at common law if one could establish that the parents had negligently permitted the child to conduct himself in a manner likely to cause injury or that the child was an employee or agent of the parents and the wrongful act was committed during the course of his employment or agency. See discussion in note 1 *supra*.

<sup>16</sup> Illustrative of this argument is the case of *Bell v. Adams*, 111 Ga. App. 819, 143 S.E.2d 413 (1965). In *Bell*, the plaintiff sued the father of a minor who had intentionally shot and killed the plaintiff's son under a statute which made the minor's parents liable for the minor's "willful and wanton acts of vandalism . . . resulting in injury or damage to the person or property of another." In upholding the trial court's judgment sustaining the defendant's demurrer, the Georgia Court of Appeals noted:

[The statute] is in derogation of common law. For this reason it must be strictly construed. . . . "Vandalism" does not encompass within its meaning acts directed only against persons. Accordingly, the statute provides for liability of the parent only in instances where the child's act is one that is intended to damage property. Of course, an act of vandalism within this meaning of the code may result in injury to persons and consequent liability of the parent for personal injuries inflicted.

(Continued on next page)

The "strict construction" approach seemed to be adopted by the Garfield Heights Municipal Court in *Centennial Insurance Co. v. Dukes*.<sup>17</sup> In *Centennial*, the plaintiff insurance company brought suit under Section 3109.09 against the respective parents of three minors to recover damages incurred by its insured when the minors stole various articles of clothing from the insured's place of business. Most of the items stolen were sold or destroyed before the minors were arrested and, consequently, were never recovered. The court granted one defendant parent's motion to dismiss, noting simply that Section 3109.09 "does not apply to a taking of property."

Notwithstanding the decision in *Centennial*, however, the possibility of recovering under Section 3109.09 for a "taking" of property has not been entirely foreclosed. In view of the legislative objectives and policies behind the statute, a litigant can make some substantial arguments for including a theft within the purview of Section 3109.09.<sup>18</sup>

### Interpretation of "Parents"

A second issue as to how terms found in Section 3109.09 are to be defined deals with the question of who are "parents" under the statute. Section 3109.09 imposes liability upon "the *parents* having the custody and control of a minor under the age of eighteen years." (Emphasis added). While there is no doubt that the statute applies to the natural parents<sup>19</sup> if they have the custody<sup>20</sup> and control<sup>21</sup> of their child, there is some uncertainty as to whether it also applies to per-

(Continued from preceding page)

*Id.* at 820, 143 S.E.2d at 415.

One does not have to resolve, however, whether given the facts of *Bell* an Ohioan could recover under Section 3109.09. In 1969 the Ohio Legislature specifically provided for such situations in a companion statute. See OHIO REV. CODE ANN. § 3109.10 (Page 1972) and discussion in note 8 *supra*.

<sup>17</sup> No. 11520 (Garfield Hts. Mun. Ct., March 3, 1972).

<sup>18</sup> See notes 11-14 *supra* and accompanying text.

<sup>19</sup> Most likely it would also include adoptive parents since

a legally adopted child shall have the same status and rights, and shall bear the same legal relationship to the adopting parents as if born to them in lawful wedlock and not born to natural parents. . . .

OHIO REV. CODE ANN. § 3107.13 (Page 1972).

Moreover, the

[a]dopting parents are entitled to custody of their adopted child to the exclusion of all other persons until some lawful reason for a change of the child's custody is made to appear by competent evidence.

*Martin v. Fisher*, 25 Ohio App. 372, 376, 158 N.E. 287, 288 (1927).

<sup>20</sup> The natural parents have the predominant right to custody of their child, but such right may be relinquished by agreement, or forfeited if the parents abandon or neglect the child or allow the child to become dependent, unruly or delinquent. See generally 31 OHIO JUR. 2d *Parent and Child* §§ 15, 21 and 22 (1960). In addition, one may be deemed to have custody of a child by virtue of his relationship to the child even though he may not have technical "legal" custody or the primary right to custody. For example, in determining who

(Continued on next page)

sons standing in loco parentis<sup>22</sup> to and having custody<sup>23</sup> and control of a minor, such as stepparents,<sup>24</sup> foster parents,<sup>25</sup> guardians<sup>26</sup> or, possibly, institutions or agencies to which the custody of a child has been transferred by agreement<sup>27</sup> or court order.<sup>28</sup>

(Continued from preceding page)

constitutes a "person having custody of the applicant" for the purpose of signing the application for a probationary driver's license under Section 4507.07, the Ohio Attorney General has ruled:

Although Section 4507.07 implies that a parent who signs an application for a minor should have custody, a divorced parent does not cease to be a parent for the purposes of this Section merely because legal custody has been awarded to the other spouse. The divorced parent who has visitation rights retains some elements of custody.

Ohio Att'y Gen. Op., Opinion No. 72-087 at 2-353 (1972) (citations omitted).

<sup>21</sup> Section 2151.411 provides that "[a] parent or guardian having custody of a child is charged with the control of such child . . ." (Emphasis added). If the effect of Section 2151.411 is to create a conclusive presumption that the parents having custody of their child have control of such child, the language of Section 3109.09 requiring that the parents have not only custody but also "control" would appear to be redundant. But under Section 2151.022 the Legislature has recognized that the parents may not be able to control their child by reason of his being wayward or habitually disobedient. OHIO REV. CODE ANN. § 2151.022 (Page Supp. 1973). Could parents possibly avoid liability under Section 3109.09 by arguing that while they had custody of their child they never really had "control" of him?

<sup>22</sup> The term "loco parentis" has been defined to describe "the situation of one who has assumed the obligations of the parental relationship without going through the formalities of legal adoption." Ohio Att'y Gen. Op., Opinion No. 7008 at 644, 646 (1956). "[I]t is the policy of law to encourage and extend the relationship of parent and child, and where the relation is assumed, all the rights and liabilities thereof attach." 41 OHIO JUR. 2d *Parent and Child* § 35 (1960).

<sup>23</sup> One standing in loco parentis to a child is entitled to his custody. *See, e.g.,* Wing v. Hibbert, 7 Ohio N.P. 124 (C.P. 1897), *rev'd on other grounds*, 11 Ohio C.D. 190 (1899).

<sup>24</sup> As a general rule a stepparent, by virtue of that relationship alone, does not stand in loco parentis to a stepchild. However,

[i]f a stepchild is received into the home, the relationship of parent and child does arise. A stepfather, under such circumstances, who educates and supports the stepchild and discharges to him all the duties of a parent, stands in loco parentis to him . . . .

41 OHIO JUR. 2d *Parent and Child* § 6 at 309 (1960).

For the purposes of this discussion it is assumed that the stepparent stands in loco parentis to the stepchild.

<sup>25</sup> A "foster parent" is "one who has performed the duties of a parent to the child of another by rearing the child as his own child." BLACK'S LAW DICTIONARY (Rev. 4th ed. 1968). A foster parent stands in loco parentis to the foster child. *See* Ohio Att'y Gen. Op., Opinion No. 6541 at 554, 569 (1943).

<sup>26</sup> While under Section 2111.08 the natural parents are deemed the guardians of their minor child, Section 2111.06 requires the probate court to appoint a guardian for

[a] minor having neither father nor mother, or whose parents are unsuitable persons to have the custody . . . of such minor, or whose interests, in the opinion of the court, will be promoted thereby . . . .

Section 2111.06 further provides that such guardian shall have the custody of the minor. OHIO REV. CODE ANN. §§ 2111.06, .08 (Page 1968). By virtue of Section 2111.13 a guardian of the person has the duty to "control" his ward. OHIO REV. CODE ANN. § 2111.13 (Page 1968). Since the guardian exercises many other duties similar to those of a parent, he stands in loco parentis to his ward. *See* Davis v. Ford, 7 Ohio 390, 395 (1836).

<sup>27</sup> OHIO REV. CODE ANN. § 5103.15 (Page 1970), which provides, in pertinent part:

*Placing of a child in public or private institution.*

The parents, guardian, or other persons having custody of a child, may enter into

(Continued on next page)



It is difficult to predict how the courts will resolve this issue. One unreported Ohio decision indicates that the term "parents" as used in Section 3109.09 must be construed narrowly to include only "natural" parents. In *St. Paul Fire and Marine Insurance Co. v. Boyd*<sup>29</sup> a default judgment was obtained under Section 3109.09 against the natural mother and stepfather of a minor who had allegedly willfully damaged the property of plaintiff's insured. Subsequently the stepfather filed a motion to vacate the judgment as it applied to him on the ground that Section 3109.09 did not apply to a stepparent.<sup>30</sup> The court, without any oral or written opinion, simply granted the stepfather's motion and vacated the judgment.

Yet, two arguments support an interpretation of the term "parents" in Section 3109.09 which imposes liability not only on the natural parents but also on persons standing in loco parentis to the minor wrongdoer. First, assuming that the Legislature intended to protect society from the willful and malicious acts of minors, and that the statute should be liberally construed to effect its intended purpose,<sup>31</sup> it follows that liability should be imposed upon those actually having custody and the legal right to exercise control over the minor regardless of whether they are the natural or loco parentis "parents."<sup>32</sup>

(Continued from preceding page)

an agreement with any association or institution of this state established for the purposes of aiding, caring for, or placing children in homes, which has been approved and certified by the division of social administration, whereby such child is placed in the temporary custody of such institution or association; or such parent, guardian, or other person may make an agreement surrendering such child into the permanent custody of such association or institution, to be taken and cared for by such association or institution, or placed in a family home.

<sup>28</sup> Under Sections 2151.353 to 2151.355, a juvenile court may commit a neglected, dependent, unruly or delinquent child to the temporary or permanent custody of, *inter alia*, a county department of welfare which has assumed the administration of child welfare, county children services boards or to any other certified agency, whether public or private. OHIO REV. CODE ANN. §§ 2151.353-2151.355 (Page Supp. 1973). Section 2151.353(D) provides that upon any such permanent commitment "[t]he natural or adoptive parents are divested of all legal rights and obligations due from them to the child or from the child to them." OHIO REV. CODE ANN. § 2151.353(D) (Page Supp. 1973).

<sup>29</sup> No. A 930 021 (Cleveland Municipal Court, January 19, 1972).

<sup>30</sup> The defendant argued, *inter alia*, that:

The natural parent usually teaches the child a sense of right and wrong. The child identifies with the parent at an early age. By the time a stepparent, such as Defendant steps in, the child's nature has been determined. Clearly the stepparent has no control over the child at this stage, outside of brute force. Liability for the child's acts, under these circumstances, would be unfair, and would impose a choice upon the stepparent of paying the penalty or imprisoning the child.

Brief for Defendant at 3-4, *St. Paul Fire and Marine Ins. Co. v. Boyd*, No. A 930 021 (Cleveland Municipal Court, January 19, 1972).

<sup>31</sup> See discussion notes 12 and 13 *supra*.

<sup>32</sup> Of course, even if the loco parentis construction is accepted, in order to impose liability under Section 3109.09 on a state institution or agency having custody and control of a child one would have to overcome the doctrine of sovereign immunity. See *Krause v. Ohio*, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972), *appeal dismissed*, 409 U.S. 1052 (1972), *petition for rehearing dismissed*, 410 U.S. 918 (1973). *But see Scheuer v. Rhodes*, 414 U.S. 448, 94 S.Ct. 1683 (1974).

Second, a close examination of Section 2151.411<sup>33</sup> supports a broad interpretation of the word "parents." Under certain circumstances Section 2151.411, somewhat of a predecessor to Section 3109.09, permits a court to require the parent having custody of a delinquent child to enter into a recognizance to assure the child's good behavior. Like Section 3109.09, Section 2151.411 does not define "parent"; however, the latter statute does provide that "[t]he provisions of this section shall not apply to foster parents." Thus, by excluding one type of non-natural parent standing in loco parentis to the child, it follows, *expressio unius est exclusio alterius*, that the Legislature intended the word "parent" to include both natural parents and other persons in loco parentis unless specifically excluded. Since Section 3109.09 deals with the same subject matter as, and was enacted after, Section 2151.411, this construction of the word "parent" should apply equally as well to this more recent statute.

The *St. Paul Fire and Marine Ins. Co.* decision gave the term "parents" a narrow interpretation. When the facts reveal that the non-natural parent actually had the custody and control of the minor wrongdoer at the time the damage occurred, the policy and statutory construction arguments in favor of imposing liability under Section 3109.09 upon such a "parent" should not be overlooked.<sup>34</sup>

### Subrogation Under Section 3109.09

Still another problem of statutory interpretation relates to the phrase "owner of property." Although Section 3109.09 permits an "owner of property" to recover from the parents of the minor wrongdoer, as a practical matter it is usually the owner's insurance company, having paid the owner for his loss and become "subrogated" to his rights, which actually seeks recovery. While Section 3109.09

<sup>33</sup> OHIO REV. CODE ANN. § 2151.411 (Page 1968). See note 3 *supra*.

<sup>34</sup> In this connection it is interesting to note that the meaning of the word "parent" under Georgia's parental liability statute has also been challenged in a slightly different context. The Georgia parental liability statute as originally enacted (Acts 1965, p. 699 repealed by Acts 1966, p. 424) provided that "every parent" having the custody and control of a minor child shall be liable for injuries to persons caused by the child's willful acts of vandalism. In *Landers v. Medford*, 108 Ga. App. 525, 133 S.E.2d 403 (1963), a Georgia Court of Appeals affirmed the dismissal of a claim under this statute against a stepfather on the ground that only *one* parent could be held liable. The Court reasoned:

The caption or title of the 1956 Act . . . which provides in part that "[T]he parent having custody and control of a minor child \* \* \* shall be liable \* \* \*" supports the interpretation that only one parent shall be liable for the acts of vandalism.

The plaintiff's petition, while alleging that both the mother and stepfather stand in loco parentis and have custody of Stanley, shows that Emma Medford was the parent having custody and control of Stanley and consequently the general demurrer of Ernest Medford was properly sustained. . . .

108 Ga. App. at 528, 133 S.E.2d at 405-406. Three years later, however, as if to clarify its original intention and possibly in direct response to the *Medford* decision, the Georgia legislature amended its parental liability statute to include "[e]very parent or other person in loco parentis." (Emphasis added). See GA. CODE ANN. § 105-113 (1968).

is silent as to whether its provisions apply to a subrogated insurance company, the general principles of subrogation<sup>35</sup> and the decisions construing similar statutes in other jurisdictions indicate that they do.

For example, in *General Insurance Co. of America v. Faulkner*<sup>36</sup> the court considered whether an insurance company, as subrogee, could maintain an action under North Carolina's parental liability statute<sup>37</sup> against the parents of a minor who had maliciously set fire to the drapes in the school auditorium. In upholding the subrogee insurance company's right to maintain an action under this statute, the court noted that to allow the defendant to escape liability merely because the property owner had insurance would give him the benefit of insurance coverage for which he had not paid:

[I]t is not apparent why the prudent foresight of the . . . [insured] . . . in protecting its property by insurance should result in a detriment to the insurance company . . . . The granting of subrogation will reach an equitable result; to deny it would accomplish injustice.<sup>38</sup>

More recently, in *Travelers Indemnity Co. v. Hobart*,<sup>39</sup> the Court of Appeals for the Eleventh Appellate District of Ohio, while reversing on other grounds a judgment in favor of a subrogee insurance company under Section 3109.09, nevertheless stated that it did "approve of the doctrine of subrogation in this situation; provided, however, the subrogee stands in the shoes of the owner of the property."<sup>40</sup>

On the other hand, it could be argued that subrogation should not be permitted because, as between the insurance company and the parents of the minor wrongdoer, it is the insurance company which,

<sup>35</sup> Ohio courts have always recognized the doctrine of subrogation:

The well-settled general rule is that if insured property is destroyed or damaged through the fault or neglect of another than the insured, the insurer, upon payment of the loss, will be subrogated to the rights of the insured owner . . . and that the rights of the insurance company under such circumstances are precisely those of the insured against the wrongdoer.

30 OHIO JUR. 2d *Insurance* § 887 at 813 (1958). (Emphasis added).

<sup>36</sup> 259 N.C. 317, 130 S.E.2d 645 (1963).

<sup>37</sup> N.C. GEN. STAT. § 1-538.1 (1969). The statute provided:

*Damages for malicious or wilful destruction of property by minors.* Any person . . . shall be entitled to recover damages in an amount not to exceed five hundred dollars (\$500.00) . . . from the parents of any minor under the age of eighteen (18) years, living with its parents, who shall maliciously or wilfully destroy property . . . belonging to any such person. . . .

<sup>38</sup> 259 N.C. at 326, 130 S.E.2d at 652.

<sup>39</sup> No. 201 (July 31, 1972). The court reversed the lower court's judgment in favor of the subrogee insurance company because the plaintiff's insured did not have legal title to the damaged premises.

<sup>40</sup> *Id.* at 3.

in good conscience, ought to bear the loss. Since Section 3109.09 imposes liability upon the parents without regard to fault, the ultimate issue involved is whether a paid surety (*i.e.*, the insurance company which contracted for the liability and has already received some compensation in the form of premiums) or an unpaid surety (*i.e.*, the faultless parents who will not profit if the loss is assumed by the paid surety) should bear the loss. Since the doctrine of subrogation is an equitable one, it could be concluded that the insurance company, not the parents, should pay.

While the author knows of no reported decisions reaching this result under parental liability statutes, subrogation has been denied in actions under an analogous statute which imposed vicarious liability on a municipality for damage to property resulting from a riot.<sup>41</sup>

### Coverage Under a Homeowners Policy

With a large number<sup>42</sup> of Ohio families insured under homeowners<sup>43</sup> policies, a second question involving insurance that is likely to arise in an action brought under Section 3109.09 is whether the parents of the minor wrongdoer are entitled to coverage under that part of the policy providing protection against personal liability. The standard homeowners policy<sup>44</sup> provides that the insurance company will

pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of

---

<sup>41</sup> See *A. & B. Auto Stores of Jones Street, Inc. v. City of Newark*, 59 N.J. 5, 279 A.2d 693 (1971). Note, however, that the court in *A & B Auto Stores* distinguished the *General Insurance* decision on the grounds that there is a "concept of fault" in the parental liability statute, and "that subrogation would further the legislative intent." *Id.* at 26, 279 A.2d at 704.

<sup>42</sup> Although no exact figures are available, a "guesstimate" of the number of homeowners policies in force in Ohio would be in excess of 1,000,000. This figure is derived by dividing the total premiums collected in Ohio for all new and renewed homeowners policies in 1971 (\$125,478,524) as reported by the Ohio Department of Insurance by an estimated average annual premium of \$120.

<sup>43</sup> The "homeowners" type policy was created by insurance companies when they began combining, in one policy, insurance against loss to real and personal property with personal liability insurance and other coverages requested by the average homeowner. At the present time there are five "standard" homeowners forms or contracts described in the trade as HO-1 (Basic Form); HO-2 (Broad Form); HO-3 (Special Form); HO-4 (Contents Broad Form); and HO-5 (Comprehensive Form). These forms have been developed by the Insurance Services Office (which is the consolidated successor of the Fire Insurance Research and Actuarial Association, the Inland Marine Insurance Bureau, the Insurance Rating Bureau, the Multi-Line Insurance Rating Bureau, the National Insurance Actuarial and Statistical Association and the Insurance Data Processing Center, and is hereinafter referred to as "ISO") and are widely used by insurance companies in Ohio, although a few companies do use their own forms with variations in language and coverage. Comprehensive personal liability insurance may also be purchased separately, and the question discussed in this section is relevant with respect to any type of insurance providing a family with protection against personal liability.

<sup>44</sup> See note 43 *supra*.

bodily injury or property damage, to which this insurance applies . . . .<sup>45</sup>

But the policy goes on to exclude from such coverage "bodily injury or property damage which is either expected or intended from the standpoint of the insured."<sup>46</sup> Since a judgment under Section 3109.09 against a minor's parents would certainly be a claim which they are "legally obligated to pay," the question of coverage must turn on the applicability of the "intentional act" exclusion.<sup>47</sup>

In 1955, the California Supreme Court considered such a question in *Arenson v. National Automobile & Cas. Ins. Co.*<sup>48</sup> In that case the defendant insurance company had issued a "personal liability policy" to the plaintiff which provided that the company would

pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law . . . .<sup>49</sup>

The policy also contained several exclusions, one of which provided that the

---

<sup>45</sup> ISO Homeowners Policy, Section II, Coverage E—Personal Liability (September, 1970 Edition). At the present time all of the HO series homeowners policies contain the same language with respect to the coverage provided for personal liability and with respect to the exclusion from such coverage for intentional acts.

The insurance provided by this section should not be confused with the limited coverage for property damage provided under the heading "Supplementary Coverages." Under this heading the insurer agrees to either pay the actual cash value of property damaged or destroyed by any insured, or repair or replace such property, without regard to liability, but limits such liability to a maximum of \$250. In addition, damage caused intentionally by any insured who has attained the age 13 is excluded from coverage under this section of the policy.

<sup>46</sup> ISO Homeowners Policy, Section II, Exclusions, paragraph 1 (f) (September, 1970 Edition). Prior to 1968 this section excluded liability for "bodily injury or property damage caused intentionally by or at the direction of the insured."

<sup>47</sup> For the purposes of this discussion it is assumed that the intentional act exclusion would apply with respect to a claim made directly against the minor who is included as an insured under a homeowners policy by virtue of the definition sections which provided:

When used in this policy the following definitions apply:

a. "Insured" means

- (1) the Named Insured stated in the Declaration of this policy;
- (2) if residents of the Named Insured's household, his spouse, the relatives of either, and any other person under the age of twenty-one in the care of the Insured:

But see note 65 *infra*.

<sup>48</sup> 45 Cal.2d 81, 286 P.2d 816 (1955). For a discussion of the *Arenson* case with respect to an insurer's obligation to the parents of a minor wrongdoer under California's general parental liability statute, see Note, *Insurance: Liability of Insurer Under Personal Liability Policy for Damage Caused by Willful Misconduct of Insured's Child—Application of New California Statute*, 7 HAST. L.J. 98 (1955).

<sup>49</sup> *Arenson v. National Automobile & Cas. Ins. Co.*, 276 P.2d 140, 142 & n.1 (Cal. App. 1954), *rev'd*, 45 Cal. 2d 81, 286 P.2d 816 (1955).

policy does not apply (c) to injury, sickness, death or destruction caused intentionally by or at the direction of the insured.<sup>50</sup>

The plaintiff was the named insured under the policy but the term "insured" was defined to include, *inter alia*, his spouse and any other person under the age of twenty-one in the care of the insured.<sup>51</sup>

Subsequent to the issuance of the policy, the plaintiff's minor son intentionally damaged a school building owned by the Los Angeles City School District. The School District then sued the plaintiff pursuant to Section 16074 of the California Education Code,<sup>52</sup> which provided that the parent or guardian of a child who willfully damaged school property would be liable for all damages sustained.

The defendant insurance company refused to defend the suit or pay the amount of the judgment rendered against the plaintiff on the grounds that the damage was caused intentionally by an insured and thus excluded from coverage by the express language of its policy. In reversing the lower court's decision and finding for the plaintiff, the Supreme Court of California held that

the policy protects the named insured against liability for intentional injury committed by another insured, and accordingly, it will be unnecessary to consider whether the son's act was in fact intentional.<sup>53</sup>

The court's conclusion in *Arenson* reflects the established rationale that has been applied by the courts with respect to analogous questions of coverage afforded partnerships and their individual partners. For example, in *Employers Surplus Lines of Boston, Mass. v. W. L. Stone*,<sup>54</sup> the defendant insurance company had issued a public liability policy to a partnership consisting of two partners engaged in the business of operating horseback riding stables. The policy de-

<sup>50</sup> 276 P.2d at 142.

<sup>51</sup> 45 Cal. 2d at 82, 286 P.2d at 816.

<sup>52</sup> Stats 1943, C. 71, P. 631:

Any pupil who willfully cuts, defaces or otherwise injures in any way any property, real or personal, belonging to a school district is liable to suspension or expulsion, and the parent or guardian shall be liable for all damages so caused by the pupil.

Section 16074 of the California Code was repealed in 1959, but re-enacted as Section 10606 of the Education Code of 1959. See CAL. EDUC. CODE § 10606, *as amended* (West Supp. 1974).

<sup>53</sup> 45 Cal.2d at 83, 286 P.2d at 818. In analyzing the *Arenson* decision, the authors of *Fire Casualty and Surety Bulletins*, Casualty & Surety Section, Public Liability at IAP-7 (5th Printing, 1970) found that the Court's construction was consistent with their understanding of the coverage provided by homeowners policies. Moreover, the *Arenson* decision has been followed by the courts of New Hampshire and Pennsylvania. See, *Pawtucket Mutual Ins. Co. v. Lebrecht*, 104 N.H. 465, 468, 190 A.2d 420, 423 (1963), *Esmond v. Liscio*, 209 Pa. Super. 200, 211, 224 A.2d 793, 798 (1967).

<sup>54</sup> 388 P.2d 295 (Okla. 1964).

fined "Insured" to include the named partnership as well as any partner therein, but excluded coverage for any assault and battery "committed by or at the direction of the Insured." While the policy was in force, one of the partners assaulted a customer of the partnership, who brought suit against both partners for the injuries which he suffered. The innocent partner settled the claim, and in turn brought suit against the defendant insurance company to recover the amount he had paid to settle the claim of the injured customer. In finding that the defendant insurance company was obligated to indemnify the innocent partner, the court noted that the defendant had insured

a partnership entity and by the terms of the policy has defined the "unqualified" word "Insured" to include any partner therein and as such they are "additional insureds," to whom the insurer has assumed separate obligations. The [innocent partner] does not fall within the exclusion terms of the policy since he neither committed or directed the assault.<sup>55</sup>

Although there are no reported decisions in Ohio considering an insurance company's obligations with respect to claims asserted against its insureds under Section 3109.09, the question was recently decided by the Court of Common Pleas for Lake County in *Nationwide Mutual Fire Ins. Co. v. Blake*.<sup>56</sup>

In *Nationwide*, a 15-year-old boy had allegedly participated in the vandalism of a high school owned by the Painesville, Ohio Board of Education. The Board of Education's casualty insurance carriers reimbursed it for the damage and then brought suit as subrogees in the municipal court<sup>57</sup> against the parents of the minor under Section 3109.09.

At the time the vandalism occurred the minor's parents (as well as the minor himself)<sup>58</sup> were insured under a homeowners policy issued by Nationwide Insurance Company. Although Nationwide was

---

<sup>55</sup> *Id.* at 298. The same result has been reached in many other jurisdictions. *See, e.g.*, *Malanga v. Manufacturers Cas. Ins. Co.*, 28 N.J. 220, 146 A.2d 105 (1958); *Morgan v. Greater New York Taxpayers Mut. Ins. Ass'n.*, 305 N.Y. 243, 112 N.E.2d 273 (1953). Likewise, it appears that an insurance company which issues a public liability policy to a corporation and defines "insured" to include not only the corporation but also its officers and directors must indemnify the corporation for liability imposed upon it as the result of an intentional act of one of its officers notwithstanding the fact that the policy excludes coverage for intentional acts committed by "the Insured." *See Portaro v. American Guar. & Liability Ins. Co.*, 310 F.2d 897, 898 (6th Cir. 1962); *Glens Falls Indem. Co. v. Atlantic Bldg. Corp.*, 199 F.2d 60 (4th Cir. 1952).

<sup>56</sup> 72-CIV-0221 (Sept. 12, 1973), *aff'd.* No. 5-037 (Eleventh App. Dist. May 28, 1974).

<sup>57</sup> *Buckeye Union Ins. Co. v. Blake*, No. 37445 (Painesville Municipal Court, filed January 27, 1972).

<sup>58</sup> *Nationwide's* policy defined insured as "the named insured and members of his family, including any other person under the age of twenty-one in the care of any of the foregoing residing in the same household."

notified of the claims being asserted against its insureds, it refused to undertake their defense and subsequently filed a declaratory judgment action with the Court of Common Pleas for Lake County<sup>59</sup> for the purpose of establishing that it was under no legal obligation to defend and/or pay any claims being asserted against the minor and his parents arising from the minor's intentional acts.

The relevant language of Nationwide's policy was similar, although not identical, to the language construed in the *Arenson* case. While generally providing that it would pay on behalf of the insured all sums which he would become legally obligated to pay as damages because of bodily injury or injury to property, it excluded from coverage "bodily injury, illness, or death or property damage caused intentionally by or at the direction of *an* insured. . . ."<sup>60</sup>

Nationwide argued, *inter alia*, that the *Arenson* and similar decisions were not applicable to the present case because unlike the policy construed in *Arenson*, the Nationwide policy excluded acts caused intentionally by *an* insured, as opposed to merely *the* insured.<sup>61</sup> Thus, by Nationwide's view, since an intentional act was committed by the parents' son, *an* insured under the policy, coverage was forfeited for all insureds, including the parents.<sup>62</sup>

<sup>59</sup> No. 72-CIV-0221 (Sept. 12, 1973).

<sup>60</sup> Nationwide Mutual Fire Insurance Company Basic Homeowners Policy, Section II, part II, paragraph 1(a) (July, 1971 Edition) (emphasis added).

Nationwide's policy also provided in the preface to Section II that the "[p]olicy insures those named in the Declarations against loss from damages for negligent personal acts . . . arising out of the ownership, maintenance or use of real or personal property. . . ." On the basis of this language Judge Robert E. Cook of the Court of Appeals for the Eleventh Appellate District would have reversed the decision of the Court of Common Pleas. In his dissenting opinion Judge Cook stated:

The real question is whether Richard and Pamela Blake are covered under the terms of the policy for liability for the intentional acts of their son, a fellow insured.

I believe the answer is found in the preface to Section II of the policy:

"PROTECTION AGAINST LIABILITY.

" Part [sic] II of this Homeowner's [sic] Policy insures those named in the declarations against loss from damages for negligent personal acts. . . ."

An intentional act by a party is not an act of negligence. . . .

Accordingly, I am of the opinion that the Homeowners policy which is the subject of this action only protects each of the insureds from liability for his own negligent acts or the negligent acts of others for which he is liable.

Nationwide Mut. Fire Ins. Co. v. Blake, No. 5-037 (Eleventh App. Dist. May 28, 1974) at 3, 4, (Dissenting opinion of Judge Cook). It should be noted that the "standard" homeowners policies do not contain such language.

<sup>61</sup> See text accompanying note 50 *supra*.

<sup>62</sup> Brief for Plaintiff at 3. See also letter from Louis Euphrat, claims attorney, Nationwide Mutual Fire Insurance Company, to Howard W. Bernstein (the attorney representing Nationwide's insureds), dated December 22, 1971, in which Mr. Euphrat explains:

There is an important distinction in the language of this coverage in that, although many years ago, the policy language referred to damage or injury "by or at the direction of *the* insured. . . ." this language was purposely changed to



However, the court did not accept Nationwide's argument, and found that Nationwide was obligated to defend and/or pay the claim asserted against the parents. In so holding, the court found that the parents' actions were not intentional, and noted that while the child was excluded from coverage by the terms of the policy, his parents were not:

The Court is of the opinion that the Policy creates a several obligation to each of the named insureds and those included by reason of relationship. The Court is further of the opinion that there exists a duty on the plaintiff [Nationwide] to defend their named insureds and in the event of a recovery, to pay any claims to the extent and limit of the statute and their [sic] policy.<sup>63</sup>

In light of the *Arenson* and *Nationwide* decisions, and in light of the well established rule of construction that exceptions and exclusions in an insurance policy must be construed strictly against the insurer and liberally in favor of the insured,<sup>64</sup> it appears that the intentional act exclusion<sup>65</sup> presently found in the homeowners policy will not relieve an insurance company of its obligation to defend and/or pay claims asserted under Section 3109.09 against its insured parents.

---

(Continued from preceding page)

exclude the intentional act of *an* insured, meaning any additional insured who is entitled to coverage under the policy of the named insured. This change arose from case law that intentional acts caused by insured persons other than the named insured did not exclude coverage because the named insured did not commit the intentional act.

<sup>63</sup> Opinion of Judge John F. Clair, Jr., at 3.

<sup>64</sup> See 30 OHIO JUR. 2d *Insurance* § 215 (1958). In affirming the Common Pleas Court's decision, the Court of Appeals held:

While admitting that a tenable argument can be made to support either position taken as to coverage under the insurance policy in question, we prefer to hold as the Trial Judge did for the singular reason that it is not clear whether or not Nationwide intended that its policy cover Richard and Pamela Blake for the damages done by the willful acts of their son, David. It is because of this ambiguity that the language must be construed most favorably to Richard and Pamela as opposed to Nationwide, the scrivener of the Homeowner's Policy. . . . We limit coverage to the facts herein presented and suggest that, in any event, Nationwide consider redrafting its Homeowner's policy to be sold to Ohio customers to make it "perfectly clear" what the intentions for coverage are to be regarding similar factual situations that will no doubt arise from time to time in Ohio.

*Nationwide Mut. Fire Ins. Co. v. Blake*, No. 5-037 (May 28, 1974) at 1, 2.

<sup>65</sup> While the "intentional act" exclusion may not relieve an insurance company of the obligation to defend claims asserted against its insured parents under Section 3109.09 for acts committed by their child, the facts necessary to establish such a claim would appear to relieve the insurance company of any liability for claims asserted directly against the minor child who is also an insured under the typical homeowners policy. See note 47 *supra*. As previously indicated in note 9 *supra*, to impose liability on the parents under

(Continued on next page)

### Conclusion\*

Although Section 3109.09 has been the subject of only one reported decision there are nevertheless significant issues as to whether the statute imposes liability for the theft as well as the destruction of property; who may be considered a parent and thus be held liable under the statute; whether an insurance company may maintain an action under the statute as subrogee of the injured party; and whether an insurer under a "homeowners" policy must defend and indemnify its insured parents who are sued under the statute for damage caused by the willful acts of their child. There are persuasive arguments on both sides of these issues and notwithstanding the unreported decisions cited in this article, these arguments should not be overlooked in prosecuting or defending an action under Section 3109.09.

---

(Continued from preceding page)

Section 3109.09 one must show that their child "willfully" (*i.e.*, that he acted with purpose and design and intended the result of his act) damaged property, and the exclusionary language of the homeowners policy leaves little doubt that if such facts are established the child would forfeit his right to coverage. On the other hand, if the facts show that the child acted intentionally, although not willfully (*e.g.*, where a child intends to set a fire, but does not intend the resulting damages), liability could not be imposed on the parents under Section 3109.09. But there is considerable authority that under such circumstances an insurance company would be required to defend and/or pay the claims asserted against the child directly because the exclusion is applicable only if it can be shown that an insured had the "specific intent to damage property." *See, e.g.*, *Sykes v. Midwestern Indem. Co.*, 34 Ohio Misc. 73 (C.P. 1973); *Connecticut Indem. Co. v. Nestor*, 4 Mich. App. 578, 145 N.W.2d 399 (1966); *Annot.*, 2 A.L.R. 3d 1238 (1965). If at the time of filing suit there is not sufficient evidence available to determine accurately a child's state of mind at the time he damaged property, it is recommended that the Complaint contain alternative counts setting forth both (1) a claim against the parents under Section 3109.09 on the ground that the child acted willfully and intended the results of his acts and (2) a claim against the child on the grounds that, although the child committed an intentional act, he did not intend the damage which resulted.

#### \* ADDENDUM:

As this article goes to press, Sen. Gene Slagle (D-26) has introduced S.B. No. 37 in the 111th General Assembly which seeks to amend Section 3109.09 by adding "guardians" as those persons who are subject to the statute's provisions.