

Torts: The COnstitutional Validity of Parental Liability

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Can the court's measure of proof, assuming *arguendo* its applicability to an unavoidably unsafe product, be satisfied without reference to expert testimony? The Wisconsin Supreme Court has held that "expert testimony should be adduced concerning matters involving special knowledge or skill or experience on subjects which are not within the realm of the ordinary experience of mankind, and which require special learning, study, or experience."²⁶ Differentiating between a dangerous defect and a dangerous characteristic intrinsic to the product would seem to be such a matter.

How then do we determine when a defect exists that is unreasonably dangerous, so as to attribute injuries to the manufacturer? While inferential evidence of a defect by negating other probable causes may be appropriate in many products liability cases, proof of defect in an unavoidably unsafe product would seem to require either direct evidence of an expert, or circumstantial evidence through use of expert opinion, of the specific defect.

These and other proof problems, however, cannot be satisfactorily resolved in a products liability case until the meanings of "defective" and "unreasonably dangerous" are clarified. Adoption of comment k to section 402A²⁷ would accomplish this in the area of unavoidably unsafe products and would facilitate a more just and accurate delineation of the scope of a manufacturer's liability.

JOHN E. VALEN

Torts: The Constitutional Validity of Parental Liability

Statutes—In 1956, the Georgia Legislature passed a law which stated that parents would be liable for the "willful and wanton acts of vandalism" of minor children under their custody and control.¹ In a series of cases interpreting that provision, the Supreme Court of Georgia found that, because of the use of the word "vandalism", the enactment was intended to apply only to acts directed against property, or to personal injury incidental to acts directed against property.² In obvious response to the court's holdings, the legisla-

in the Product: The Necessary Basis for Products Liability in Tort and in Warranty, 33 TENN. L. REV. 323 (1966).

26. *Cramer v. Theda Clark Memorial Hospital*, 45 Wis. 2d 147, 150, 172 N.W.2d 427, 428-29 (1969).

27. Note 12 *supra*.

1. Law of March 9, 1956, no. 421, [1956] Ga. Laws 699 (repealed 1966).

2. *Vort v. Westbrook*, 221 Ga. 39, 142 S.E.2d 813 (1965); *Bell v. Adams*, 111 Ga. App. 819, 143 S.E.2d 413 (1965); *Landers v. Medford*, 108 Ga. App. 525, 133 S.E.2d 403 (1963).

ture, in 1966, deleted the word vandalism from the statute.³

On the basis of the new provision, in *Corley v. Lewless*,⁴ the plaintiff brought an action against one of the parents and an uncle, who stood in loco parentis, of a twelve year old boy for the personal injuries the boy caused the plaintiff when the boy struck him with a rock. The trial court found for the plaintiff, and upon appeal the supreme court declared the revised statute unconstitutional.

The court stated that at common law vicarious liability could not be grounded solely on the parent-child relationship. The Georgia statute was distinguished from similar statutes in other states because it was not limited to property damage and contained no limit for the parents' liability. The court reasoned that recoveries under statutes that had limits on parental liability were in the nature of penalties, but the Georgia statute had as its objective the compensation of injured parties.

The court implied that it was within the legislature's power to enact a statute, punitive in nature, based solely on the parent-child relationship, but that it would be beyond its power to create vicarious liability based on the same relationship.

It would not matter that the parent was entirely free from negligence or fault or even that he had no knowledge of his child's tort.

. . . [I]n *Lloyd Adams, Inc. v. Liberty Mutual Ins. Co.*, 190 Ga. 633, 641, 10 S.E.2d 46, 51 . . . this court stated: 'To allow any recovery on the basis stated by the statute would deprive the defendant of property without due process of law, would authorize a recovery without liability, and would compel payment without fault.' . . . [I]n our opinion, Code Ann. § 105-113 contravenes the due process clauses of the State and Federal Constitutions (Code Ann. §§ 1-815, 2-103, Const. art. I, § I, par. 3) and is void.⁵

Since 1957, over thirty states have enacted parental liability statutes,⁶ but to appreciate their significance in tort law one must first be aware of the historic legal perspective out of which they arise.

Although the early common law was willing to fuse the identity of the individual into that of the family for many purposes, it was

3. Law of March 10, 1966, no. 514, [1966] Ga. Laws 424; GA. CODE ANN. § 105-113 (1968).

4. 227 Ga. 745, 182 S.E.2d 766 (1971).

5. *Id.* at _____, 182 S.E.2d at 770.

6. Note, *The New Jersey Parental Liability Statute*, 39 TEMP. L.Q. 177, app. 187 (1966).

accepted that the parent-child relationship alone was not a sufficient basis for finding the parent vicariously liable for the torts of his child.⁷ Only if it could be shown that there was negligence on the part of the parent that was instrumental in causing the harm, or that the child was acting as the agent of the parent, would the parent be liable.⁸

In recent years, statutes have become a means whereby a parent can be found liable for the torts of his child, and many of these statutes are grounded on basic contract principles. When a child wants to engage in an activity that requires the parent's consent, the statutes state that the parent also consents to be held liable for any damage the child causes while engaged in that activity. Many states have statutes that make persons who sign for driver's licenses of minors vicariously liable for any damage that results.⁹ A New Jersey statute requires that parents contract to be liable for any damage their children do to school property as a prerequisite to enrollment in the public school system.¹⁰

Many states have currently passed parental liability statutes that find their origin, not in the common law, but in the legislatures' attempts to curb the rising rate of juvenile delinquency and the resulting increase in property damage.¹¹ The prime motivating force behind the legislatures passing these parental liability statutes

7. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 123, at 871 (4th ed. 1971).

8. *Steinberg v. Cauchois*, 249 App. Div. 518, 293 N.Y.S. 147 (1953), states the five most commonly accepted grounds upon which a parent could be found liable for the torts of his child at common law: (1) where the relationship of master and servant exists and the child is acting within the scope of his authority accorded by the parent; (2) where a parent is negligent in entrusting to the child an instrument which, because of its nature, use, and purpose, is so dangerous as to constitute, in the hands of the child, an unreasonable risk to others; (3) where a parent is negligent in entrusting to the child an instrumentality which, though not necessarily a dangerous thing of itself, is likely to be put to a dangerous use because of the known propensities of the child; (4) where the parent's negligence consists entirely of his failure reasonably to restrain the child from vicious conduct imperiling others, when the parent has knowledge of the child's propensity toward such conduct; and (5) where the parent participates in the child's tortious act by consenting to it or by later ratifying it and accepting the fruits.

9. *See, e.g.*, WIS. STAT. § 343.15(2) (1969).

10. *See Palmyra Bd. of Education v. Hansen*, 56 N.J. Super. 567, 153 A.2d 393 (1959), interpreting N.J.S.A. § 18:14-51 (currently N.J.S.A. § 18A: 37-3 (1968)).

11. Despite the passage of statutes of this type, the general trend in tort law today is to view each member of the family as an independent legal entity, and no longer, as it was the case at early common law, to fuse the identity of the individual into that of the family. This change in philosophy is evidenced by recent changes in the tort law that allow members of the family to freely sue one another. Husbands and wives are no longer responsible for the torts of the other, and each can own and hold property in his own name. *See* W. PROSSER, *supra* note 7, § 123, at 870-71.

is the belief that juvenile delinquency is the result of laxness on the part of the parents and that the parents will take a more active role in raising their children if they know they can be found liable for the torts of their offspring. The belief that it is more equitable to have the parents of delinquent children bear at least some of the resulting loss, rather than innocent third parties, also gave legislatures added impetus to pass such statutes.¹²

The basic elements of the parental liability statutes are generally the same for all states that have them: the child must be a minor, under the custody and control of the parents and himself liable for the tort. Many states limit the parents' liability to damage to property, and most states have ceilings on the amount that can be recovered.¹³

Prior to the Georgia Court's decision in *Corley*, only three other state supreme courts had occasion to determine the constitutionality of their parental liability statutes.¹⁴ All three found that it was within the police power of the state to pass such legislation, but none of these courts adequately confronted the constitutional questions that were raised in *Corley*.

Of the three previous decisions, only *General Insurance Company v. Faulkner*¹⁵ considered the pertinent legal issues at any length. The North Carolina Supreme Court in that case held that because the state's statute limited parental liability to \$500 of property damage, it "fail[ed] to serve any of the general compensatory objectives of tort law" and was therefore punitive in nature.¹⁶ The court decided that it was within the police power of the state to pass a statute that was punitive in nature and aimed at curbing juvenile delinquency. In *Corley*, the Georgia court reasoned that if the

12. Comment, *Parent and Child—Civil Responsibility of Parents for the Torts of Children—Statutory Imposition of Strict Liability*, 3 VILL. L. REV. 529 (1958). The article goes on to say that, in sharp contrast to the common law jurisdictions' recent acceptance of such a position, "[t]he 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." *Id.* at 531.

13. Note 6 *supra*.

14. *General Insurance Co. v. Faulkner*, 259 N.C. 317, 130 S.E.2d 645 (1963); *Kelly v. Williams*, 346 S.W.2d 434 (Tex. Civ. App. 1961); *Mahaney v. Hunter Enterprises, Inc.*, 426 P.2d 442 (Wyo. 1967). The limit of liability for the parent in most states is \$500 or less. The cost of appeal would be prohibitive for so small an amount, and is the probable reason that there have not been more challenges to these widely used statutes. In addition, the parents in many instances may feel at least some moral obligation to pay for the damage caused by their minor children.

15. 259 N.C. 317, 130 S.E.2d 645 (1963).

16. *Id.* at ____, 130 S.E.2d at 650.

Georgia statute had been similarly limited it would also be punitive in nature and constitutional.

If the test of the constitutionality of these statutes is whether or not they are compensatory in nature, problems will necessarily arise for other state courts. The parental liability statutes of Hawaii and Louisiana are, without question, compensatory in nature,¹⁷ and under the above-stated reasoning are violative of the federal, if not the state constitutions. Courts will also be required to determine whether state statutes with a relatively high dollar limit for the parents' liability should be viewed as compensatory in nature.¹⁸

One might question whether limiting liability to either property damage or a stated dollar ceiling really makes the statute punitive. The legislative purpose in passing such statutes, the courts say, is to attempt to curb the rising rate of juvenile vandalism and its consequential damages.¹⁹ If the usual product of these activities can be shown to be damage to property of a limited amount, are the statutes not compensatory in nature with a restricted purpose?

The three other state supreme courts which, prior to *Corley*, had to determine the constitutionality of their parental liability statutes, spoke at length about the fairness of allocating the burden of loss to the parents of the children who caused the damage, rather than to the innocent victim. When one speaks of allocation of burden of loss, it is in the realm of compensation.

Perhaps the most basic theory that arises when one considers the reasoning of these courts is that although a person generally cannot be required to *compensate* another when he is not at fault, he can be *punished*. If the parent had the requisite knowledge of his child's propensities and activities or was himself at fault, he would be liable under the common law. If he had no knowledge of his child's dangerous propensities and exercised reasonable care in his upbringing, what actions on the part of the parent are punishable?²⁰

The question of the statute's intended nature may be a moot one because the result is the same in either instance. In *Faulkner*,

17. See Comment, *supra* note 12.

18. See, e.g., WIS. STAT. § 895.035 (1969) (\$1,000 limit).

19. 259 N.C. at _____, 130 S.E.2d at 648.

20. In determining liability in punitive damages, the relative worth of the defendant is considered; this is not the case for compensatory damages. Annot., 9 A.L.R.3d 692 (1966). Since these "punitive" statutes do not differentiate regarding the relative worth of the parents involved, they burden poor parents more severely.

the North Carolina Supreme Court explicitly stated that although its statute was punitive in nature, it created vicarious liability based solely on the parent-child relationship.²¹ Vicarious liability based on the parent-child relationship was the very ground upon which the Georgia court declared its statute unconstitutional. If it is unconstitutional to deprive a person of property based on his status as a parent and give it to another to compensate for his loss, then no matter what a legislature's intention was in passing such a law, the statute will not satisfy due process requirements if proof of the relationship, without more, can establish liability.

Fault, to be sure, is no longer an absolute prerequisite for liability in modern tort law. Prosser states:

There is a strong and growing tendency, where there is blame on neither side, to ask, in view of the exigencies of social justice, who can best bear the loss and hence to shift the loss by creating liability where there has been no fault.²²

The result of this change in belief can be seen in many areas of tort law: individuals are liable for the torts of their agents and servants;²³ persons engaged in inherently dangerous activities are responsible for all resulting harm;²⁴ and dangerous animals are kept at one's own risk.²⁵

In each of the instances in which we find liability without fault, the person is engaged in an activity which creates or increases, either directly or indirectly, the risk of injury to a portion of the public.²⁶ Are courts going to be willing to say that parents, by engaging in the natural activity of raising children, are exposing a portion of the public to a greater risk of injury? Is raising children an inherently dangerous activity? Are they wild animals that one keeps at his own risk? How would a parent disengage himself from such an activity? If liability is based on the relationship, and not negligence, would it be any less reasonable to make the child liable for the torts of his parents?

21. With the enactment of G.S. § 1-538.1, North Carolina joins thirty-one other states which have imposed, by more or less similar statutes, *vicarious liability upon parents by virtue of their parental relationship* for the malicious, or willful, or intentional acts of their children.

259 N.C. at _____, 130 S.E.2d at 648 (emphasis added).

22. W. PROSSER, *supra* note 7, § 75, at 494.

23. RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

24. RESTATEMENT OF TORTS §§ 519-24 (1938).

25. *Id.* §§ 514-18.

26. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

The parental liability statutes require parents to stand as insurers of their children's actions. The Georgia court recognized that the control a parent has over his child is not absolute, and that no amount of effort on the part of the parent will guarantee a good result. For this reason the court could not find the Georgia parental liability statute constitutional.

CONCLUSION

One can sympathize with the plight of a party who finds himself injured and unable to be made whole because the minor defendant is judgment-proof; but does shifting the burden of loss to parents eliminate the injustice or merely substitute victims? The essence of the Georgia court's holding in *Corley* is that it is a violation of due process to hold a person vicariously liable for the torts of another when the only legal relationship between them is familial, the person being held vicariously liable is without fault, and he is incapable, by any action on his part, of insuring against the resulting harm. Placing ceilings on the amount to be recovered from the parent or limiting such liability to property damage does not alter the nature of the statutes; it merely limits their effects. If it is unconstitutional to have vicarious liability based solely on the parent-child relationship, then other states must reconsider the validity of their statutes.

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