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Parent and Child - Liability of Parent for Misuse of Air Rifle by Child - Dangerous Instrumentalities

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cases, and the circumstances left little doubt as to the substantial nature of the resulting injury to the sensibilities. Loss of bargain sometimes offers a tangible basis upon which to estimate the damages of mental suffering. In the instant case, however, it is obvious the plaintiff was not suing for loss of the advantage of witnessing the performance. His claim was for discourteous treatment.

Although most courts prefer to seize upon the breach of contract idea or the public duty owed by the carrier or proprietor, several cases have proceeded more directly to the point. The courts in such cases often resort to such terms as "improper expulsion,"[19] or "wrongful acts"[20] or "wanton or shamefully gross wrong,"[21] offering no clue as to what is improper or wrongful. In one Louisiana case[22] similar to the present controversy, recovery was allowed without reference to any theory whatsoever. These decisions, although difficult to align with established torts doctrines, indicate nevertheless that here is an independent wrong which is on the way to achieving open recognition. Few decisions in the history of torts law have directly announced the advent on first trial of a complete new doctrine with boundaries fully defined. Usually the process is one of slow and cautious growth. Hence vagueness and uncertainty in these opinions is to be expected.

In conclusion it might be questioned whether the plaintiff in the instant case sustained any appreciable injury. The dedefendant was seeking to enforce a rule for the safety of his patrons, and the reported evidence that his conduct was excessive was meagre at best. The law cannot effectively protect overacute sensibilities without disregard of the hard actualities of modern living. On the facts as given it may be suggested that the court has overshot the mark.

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PARENT AND CHILD—LIABILITY OF PARENT FOR MISUSE OF AIR RIFLE BY CHILD—DANGEROUS INSTRUMENTALITIES—Defendant's son, a boy of about ten years of age, fired at a target with an air rifle which he had borrowed from a friend. The shot ricocheted and

19. Aaron v. Ward, 203 N.Y. 351, 96 N.E. 736 (1911).
20. Davis v. Tacoma Ry. & Power Co., 35 Wash. 203, 77 Pac. 209 (1904).
21. Saenger Theatres Corp. v. Herndon, 180 Miss. 791, 178 So. 86 (1938).
22. Planchard v. Klaw & Erlanger New Orleans Theatres Co., 166 La. 235, 117 So. 132 (1928).

injured the eye of plaintiff's son. The facts reveal no carelessness on the part either of the defendant or his son, and it appeared that the latter was one of the few boys in the neighborhood who had not been permitted to use such a weapon. On appeal it was held that the defendant was liable for the damages inflicted by virtue of Article 2318 of the Civil Code, which provides that a parent is liable for the torts of his child. The court overrode the objection that there was no evidence of negligence by falling back on the dangerous instrumentality doctrine. *Phillips v. D'Amico*, 21 So. (2d) 748 (La. 1945).

The above article of the Civil Code has been uniformly interpreted in this state as imposing liability on the parent for the torts of a minor child without respect to any notion of fault on the part of the parent or an agency relationship between the parent and the child.[1] This article is generally regarded as an innovation and differs from the corresponding article of the Code Napoleon as well as the common law. The idea behind the article as so interpreted appears to be that the parent's solvency should stand behind the wrongdoings of his dependent children. In interesting contrast, Louisiana law does not hold the husband for the torts of the wife when she is on a mission for her separate interest,[2] although it is otherwise when she is acting on behalf of the community of husband and wife.[3] This discrepancy in attitude toward the liability of the head of the family for the torts of the respective members of the family, although it is consistent with the code provisions involved, nevertheless reveals an uncertainty as to what purpose underlies the liability of the family head.

In common law jurisdictions, the search for a solvent defendant behind the wrongdoing of the dependent members of the family has been intensified with the advent of the family automobile. There is a growing idea that the solvent family head should bear the loss for the injuries tortiously inflicted by those members of the family who are dependent upon him. This idea

1. Notes (1931) 5 Tulane L. Rev. 644, (1933) 7 Tulane L. Rev. 119. Cleaveland v. Mayo, 19 La. 414 (1841) (parent responsible for the neglect on the ground that, through his control of the child, he could have prevented the act); Mullins v. Blaise, 37 La. Ann. 92 (1895); Toca v. Rojas, 152 La. 317, 93 So. 108 (1921) (birth gives rise to paternal control and authority over a child, and paternal responsibility for the torts of a child is the consequence and offspring of the paternal authority).

2. Chauviere v. Fliege, 6 La. Ann. 56 (1851); Matulich v. Crockett, 184 So. 748 (La. App. 1938); Wise v. Smith, 186 So. 857 (La. App. 1939).

3. Reaneau v. Brown, 9 La. App. 375, 158 So. 406 (1928); Adams v. Golson, 187 La. 363, 174 So. 876 (1937).

has found expression in the common law, which, although it proceeds on the basic premise that the parent and husband are not liable for the torts of the child or wife, has nevertheless managed to impose liability in a substantial number of cases through indirection. The devices used are several; two notions particularly have been seized upon by the courts. First, if an agency relationship obtains between parent and child, and the wrong committed by the child can be attributed to that relationship, liability will be imposed.[4] The same is true, of course, with respect to husband and wife. In recent years the courts have tended to manipulate and even distort traditional agency conceptions within the family unit in order to impose the much desired liability upon the head of the family. The outstanding example of this perversion of the usual agency relationship is the so-called family purpose doctrine, which makes the head of the family liable for any negligently inflicted injuries occasioned through the use of the family automobile.[5] Another device which has been resorted to in order to reach the solvent family head is the accepted notion that the parent is liable for the torts of his children, if the parent was guilty of any personal fault which contributed to the injury. Common law courts have adopted a very liberal attitude with respect to the concept of fault in these cases and have succeeded in imposing liability in many situations where moral blameworthiness is in fact difficult to discover.[6]

4. Smith v. Jordan, 211 Mass. 269, 97 N.E. 761 (1912) (authority of a father to son to do an act which resulted in injury to a third person may be derived from the father's actual presence, or from his express or implied direction, or from a precedent course of conduct); Broadstreet v. Hall, 168 Ind. 192, 80 N.E. 145 (1907); Napier v. Patterson, 198 Iowa 257, 196 N.W. 73 (1923); Elms v. Flick, 100 Ohio St. 186, 126 N.E. 66 (1919).

5. Griffin v. Russell, 144 Ga. 275, 87 S.E. 10 (1915); Rufferford v. Smith, 284 Ky. 592, 145 S.W. (2d) 533 (1940) (grandmother held liable under the "family purpose doctrine" for grandson's negligent operation of automobile); Griffin v. Russell, 144 Ga. 275, 87 S.E. 10 (1915); McNeal v. McKain, 33 Okla. 449, 126 Pac. 742 (1912); Davis v. Littlefield, 97 S.C. 171, 81 S.E. 487 (1914) (parent held liable for negligence of son when son driving for pleasure). See Brodsky, Motor Vehicle Owners' Statutory Vicarious Liability in Rhode Island (1939) 19 Boston U. L. Rev. 448; Chamberlain, Automobile and Vicarious Liability (1924); Notes (1924) 24 Col. L. Rev. 782; (1925) 38 Harv. L. Rev. 513; (1933) 81 U. of Pa. L. Rev. 60; (1937) 21 Minn. L. Rev. 823. Constitutionality upheld in Robinson v. Rent-A-Ford Co., 205 Iowa 261, 215 N.W. 724 (1927).

6. Graham v. Page, 300 Ill. 40, 132 N.E. 817 (1921) (minor daughter using father's automobile to bring his shoes from repair shop, held to be his agent); Stewart v. Swartz, 57 Ind. App. 249, 106 N.E. 719 (1914) (where a parent knew, several days before the accident, that his minor children had stretched a rope across a highway, and a traveler was injured thereby, the parent was liable); Schaefer v. Osterbrook, 67 Wis. 495, 502, 30 N.W. 922, 926 (1886) (where the court said: ". . . the burden to show that his son was not his servant is imposed upon the father"); Hiroux v. Baum, 137 Wis.

A comparison of the results reached at common law and under the Louisiana decisions leads to the conclusion that under both systems the parent is likely to be held. The primary difference seems to be in the method of attack.[7] The Louisiana courts proceed directly to the conclusion that the parent is liable, while the common law courts reach similar results by engrafting numerous exceptions onto an initial rule of no liability. With respect to the liability of the husband for torts of the wife, the results under both systems are more uneven. The Louisiana courts make the matter hinge on the fact that the wife was engaged on a community mission, while the common law jurisdictions either rely upon the family purpose doctrine or deny liability altogether.

In the instant case the court admitted that the codal article relied upon could not fairly be interpreted as imposing liability in the absence of a showing of fault upon the part either of the parent or the child. It took the position, however, that the use of an air gun in a congested urban district imposes so high a degree of care that the user would be liable unless "there was no reasonable possibility that the bullets might strike anyone who might be nearby.[8] Thus a virtual insurer's liability is placed upon the juvenile user of such a weapon, which, in turn, is reflected back upon the entirely innocent parent. Perhaps the decision will have a salutary effect upon the safety of urban areas. It comports with the general tendency of courts everywhere to discuss cases involving injuries by firearms in terms of negligence, but at the same time to so weight the case against the defendant that he has little chance of escaping liability.[9] Under the facts presented, however, common law courts would

197, 118 N.W. 533 (1908) (one who is running an automobile at the time of a collision with a person in the street is prima facie the servant of the automobile); Zeidler v. Goelzer, 191 Wis. 378, 211 N.E. 104 (1926).

7. Louisiana has been severely criticized for holding parents liable who are not at fault for the tort of their child. An example is this quotation from Note (1934) 19 Corn. L. Q. 643: "It is difficult to see how recurrence of harm will be prevented by imposing an absolute liability on a parent who could not have prevented the act complained of. The rule seems quite as likely to foster birth control." Ritter v. Thibodeaux, 41 S.W. 492 (Tex. Civ. App. 1897): "Such a case would have been upheld by the civil law, under the operation of which the child occupied the position almost of a slave, ..." The absurdity of these statements are a sufficient refutation.

8. Phillips v. D'Amico, 21 So. (2d) 748, 751 (La. 1945).

9. See the excellent discussion in Inbau, Firearms and Legal Doctrine (1932) 7 Tulane L. Rev. 529, 548 et seq., and cases cited in the instant decision.

encounter great difficulty in translating the son's technical wrong into a responsibility to be shouldered by the parent.[10]

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WORKMEN'S COMPENSATION—RIGHT OF UNACKNOWLEDGED ILLEGITIMATE CHILDREN TO BENEFIT PAYMENTS—The father of two illegitimate children was killed while in the defendant's employ. Plaintiff, mother and tutrix of the minor children of this union, sued for damages and in the alternative for compensation under the Workmen's Compensation Act. The supreme court on first hearing disallowed the claim for damages, ruling that Article 2315 of the Revised Civil Code applied only to legitimate children. The claim to compensation was not allowed as the children had not been formally acknowledged in accordance with the provisions of Article 203 of the Revised Civil Code as required by the Workmen's Compensation Act.[1] Upon rehearing the court reversed its previous stand and allowed compensation benefits to the children, though not formally acknowledged, because they were dependent upon the deceased for support. *Thompson v. Vestal Lumber & Manufacturing Company*, 22 So. (2d) 842 (La. 1945).

Obviously the decision in this case is not in accordance with a strict interpretation of the Workmen's Compensation Act. Section 8, Subsection 2(H), of the act specifically provides that the term "child" or "children" shall cover illegitimate children acknowledged under the provisions of Civil Code Articles 203, 204, and 205. Hitherto, the court has followed the strict letter of these provisions.[2] The provisions of Section 8, Subsection 2(D) do not seem to have been mentioned by the court or used in any way to justify the rights of illegitimate children. Hence the prior jurisprudence has steadfastly denied the right of illegitimates, unacknowledged according to the provisions of Article 203 of the

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10. Compare Sullivan v. Creed (1904) Ir. R. 1025 with Swanson v. Crandall, 2 Pa. Super. 85 (1896). Shearman and Redfield, A Treatise on the Law of Negligence (rev. ed. 1941) § 761.

1. La. Act 20 of 1914, § 8(2)(H), as amended by La. Act 242 of 1928 [Dart's Stats. (1939) § 4398].

2. Perkins v. Brownell-Drews Lbr. Co., Ltd., 147 La. 337, 84 So. 894 (1920); Lillian Gullung v. Dalgarn Const. Co., 1 La. App. 147 (1924); Wells v. White-Grandin Lbr. Co., Inc., 13 La. App. 696, 129 So. 171 (1930); Stewart v. Parish of Jefferson Davis, 17 La. App. 626, 136 So. 659 (1931); Barranco v. Davis, 175 La. 35, 142 So. 844 (1932); Beard v. Rickert Rice Mills, Inc., 185 La. 55, 168 So. 492 (1936).