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PARENTAL TORT LIABILITY

INTRODUCTION

The phrase "parental tort liability" has been variously used to describe three separate and distinct situations from which liability arises in the parent-child relationship: (1) the civil liability of a parent to his child for the parent's torts against the child; (2) the criminal liability (usually a misdemeanor) of a parent for a child's torts against others, and (3) the civil liability of a parent to compensate a third person for damages caused by the tort of his child.

The 1965 Wyoming Legislature enacted a statute entitled "Parental Tort Liability" which deals with the situation last-named above. This statute imposes a maximum liability of three hundred dollars plus costs upon parents in favor of a third person whose property is damaged by the willful and malicious torts of a child between the ages of ten and seventeen. In other words, the statute imposes a limited legal duty upon parents to answer in damages to those who are harmed by their failure to discharge their moral duty to control their children.

The draftsmen of the Wyoming Statute appear to have borrowed, almost in its entirety, the highly similar statute of the State of Texas which was amended in 1965. A comparison of these two statutes may be found in the Appendix. In addition, the Appendix will show that thirty-seven of the fifty states presently have statutes similar to that of Wyoming. Wyoming has thus joined the majority of states which have recognized the need for progressive legislation in this field.

COMMON LAW

At common law the general rule is that parents have no legal responsibility or liability for the torts of their children.¹ Children of course are liable for their torts, and parents for theirs, but in the absence of statute or one of the five situations noted below, neither is liable for the torts of the other. "Relationship does not alone make a father answerable for the wrongful acts of his minor child. There must be something

1. PROSSER, *TORTS* § 101 (2d ed. 1955); 39 *AM. JUR. Parent and Child* § 55

besides relationship [consanguinity] to connect him with such acts before he becomes liable."²

There are, however, certain common law doctrines which impose liability upon parents for their children's torts in certain specified situations. These doctrines, although often viewed as exceptions to the general rule, are in reality simply applications of the law of agency or else hold the parent liable for his own torts. The doctrines which have developed have application in the following situations: (1) respondeat superior, a situation in which the child is the agent of the parent;³ (2) a situation in which the parent has knowledge of the child's dangerous propensities but fails to protect others not having such knowledge;⁴ (3) the situation in which the parent entrusts a dangerous instrumentality to the child;⁵ (4) the situation in which the parent participated with the child by consenting to or ratifying the tortious act;⁶ (5) and the situation in which, through the parent's negligence, the child obtains a dangerous instrumentality, the parent knowing or being in a position to know that the child is capable of inflicting injury with it.⁷ It should be noted, however, that in the last four situations listed above it is not so much that the parent is liable for the negligence or willful damage of the child, but rather that he is liable for his own negligence which results in the child being enabled or allowed to cause the harm complained of.⁸

One form of respondeat superior which has gained acceptance in many jurisdictions is the "family purpose" doctrine which is an application of agency law to impose liability upon parents for torts committed by their children when they are sent on errands of family purpose in the family car. This doctrine indicates that some courts, because of the common law rule, have gone further to find an agency relationship in the parent-child area.⁹

(1942); 67 C.J.S. *Parent and Child* § 66 (1950).

2. 39 AM. JUR. *Parent and Child* § 55 (1942).

3. *E.g.*, *Hice v. Pullam*, 130 Colo. 302, 275 P.2d 193 (1954).

4. *E.g.*, *Martin v. Barrett*, 120 Cal. App. 2d 625, 261 P.2d 551 (1953).

5. Note, 30 NOTRE DAME LAW. 295 (1955).

6. *E.g.*, *Johnston v. Orlando*, 131 Cal. App. 2d 705, 281 P.2d 357 (1955).

7. *E.g.*, *Ellis v. D'Angelo*, 9 Cal. Rep. 457, 253 P.2d 675 (1953).

8. *Landers v. Medford*, 108 Ga. 525, 133 S.E.2d 403 (1963); *Potomac Ins. Co. v. Torres*, 401 P.2d 308 (N.M. 1965).

9. *Ligon*, *Statutory Comment*, 40 N.C.L.REV. 619 (1962).

It should be remembered, however, that without a situation covered by one of these doctrines or by statute the common law rule remains that parents have no legal liability for the torts of their children.

Although there is no case law in Wyoming which directly adopts the common law rule,¹⁰ it is reasonable to infer that in the absence of statute the Wyoming courts would follow the general rule. This conclusion becomes more obvious when it is noted that Wyoming does not follow the family purpose doctrine.¹¹ It follows, then, that if our courts are reluctant to impose liability upon parents for the torts of their children in actions arising from automobile collisions in the absence of a showing of a clear agency relationship, they would be equally reluctant to impose liability in other situations without a similarly clear showing of a comparable relationship.

THE NEW STATUTE

The Wyoming Legislature changed the common law rule in part by the enactment of the 1965 Parental Tort Liability statute.¹² The obvious purpose of the statute is to impose a limited liability upon parents for the torts of their children

10. The rule was evidently so widely and generally accepted that no one attempted to challenge it in Wyoming courts.

11. *Sare v. Stetz*, 67 Wyo. 55, 214 P.2d 486 (1950); Wyoming Dep't of Revenue v. *Wilson*, 400 P.2d 144 (Wyo. 1965).

12. WYO. STAT. § 14-5.1 (Comp. 1965): Parental tort liability—Who may recover; limitation on amount of damages; parents to whom act inapplicable.—Any property owner, including any municipal corporation, county, school district, or other political subdivision of the State of Wyoming, or any department or agency of the State of Wyoming, or any person, partnership, corporation or association, or any religious organization whether incorporated or unincorporated, shall be entitled to recover damages in an amount not to exceed three hundred dollars (\$300) from the parents of any minor under the age of seventeen (17) years and over the age of ten (10), who maliciously and willfully damages or destroys property, real, personal or mixed, belonging to such owner. However, this act [§§ 14-5.1 to 14-5.3] shall not apply to parents whose parental custody and control of such child has been removed by court order, decree or judgment.

WYO. STAT. § 14-5.2 (Comp. 1965): Same—Limitation on amount of recovery. The recovery in such action shall be limited to the actual damages in an amount not to exceed three hundred dollars (\$300), in addition to taxable court costs.

WYO. STAT. § 14-5.3 (Comp. 1965): Same—Action authorized by act does not preclude other actions.—The action authorized in this act [§§ 14-5.1 to 14-5.3] shall be in addition to all other actions which the owner is entitled to maintain and nothing in this act shall preclude recovery in a greater amount from the minor or from any person, including the parents, for damages to which such minor or other person would otherwise be liable, it being the purpose of this act to authorize recovery from parents, and to limit the amount of recovery, in situations where they would not otherwise be liable.

in some situations where the general common law rule would otherwise apply.

The statute begins by reciting those persons who are eligible to bring an action against the child tort-feasor's parents. "Any property owner, including any municipal corporation, county, school district . . . or any department or agency of the State . . . or any person, partnership, corporation or association, or any religious organization . . ." are the enumerated specific types of persons who may sue under the statute and who would be most likely to need the protection of the statute.¹³ Thus almost everyone who owns property is covered by the statute.

The significant problem in this area concerns the definition of "owner." There could well be argument concerning whether or not persons with less than full title interest, such as lessees, bailees, mortgagees and others are owners within the meaning of the statute. It can fairly be assumed, however, that in this area of law, as in others, such persons would be entitled to maintain an action under the statute. Thus bailees have been described as having a special property in the subject matter of the bailment which is the equivalent of actual ownership as against anyone but the bailor.¹⁴ Bailees, then, are entitled to maintain actions under replevin statutes.¹⁵ Similarly, at common law, possession was viewed as the equivalent of ownership for purposes of maintaining trespass for damages to real and personal property, thus allowing the possessor to recover as against anyone but the one with better title.¹⁶ In addition, mortgagees have been allowed to recover in replevin¹⁷ and an insurer has been allowed to recover under a parental liability statute through subrogation.¹⁸ These interests, bailment, possession, and so forth, carry with them rights similar to ownership. Therefore, it would appear that persons in such positions should be entitled

13. WYO. STAT. § 14-5.1 (Comp. 1965).

14. *Eaton v. Schild*, 8 N.J. Misc. 245, 149 Atl. 637 (1930).

15. *E.g.*, WYO. STAT. § 1-1001(2) (1957).

16. *E.g.*, *Noble & Carmody v. Hudson*, 20 Wyo. 227, 122 Pac. 901 (1912); *Bader v. Mills & Baker Co.*, 28 Wyo. 191, 201 Pac. 1012 (1921).

17. *Freeman v. Crout*, 1 Wyo. 361 (1875); *Iba v. Central Ass'n.*, 5 Wyo. 355, 40 Pac. 527 (1895).

18. *General Ins. Co. of America v. Faulkner*, 259 N.C. 317, 130 S.E.2d 645 (1963).

to sue for damages under this statute in the proper circumstances.

The statute is clear regarding the property which it is designed to cover, *i.e.* "real, personal, or mixed . . ." ¹⁹ This means that vandalism to automobiles, homes, camping equipment, land, or virtually any property is actionable provided that the other requirements are met. ²⁰

LIMIT OF LIABILITY

The \$300 plus costs limit of liability is in line with most of the liability limits of the statutes of other states, ²¹ the median of the range, with a low of \$100 to a no-limit high, being \$300. The basis of determination in reaching this figure is not altogether clear, but this amount is probably adequate to compensate for the type of destruction which the statute contemplates.

PERSONS COVERED

The Wyoming statute holds parents liable for the torts of persons "under the age of seventeen and over the age of ten. . . ." It may be that more perfect language could have been chosen for this description, but it seems certain that children come within the scope of the statute on their tenth birthday and fall without it on their seventeenth birthday. Here again it is not clear exactly why these particular limits were chosen but the reason would appear to be that children under the age of ten are traditionally viewed as being incapable of forming the requisite intent, ²² and that children above the age of seventeen are beyond their parents' control. The median maximum age covered in other states is eighteen whereas in Wyoming it is seventeen; however, most other states do not provide for a lower or minimum age as does Wyoming. ²³

19. See statute *supra* note 12.

20. The reported cases seem largely confined to actions involving homes, schools and automobiles.

21. See appendix *infra* p. 308.

22. PROSSER, TORTS § 109 (2d ed. 1955); 46 C.J.S. *Intentional* (1946); *Connors v. Pantano*, 165 Neb. 515, 86 N.W.2d 367 (1957) (a child of four years and seven months incapable of willful and intentional destruction of property for purposes of statute).

23. See appendix *infra* p. 308.

INTENT

Perhaps one of the most important features of the statute and the one which prevents it from becoming a catch-all for nuisance or simple negligence claims is the requirement of a showing of malicious and willful intent. Malicious and willful intent has been defined generally as an act done in willful neglect of a known obligation, with reckless disregard of the consequences.²⁴ Malicious means simply intentional and willful.²⁵ "Acts willfully and designedly done which are unlawful, are malicious in respect to those to whom they are injurious."²⁶ Thus, willful and malicious are synonymous.

Quoting with approval from a Massachusetts case,²⁷ the Wyoming Supreme Court has defined malicious and willful intent as follows: "The injury must not only be willful (that is, intentional and by design, as distinguished from that which is thoughtless or accidental), but it must, in addition, be malicious, in [that it must be done out of a spirit of cruelty, hostility, or revenge]."²⁸

In view of the intent requirement of the statute it is readily apparent that it is not within the scope of the statute to hold parents liable for simple negligent acts of their children.²⁹ The acts must amount to something more, and the damage must have been done by the child with full knowledge of the damage he was causing. By this requirement it is obvious that most of the "usual" acts of vandalism and malicious mischief, *e.g.*, slashing tires, smearing paint on automobiles or houses, will be covered, while acts of common negligence, *e.g.*, baseballs through windows and bicycles through flower beds, will not.

WHO ARE PARENTS?

Parents "whose parental custody and control of such child has been removed by court order, decree or judgment" are not within the contemplation of the statute.³⁰ Although

24. *United States v. Reed*, 86 Fed. 308 (1897).

25. *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902).

26. *Bourisk v. Derry Lumber Co.*, 130 Me. 376, 156 Atl. 382, 383 (1931).

27. *Commonwealth v. Williams*, 110 Mass. 401 (1872).

28. *State v. Johnson*, 7 Wyo. 512, 54 Pac. 502 (1898).

29. *Connors v. Pantano*, *supra* note 22; *Potomac Ins. Co. v. Torres*, *supra* note 8.

30. Wyo. STAT. § 14-5.1 (Comp. 1965).

this seems clear enough, questions may arise as to whether step-parents, who are not legal or adoptive parents, are liable under the statute; and whether others standing *in loco parentis* are liable for the child's torts. The answers to these questions are unclear at this point, but the small weight of authority seems to indicate that persons in both categories are liable.³¹ At least one court, however, has held that whether or not such "parents" are liable depends upon the particular facts of each case.³² Thus, whether the step-parents are legally adoptive parents, the extent of dominion and control exercised over the child, and the length and permanency of residence of the child with those sought to be charged are all important considerations in determining liability.

In addition to the above questions, there seems to be a possible controversy over whether liability will fail in any other situation where the child is not living with the parent, other than when custody and control have been removed by court order. One case held that the parent was not liable when the son was in military service.³³ This court also said there would be no liability when the son was in the custody of law enforcement authorities.³⁴ To the contrary, however, still another case held that even though the child "quits the parental roof" the father was liable if he had not given up parental authority and control or unless it was suspended, interrupted or destroyed by operation of law.³⁵ No safe sweeping generalization can be made in this area as yet, but it would appear that if custody and control have been removed either in law or in fact, parents will no longer be liable.

OTHER ACTIONS

The statute plainly states that it is not a substitute for the other actions that may be available to persons sustaining damage, under any of the five doctrines noted above, but is in addition to such actions and is designed to allow recovery in circumstances where the doctrines would not apply. Thus,

31. *Xaphes v. Mossey*, 224 F. Supp. 578 (1963); *Loomis v. State*, 39 Cal Rep. 820, 228 Cal. App. 2d 820 (1964).

32. *Bricault v. Deveau*, 157 A.2d 604 (Conn. 1960).

33. *Redd v. Bohannon*, 166 So.2d 362 (La. 1964).

34. *Ibid.* (Dictum).

35. *Watkins v. Cupit*, 130 So.2d 720 (La. 1961).

the statute broadens rather than restricts the possibilities of recovery by a property owner or person for child-caused damage. In addition to adding one more area of recovery to the field, it does not eliminate the right of a judgment creditor to keep his judgment alive through the statutory process of renewal until that child acquires sufficient assets to satisfy it. Thus, it is now safe to say that the Wyoming Legislature has by legislation caused one more chink in the armor of parental immunity for a child's torts.

CASE LAW

There is a decided paucity of case law in the parental tort liability field. Most of the cases do not deal with a direct application of the particular statute to particular situations, nor with interpretation of the provisions of the statutes in question. Those which do exist are concerned primarily with the issue of constitutionality.³⁶ The constitutional argument is that it is unconstitutional to hold one person liable for the acts of another, because this violates due process and equal protection.³⁷ This contention, however, was disposed of by the Texas Court of Civil Appeals in *Kelly v. Williams*³⁸ in which it was said that the statute gave fair notice of what was required and that it was neither unreasonable and discriminatory nor a denial of equal protection and due process to hold a parent liable for the intentional torts of his child. In the *Kelly* case a boy of fifteen had stolen the plaintiff's car and had caused severe damage to it in a high speed chase with the police. Both the trial and appellate courts allowed recovery to the statutory limit of \$300. The *Kelly* case was in turn cited with approval in the 1963 North Carolina case of *General Insurance Company of America v. Faulkner*³⁹ which held that an insurer could recover by subrogation from the parents of an eleven year old child who had set fire to the insured's school building. The *Faulkner* case, decided by the North Carolina Supreme Court, similarly held that the statute was not violative of due process or equal protection

36. 47 A.B.A.J. 804 (1961).

37. *Kelly v. Williams*, 346 S.W.2d 434 (Tex. Civ. App. 1961).

38. *Ibid.*

39. *General Ins. Co. of America v. Faulkner*, *supra* note 18.

in so holding the parents liable and was, therefore, constitutional.

In the *Kelly* case the court said:

The Civil Codes of Europe, Central and South America, Quebec, Louisiana, Hawaii and Puerto Rico have always provided for parental liability for the torts of children [T]hese legislatures . . . have decided that in all fairness, it is better that the parents of these young tort feasons be required to compensate those who are damaged, even though the parents be without fault, rather than to let the loss fall upon the innocent victim.⁴⁰

This same passage was quoted in the *Faulkner* case and the North Carolina Court, in addition, said that it is not unconstitutional to allow a plaintiff to sue parents under a statute imposing "vicarious liability upon parents by virtue of their relationship for the malicious or willful destruction of property by a child under the age of eighteen living with them."⁴¹ Although the United States Supreme Court has not yet been called upon to decide the constitutional question of such statutes, in view of present public opinion and policy it is expected that the statutes would not be found constitutionally objectionable by it.

In view of the recent enactments of most of the parental tort liability statutes and of the decidedly few actions which have been brought under them, it is too early to tell whether or not such statutes will have the desired effect of increasing parental responsibility and control, and reducing juvenile delinquency.⁴² Opinions have been ventured on both sides. A majority of the state legislatures, however, have evidently been impressed with the possibility that such statutes will accomplish this result.⁴³

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40. *Kelly v. Williams*, *supra* note 37 at 437, quoting from 3 VILL. L. REV. 529, 531 (1958).

41. *General Ins. Co. of America v. Faulkner*, *supra* note 18 at 652.

42. *Freer, Parental Liability for Torts of Children*, 53 KY. L.J. 254 (1964-1965).

43. *Ibid.*

Appendix*

PARENTAL LIABILITY LEGISLATION

STATE CODE CITATION	YEAR†	MAXIMUM LIABILITY	AGE
ALASKA STAT. § 34.50.020 (1962) ⁴	1957	\$ 500	18
ARIZ. REV. STAT. ANN. § 12-661 (1956) ^{1,4,4}	1956	500	Minor
ARK. STAT. ANN. § 50-109 (Supp. 1965) ⁴	1959	300	18
CAL. CIV. CODE § 1714.1 ^{1,4,4}	1955, 1965	500	Minor
COLO. REV. STAT. ANN. § 41-2-7 (1963) ⁴	1959	300	18
CONN. GEN. STAT. ANN. § 52-572 (Supp. 1963) ^{1,4,4,4}	1955, 1959	750	Minor
DEL. CODE ANN. tit. 10, § 3923 (Supp. 1964) ⁴	1958	300	18
FLA. STAT. ANN. § 45.20 (1963) ⁴	1956	300	18
GA. CODE ANN. § 105-113 (1956) ^{1,4,4}	1956	Open	17
HAWAII REV. LAWS § 330-3 (1955) ^{1,4}	1859	Open	Minor
IDAHO CODE ANN. § 6-210 (Supp. 1965) ⁴	1957	300	18
IND. ANN. STAT. § 2-520 (Supp. 1965) ^{4,4}	1957	500	18
KAN. GEN. STAT. ANN. § 38-120 (Supp. 1965) ⁴	1959, 1965	1,000	18
LA. CIV. CODE art. 2318 (West 1961) ^{1,4}	1952	Open	Minor
ME. REV. STAT. ANN. tit. 19, § 217 (1965) ^{1,4}	1959	250	7-17
MD. ANN. CODE art. 26, § 76(i) (Supp. 1965) ⁴	1959	500	Minor
MICH. STAT. ANN. § 27A.2913 (1962) ^{1,4}	1953, 1962	500	18
MONT. REV. CODES ANN. § 61-112.1, 2 (1947) ⁴	1957	300	18
NEB. REV. STAT. § 43-801 (1943) ⁴	1951	Open	Minor
NEV. REV. STAT. § 41.470 (1957) ^{1,4}	1957	300	18
N.J. REV. STAT. § 18:14-51 (1937) ⁵	1903	Open	Pupil
N.M. STAT. ANN. § 13-8-53.1 (Supp. 1965) ⁴	1953, 1965	500	18
N.C. GEN. STAT. § 1-538.1 (Supp. 1965) ⁴	1961	500	18
N.D. CENT. CODE § 32-03-39 (1960) ^{4,4}	1957	300	18
OKLA. STAT. ANN. tit. 23, § 10 (1962) ⁴	1957	300	18
ORE. REV. STAT. § 30.770 (1965) ^{4,4}	1959	300	18
R.I. GEN. LAWS ANN. § 9-1-3 (1956) ^{1,4,4}	1956	250	Minor
S.D. CODE § 14.0309-1 (Supp. 1960) ⁴	1957	300	18
TENN. CODE ANN. § 37-1001, 1002 (Supp. 1965) ^{4,4}	1957	300	18
TEX. REV. CIV. STAT. art. 5923-1 (Supp. 1965) ^{4,4,4}	1957, 1965	5,000	10-18
VT. STAT. ANN. tit. 15, § 901 (Supp. 1965) ^{4,4}	1959	250	17
VA. CODE ANN. § 8-654.1 (Supp. 1964) ⁴	1960	200	18
WASH. REV. CODE ANN. § 4.24.190 (1962) ^{4,4}	1961	300	18
W. VA. CODE ANN. § 5482.2, 3 (1961) ^{4,4}	1957	300	18
WIS. STAT. ANN. § 331.035 (1963) ⁴	1957	300	Minor
WYO. STAT. § 14-5.1 to .3 (Comp. 1965) ^{4,4}	1965	300	10-17

* All such legislation as author's research disclosed. Similar other legislation may exist under different index titles.

† The first date listed is the year the original act was enacted; subsequent dates indicate the latest significant amendment.

1. Includes personal injury liability.
2. Includes motor vehicle liability.
3. In addition to any other civil liability.
4. Property liability only.
5. School vandalism only—by pupil.
6. Public property only.
7. Due care and diligence of parent or guardian is a bar to recovery.
8. Probably Wyoming's statute of origin.