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T H E S I S

Infants and Their Torts.

-by-

Frank H. Ferris,
Cornell University School of Law,

1893.

THE INFANT AND HIS TORTS.

Infancy.

Infancy is that stage of a human being's life, wherein, by reason of his youth, he is not presumed, by law, to have reached that maturity of mind which should make him capable of judging and acting for himself. All minds are not the same. Some mature earlier than others. Therefore many infants are as capable of choosing for themselves at the age of fifteen years, as others at the age of twenty-one. But the law cannot look to every individual and decide his case separately. We must for convenience and stability fix upon some age and declare every person to be at his majority upon attaining such age. So by the law of the early Romans, we find that the female was subject to perpetual guardianship and was never allowed her majority except when she married.

This state of affairs gradually changed, and at the time of Justinian, by the civil law, both the female and the male were considered at their majority upon reaching the age of twenty-five years. By the Common Law of England, according to Blackstone, "the full age in male or female is twenty-one years, which age is completed on the day preceding the anniversary of a person's birth, who until that time is an infant, and so styled in law." Infancy is privileged by the law. The person under twenty-one years of age, by the law of England and America is exempt for the most part from contract liability. At a certain stage of infancy the person is conclusively presumed incapable of committing crime. Whether or not the infant is liable for his tort it is mainly our purpose to investigate and determine.

Prevailing Opinion that the Father is Liable.-

At the very out-set of this discussion there is a snag to be encountered. It is the wide spread idea among the laymen, that the father is responsible for the torts of his minor child. Remarkable as this may seem, considering that the law has been settled upon this point for so many years, nevertheless, we find it true. If a child go down town and break in

the glass front to a merchant's store, the merchant, in nine cases out of ten, will believe himself to have a full recovery in damages against the child's father. And the father also will believe himself liable, and upon being presented with the bill will pay it. Perhaps this common opinion may be said to come from the belief that the father is solely responsible for the being of the child, that the child is brought into the world for personal gratification of the parent and that he should watch over and educate him in what his right and wrong; that the tort or wrong of the child may be traced back to the neglect of the parent in such education; and that, therefore the parent should be made to suffer and so be held responsible for the tort. If this be the foundation for this prevailing notion, it is unsound,- the child is not brought into this world simply through personal gratification of the parent, but because of a duty owing to mankind. To cause the child to be perpetually watched would impair him for society, and to impose upon the parent this duty would be absurd. That a father should be held responsible for the wrongful acts of his infant child would also put the future of the father in constant peril. But the law

stamped this doctrine as unsound.

Remedy given at Early Roman Law.- It is true that in the early Roman Law, there was a remedy against the father for the tort of the child. When an injury was done by the child, the father could either pay damages or surrender up the child. But at this period it must be remembered that the child was considered but little better than the slave, that the same remedy was given against the master for the tort of his slave, as for the tort of his child, and that there was no remedy against the child or slave. Later the child was considered as something better, and it was not required that he should be surrendered upon the commission of a wrong. The general principle of the Roman Law "That every person is responsible, not only for injuries cause by his own act, but for all that are caused by the act of persons and things under his dominion," is adopted in the Civil Code of France (Article 1384), but, the father is not held liable for the tort of his child which he was not able to prevent; and the same interpretation is given to this principle in the State of La., in whose code it has been also adopted. (Cleveland v. Mayo, 19 La., 414; Governor v. Lambeth, 9 La.,

241).

At the English Law there is no Remedy against the Father.- As a general proposition, it may be said that; at the English Law there is no Responsibility placed upon the Father for the torts of his infant child. The English courts are quite emphatic upon this point; and in one case a modern one decided in the year 1860, the court went very close to the region, where the employer should be held liable for the torts of his employee, committed while acting in his service, and declared the father exempt. This was the case of Moon v. Tinners (8 C.B.(N.S.) 611).:- The action was for trespass and false imprisonment. The facts are these; The defendant's son was ~~working~~ working for him as treasurer of his Theatre. The property man of the Theatre, was alleged, by the son, to have embezzled the funds and was thereupon taken before a magistrate who remanded but ultimately discharged him. After the remand the son told his father what he had done. The father did not prohibit the son from proceeding. In the opinion the Court said:- "I am not aware of any such relation between a father and son, though the son be living with his father as a member of his family, as will make the

acts of the son more binding upon the father than the acts of anybody else. I apprehend, that when it is established that a father is not liable upon contracts made by his son within age, except they be for necessaries, it would be going against the whole tenor of the law to hold him liable for his son's trespasses. ----- No man ought, as a general rule, to be responsible for acts not his own."

The same principle which is given for the English Law will be found to govern in the majority of the states of the Union. Let us look at some of the cases. In 4 Denio, 175, Tifft v. Tifft, the plaintiff brought an action for damages against the father of a minor daughter, because of the child's having set a dog owned by the father upon a neighbor's hog, and killing it. The court said;- "The defendant was not answerable for the act of his daughter done in his absence and without his authority or approval." The case of Baker v. Halderman, 24 Mo., 219, was an action to recover damages for assault upon the minor child of the plaintiff by the minor child of the defendant. The petition of the plaintiff, in this action, stated "that the son of the defendant became and was dangerous to the plaintiff and her

children by reason of his viscious and destructive temper and of his sudden and causeless fits of anger, and that the plaintiff notified the defendant of said fact, and desired him to restrain and control his son, to the end that she and her children might live in safety; that said defendant failed and neglected to restrain and control his said son, and that in consequence of such failure and neglect said injury resulted." The petition was demurred to by the defendant, on the ground that the father was not responsible for injuries caused by an assault made by his minor child. The demurrer was sustained. This case decides for us, that the child is not to be looked upon as the dog or other animal; that although the owner may be held liable for the injuries inflicted by his dog, which he knew to be viscious, not so for the injuries committed by his child. These cases will suffice to show the law as it stands to day in this country, and we may consider them as showing the principle which has been adopted in the different states of the Union.

Exceptions to General Rule.- Having found the general principle to be as above we will now consider what

are called by some writers and cited in some cases, Decisions to the Contrary, or Exceptions. It shall be tried to show that these, however, are only apparent exceptions and that they leave the general principle unharmed. Thus in a Penn. case (39 Pa.,177) the father was held liable for injuries done by reason of a collision between his wagon and that of the plaintiff's, caused by his son's negligent and reckless driving, the father being seated all the while beside his son and permitting the same. In this case, it was not the tort of the infant which was the true ground of the decision, but it was the negligence of the father in permitting his son to be so reckless while he could easily have prevented him from being so, which caused his liability. It was the tort of the father and not that of the son which was the true basis of the decision. If the father had not been present, in this case, and helped about the commission of the injury, he would not have been held responsible. Another instance where the father has been liable, is where the wrong is done at his express command. The same reasoning will apply in this case as in the other; it is the father's own wrong for which he is made responsible. By running

through the cases we will find that, where the father is not present when the wrong is committed, and when he could not prevent the wrong from being committed, he is exempt from liability. (46 Me., 362)

Under circumstances where he can prevent the injury is he not himself guilty of the tort negligence?

Supposed Analogy between the Relation of Man and Wife--and Parent and Child.- Before leaving the subject of the Parent's Liability it may be well to look at the analogy which by some is supposed to exist between the Relation of Parent and Child, and that of Husband and Wife. The question may be asked,- Why, since at the Common Law, the husband was held liable for the torts of his wife, should he not be held responsible for those of his minor child? And it may be answered in this way: that the husband upon marrying came into possession and right of all the wife's property. The personal property became his absolutely and the use of the realty was given him during life. In order to hold anyone, therefore, it must be the husband. While in the relation existing between the parent and his child we find no such condition of affairs. The father was not entitled to

more than the wages of the child. In the former case, since the husband ^{took} all the property, it was no more than fair that he should be held liable; while, in the latter case, we find no such reason. If the child is entitled to his property, why not bring the action against him? To sustain this argument that it was the right of the husband in the property of the wife which caused his liability for the torts of the wife, we have only to look, at the present day, in the states where statutes have been passed taking these property rights away. Here we will find that the husband is no longer liable for the wife's torts.

That the infant is liable, for torts committed by himself, is well settled in the United States and England.- 23 N.H., 507; 2 Kent's Comm., 241; 3 Wend., 391; 3 McCord, 257; 9 N.H., 441; 10 Vt., 71; 8 T.R., 335; 16 Mass., 389; 17 Wis., 231; 14 C.B.(N.S.), 45; 107 Mass., 251.

Intent.- For those torts in which merely force is involved and no maliciousness is present, the infant has been held responsible at any age and without regard to the intent with which they were committed. The law is inclined to look at the injury done and not the intent. Mr. Tyler, in

his work on says:- "Infants are liable at any age, for in case of civil injuries with force the intention is not regarded, and cites 29 Barb., 218. In a Wisconsin case, 17 Wis., 231, a child under the age of seven years was held liable in trespass for breaking down the shrubbery and flowers of a neighbor's flower garden.

But in those cases where malice is a necessary ingredient in the tort, the infant is no longer by the weight of authority, held responsible, where, by reason of his youth, he could not have been capable of bearing such malice.

Mr. Cooley in his work on Torts, section 120, says:- "In those cases in which malice is a necessary ingredient in the wrong, an infant may or may not be liable according as his age and capacity may justify imputing malice to him or preclude the idea of his indulging it. The case of the alleged defamation affords a suitable illustration, the absurdity of a suit against a child of three years old will be

sufficiently manifest, but not more so than the granting of immunity to the malicious utterances of a youth of twenty. And while it would be impossible to name any age which should constitute the dividing line between responsibility and irresponsibility, in these and all similar cases, there would be no difficulty in reaching the conclusion that for all malicious injuries the wrong doer should be held responsible if he has arrived at an age and a maturity of mind which should render him morally responsible for the consequences of intentional action. All general statements that an infant is responsible like any other person for his torts, are to be received with the qualification that the tort must not be one involving an element which in his particular case must be wanting. If a child less than seven years cannot be held responsible for larceny because of defect of understanding and incapacity to harbor a felonious intent, it would seem preposterous to hold him responsible for his slander, the moral quality of which he would be much less likely to appreciate, and injury from which must be purely imaginary." I have been able to find no cases upon this point but believe Mr. Cooley to be correct.

Negligence.- As in the cases where malice is involved so where injuries are caused by negligence it is the tendency of the court at the present day, to hold infants of tender age exempt from liability. A definition of negligences has been given thus:- "Negligence is an inadvertant act or omission in a responsible human being, while engaged in a lawful employment, that produces as a natural result damages to another which might have been avoided by the use of ordinary care." From this definition we can see that the test to be used in cases of negligence, is: was there a "want of ordinary care?" The infant of tender years does not know what ordinary care is, and to hold him responsible for not using it, is against reason.

Underhill in his work on Torts says:- "There is a conflict in the cases in the United States upon the question as to whether the same degree of care is to be exacted from a child of tender years, as from an adult" and he says that, "the best opinion is that he is not," and cites 53 Ala., 70; 65 Ala., 536; 52 Cal., 602; 78 Ill., 88; 5 Am.Rep., 146; 148 note; 45 Mo., 70; 64 N.Y., 633; 60 N.Y., 326.--Let us look at the last case cited,

60 N.Y., 326. In this case a child eight or nine years old attempted to cross a street railroad and was struck and injured. Action was brought on behalf of the child for the injury sustained, and for defense, the company put in that the child was guilty of contributory negligence and so was not entitled to recover. The court said:- "The degree of care required of an infant of tender years, the omission of which will constitute negligence on his part, is entirely different from that required of an adult. It is to be measured in each case by the maturity and capacity of the individual, the law only requiring the degree of care to be reasonably expected in view thereof." The child recovered damages.

The doctrine of *Respondeat Superior* cannot apply to Infants, because of their incapacity to contract. *Robins v. Mount*, 4 Robt., 553; 33 Hun Pr., 34.

Exception to the Rule that the Infant is liable for his Torts no matter what be the Age. Torts which result

from Contracts.

Blackstone says that:- "In some cases, a tort is connected with a contract, and an infant is then held irresponsible, whenever to hold him liable on the ground of tort would be virtually to render him responsible upon his contract obligation." The courts will not allow a person to enforce his contract obligation by bringing an action of tort against the infant. So it was held, that when a boy hired a horse and injured it while overdriving that there was only a breach of contract and that the child was not answerable for tort. Again where in exchanging horses the infant fraudulently warranted his mare to be sound, he was protected from the consequences on the same principle. 8 T. & R., 333; 2 Marsh, 485; 4 Camps., 118; 19 Vt., 505. The English Courts favored this rule exceedingly and at one time showed a tendency to carry it too far. Thus in Manby v. Scott, where goods had been delivered to an infant, and a suit was brought for trover and conversion, the court said:- "The infant shall not be chargeable for by that means all infants in England would be ruined." The later English cases show a disposition to hold the infant liable for his wilfull torts,

even though they be committed during a contract relation. The case of Haggis v. Burnard, 14 C.D.(N.S.), 45, will illustrate this matter,--A young man twenty years of age hired a horse of a liveryman to ride, and he was expressly told that the horse was not to be used for jumping purposes. Upon getting the horse the infant did use it to jump with and thereby killed the animal. In this case there was not simply a breach of contract, but there was a decided and wilful wrong committed. Jumping the horse was acting entirely contrary to the purpose for which the horse was bailed. The test in such a case as this is; Has there been a departure from the contract? Has there been a wilful wrong committed?

It has been held that conversion will lie against the infant, although the goods converted were in the possession of the infant at the time they were converted, 6 Cranch., 226.- 2 Wend., 137; 15 Mich., 233; 32 Vt., 217.

Detinue has been held to lie against an infant, where goods were delivered for a specific purpose not accomplished. 4 B.& P., 140.

As to the question of fraud practiced in the creation of the contract, the authorities are not agreed. In

New York State, and some other states, an infant is held liable in tort for obtaining goods on credit, intending not to pay for them. 5 Hill, 391; 59 Ill., 341; 3 Pick., 492.

In Vermont, it has been held that the plea of infancy will prevail when the gravamen of the action of the fraud consists in a transaction which really originate in contract. 38 Vt., 311.

The better view of the question of fraud connected with contract is found in the case of Fitts v. Hall, 9 N.H., 441.-- In this case an infant obtained goods upon his falsely representing himself to be of age. Judge Parker in the opinion said:- "The principle seems to be that if the tort or fraud of an infant arises from a breach of contract, although there may have been false representations or concealments respecting the subject matter of it, the infant cannot be charged for this breach of his promise or contract by a change in the form of the action. But if the tort is subsequent to the contract and not a mere breach of it, but a distinct, wilful and positive wrong itself, then, although it may be connected with the contract, the infant is liable." The representation in Johnson v. Tye, and in the present

case, that the defendant was of full age, was not part of the contract, nor did it grow out of the contract or in any way result from it. It is not any part of its terms, nor was it the consideration upon which the contract was founded. No contract was made about the defendant's age. The sale of the goods was not a consideration for the affirmation or representation. The representation was not a foundation for an action of Assumpsit. The matter arises purely ex delicto. The fraud was intended to induce, and did induce the plaintiff to make a contract for the sale of lots, but that by no means makes it a part and parcel of the contract. It was antecedent to the contract, and if an infant is liable for a positive wrong connected with the contract, but arising after the contract has been made, he may well be answerable for one committed before the contract was entered into, although it may have led to the contract." This is the doctrine established in the state of New York 5 Hill, 391,- and also in Indiana Rice v. Boyer, 113 Ind., 472.

The Editor's of the American Leading Cases, claim this doctrine to be unsound. Saying that "the representation by itself, was not actionable, for it was not an injury and

the evidence of the contract which made it so, nor the exercise of a legal right on the part of the infant." -----The test in an action against an infant is, whether a liability can be made out without taking notice of the contract."

-----I believe with Mr. Parson that the editors of the Leading American Cases mistook the real ground of the decision in this case which was that a fraudulent representation, whereby money or goods are obtained by an infant, is an actionable injury. 1 Parson on Contracts, 7 Ed. 317 note. See Walker v. Davis, 1 N.Y., 806; 23 Vt., 359; 5 Hill, 391.

However, the majority of the decisions are contra to the above.

