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Parent and Child--Liability of Parent for Child's Tort--Negligence (Crellesen v. Colburn, 156 Misc. 254 (Co. Ct. 1935))

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selves to prevent recovery, unless in addition the jury find from the evidence that the holder acted in bad faith.[15]

L. H. R.

PARENT AND CHILD—LIABILITY OF PARENT FOR CHILD'S TORT-NEGLIGENCE.—Plaintiff's dog, while straying about defendant's premises, was shot and killed by defendant Kenneth Colburn, an infant over the age of 14 years. The evidence showed that the gun belonged to the infant's father and was kept hanging on a hook in the residence and was not loaded. The shells were kept in a separate place. The evidence further establishes that defendant Hiram Colburn, the father, had no knowledge concerning the action of his son Kenneth, or of the presence of the dog. The plaintiff recovered $100 on a verdict rendered by a jury. Defendant's motion to set aside the verdict for plaintiff and dismiss the complaint as to defendant first named was denied. On appeal, *held,* motion granted. The father is not liable for the shooting of plaintiff's dog by his son, where the father had no knowledge concerning his son's action, or of the presence of the dog on the premises. *Crellesen* v. *Colburn,* 156 Misc. 254, 281 N. Y. Supp. 471 (Co. Ct. 1935).

Under the Civil Law [1] and by statute [2] a parent is liable for the torts of his child as a consequence of the relationship alone.[3] This non-fault liability has been consistently rejected by the common law courts, which hold that a parent is not liable for the tortious acts of

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[15] Postal Tel.-Cable Co. v. Citizens Nat. Bank, 228 Fed. 601 (C. C. A. 3d, 1916); Fidelity Trust Co. v. Mayhugh, 268 Fed. 712 (C. C. A. 5th, 1920); Murray v. Wagner, 277 Fed. 32 (C. C. A. 2d, 1921); Meyer v. Guardian Trust Co., 296 Fed. 789 (C. C. A. 8th, 1924); Kintyre Farmers Co-op. El. Co. v. Midland Nat. Bank, 2 F. (2d) 348 (C. C. A. 8th, 1924); Cole v. Harrison, 167 App. Div. 336, 153 N. Y. Supp. 200 (1st Dept. 1915); Oliner v. Gronich, 168 App. Div. 874, 154 N. Y. Supp. 612 (1st Dept. 1915); A. E. McBee Co. v. Shoemaker, 174 App. Div. 291, 160 N. Y. Supp. 251 (1st Dept. 1916); Ironbound Trust Co. v. Schmidt-Dauber Co., 102 Misc. 708, 169 N. Y. Supp. 524 (1918).

[1] Takayanagi, *Liability Without Fault in the Modern and Civil Law* (1921) 16 ILL. L. REV. 163, 291.

[2] LA. CIV. CODE (Dart, 1932) arts. 2317, 2318. The reasoning under the Louisiana rule is that "birth gives rise to parental control and authority over a child, and paternal responsibility for torts is the consequence and offspring of paternal authority." A similar rule exists in France, Germany, Holland, Italy, Portugal, Spain, and Switzerland. See Note (1930) 17 CORN. L. Q. 178.

[3] Rush v. Farmerville, 156 La. 857, 101 So. 243 (1924); Kern v. Knight, 13 La. App. 194, 127 So. 133 (1930). But *cf.* Johnson v. Butterworth, 180 La. 586, 157 So. 121 (1934) (court holding that the doctrine of contributory negligence does not apply to a child under four years of age, where the child bit a nurse and parents had no knowledge of dangerous disposition of the child).

a minor child on the mere ground of parental relationship.[4] New York follows the common law rule,[5] although it has seen fit to impose an absolute liability in certain instances.[6] However, liability will be imposed where the child has acted at the direction of the parent;[7] where the parent has authorized the child to act as his agent or servant;[8] where the parent has ratified the tortious acts of the child by accepting the benefits thereof;[9] or where the parent's negligence has made it possible for the child to gain control of agencies which in the child's incompetent hands become dangerous to others.[10] Plaintiff contends that defendant is liable under the latter rule[11] and relies on a recent New York case, *Kuchlik* v. *Feuer*,[12] the evidence of which justified holding the parent liable on grounds of negli-

[4] Gray v. Meadows, 24 Ala. App. 487, 136 So. 876 (1931); Lane v. Bing, 202 Cal. 590, 262 Pac. 318 (1927); Gordon v. Rose, 54 Idaho 502, 33 P. (2d) 351 (1934); Arkin v. Page, 287 Ill. 420, 123 N. E. 30 (1919); Dempsey v. Frazier, 119 Miss. 1, 80 So. 341 (1919); Hays v. Hogan, 273 Mo. 1, 200 S. W. 286 (1917); Murphy v. Loeffler, 327 Mo. 1244, 39 S. W. (2d) 249 (1933); Rawley v. Commonwealth Cotton Oil Co., 88 Okla. 29, 211 Pac. 74 (1922); Miller v. Stevens, 256 N. W. 152 (S. D. 1934); Highsaw v. Creech, 17 Tenn. App. 573, 69 S. W. (2d) 249 (1933).

[5] Tifft v. Tifft, 4 Denio 175 (N. Y. 1847); Heissenbuttel v. Meagher, 221 N. Y. 511, 116 N. E. 1050 (1917); Maher v. Benedict, 123 App. Div. 579, 108 N. Y. Supp. 228 (2d Dept. 1908); McCarthy v. Heiselman, 140 App. Div. 240, 125 N. Y. Supp. 13 (2d Dept. 1910); Schultz v. Morrison, 91 Misc. 248, 154 N. Y. Supp. 257 (4th Dept. 1916); Weiner v. Weinberg, 125 Misc. 393, 211 N. Y. Supp. 48 (1st Dept. 1925).

[6] For example—N. Y. VEHICLE AND TRAFFIC LAW § 59—which makes the owner of an automobile liable for injury caused through the negligence of one driving with the permission, express or implied, of the owner. Fluegel v. Coudert, 244 N. Y. 393, 155 N. E. 683 (1927) at 395.

[7] Forsythe v. Rexroat, 234 Ky. 173, 27 S. W. (2d) 695 (1929); Trahan v. Smith, 239 S. W. 345 (Tex. Civ. App. 1922); Hopkins v. Droppers, 184 Wis. 400, 198 N. W. 738 (1924).

[8] Daily v. Schneider, 118 Kan. 295, 234 Pac. 951 (1925); Haunert v. Speier, 214 Ky. 46, 281 S. W. 998 (1926); McComb v. Boardman, 199 App. Div. 229, 191 N. Y. Supp. 874 (3d Dept. 1921); McCrossen v. Moorhead, 202 App. Div. 560, 195 N. Y. Supp. 164 (3d Dept. 1922); Schmitt v. Kier, 111 Okla. 23, 238 Pac. 410 (1925); Curtis v. Harrison, 253 S. W. 474 (Mo. 1922) (no presumption of agency arises merely from the relation of parent and child); *cf.* Gallagher v. Holcomb, 44 P. (2d) 44 (Okla. 1935) (presumption exists that minor son driving family automobile is acting as servant and agent of owner, but presumption can be overcome by uncontroverted testimony).

[9] Cerchio v. Mullins, 33 Dela. 245, 138 Atl. 277 (1922); Hulsey v. Hightower, 44 Ga. App. 455, 161 S. E. 664 (1931); Stanford v. Smith, 173 Ga. 165, 159 S. E. 666 (1931); Myers v. Shipley, 140 Md. 380, 116 Atl. 645 (1922); Howell v. Norton, 134 Miss. 616, 99 So. 440 (1924).

[10] Dickens v. Barnham, 69 Colo. 349, 194 Pac. 356 (1920) (firearms); Davis v. Gavales, 37 Ga. App. 242, 139 S. E. 577 (1927) (velocipede); Collinson v. Cutter, 186 Iowa 276, 170 N. W. 420 (1919) (automobile); Stephens v. Stephens, 172 Ky. 780, 189 S. W. 1143 (1916) (dynamite); Kuchlik v. Feuer, 264 N. Y. 542, 191 N. E. 555 (1934) (firearms); Phillips v. Barnett, 2 City Ct. R. 20 (1882) (firearms); 12 A. L. R. 812, 44 A. L. R. 1509. *Contra:* Hagerty v. Powers, 66 Cal. 368, 5 Pac. 622 (1885) (firearms).

[11] *Supra* note 10.

[12] 264 N. Y. 542, 191 N. E. 555 (1934).

gence.[13] However, where, as in the instant case, the evidence establishes beyond a doubt that the defendant had no knowledge [14] concerning the action of his son, the court was sufficiently supported by analogous authority [15] to dismiss the complaint, for to have held otherwise would have imposed too great a burden on the parent, and attached too much weight to the relationship alone.

H. T. P.

PARENT AND CHILD—NEGLIGENCE—UNEMANCIPATED INFANT. —Plaintiff, an unemancipated infant of nineteen years, sustained injuries while a passenger in an automobile owned by her mother and negligently operated by her father. At the time of the suit the plaintiff was over twenty-one. The trial court refused to non-suit the plaintiff and returned a verdict in her favor. *Held,* reversed. An adult has no right of action against its parents for a tort committed during infancy. *Reingold* v. *Reingold,* — N. J. —, 181 Atl. 153 (1935).

The question presented is: may an unemancipated infant sue its parent in tort. The English cases are silent on the point.[1] The American cases began in 1891, when recovery was denied to a married woman, living with her mother away from her husband, who sued the mother for false imprisonment and malicious confinement occurring during infancy.[2] Subsequently, relief was denied to infants for cruel and inhuman treatment;[3] injuries arising from the negligence of the brother of an infant while the infant was working with the brother in a factory owned by the mother;[4] and rape by the father upon an infant daughter.[5] In what appears to be the first case on the subject in New York, relief was denied.[6] Subsequently the Court of Appeals reached the same result by a four-to-three decision without an opinion.[7] Relief has been denied in other jurisdictions.[8]

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[13] *Id.* at 543. The court found that the gun belonged to the infant and that his parents knew he was using it. The father was held on the ground that "his negligence made it possible for the child to cause the injury complained of and probable that the child would do so."

[14] Trice v. Bridgewater, 81 S. W. (2d) 63 (Tex. App. 1935).

[15] Cases cited notes 4, 5, 10, *supra.*

[1] Dunlap v. Dunlap, 84 N. H. 352, 150 Atl. 905 (1930).

[2] Hewlitt v. George, 68 Miss. 703, 9 So. 885, 13 L. R. A. 682 (1891).

[3] McKelney v. McKelney, 111 Tenn. 388, 78 S. W. 664 (1903).

[4] Taubert v. Taubert, 103 Minn. 24, 114 N. W. 763 (1908).

[5] Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905).

[6] Ciani v. Ciani, 127 Misc. 304, 215 N. Y. Supp. 767 (1926).

[7] Sorrentino v. Sorrentino, 248 N. Y. 626, 162 N. E. 128 (1928).

[8] Wick v. Wick, 92 Wis. 260, 212 N. W. 787 (1927); Mesite v. Kirchenstein, 109 Conn. 77, 145 Atl. 753 (1929); Smith v. Smith, 81 Ind. App. 1566, 142 N. E. 128 (1924).