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Sibes v. Johnson, 16 Mass. 388 (1820); Mazzocchi v. Seay, 126 W. Va. 490, 29 S.E.2d 12 (1944). This doctrine has been modified in some states by statute. Under West Virginia's parental liability statute, liability is limited (1) to the parent or parents (2) in an amount not to exceed three hundred dollars (3) of a child under eighteen years of age (4) who is living with the parent or parents (5) at the time he commits a wilful and malicious act (6) which results in property damage. W. VA. CODE ch. 55, art. 7A, §§ 1,2 (Michie 1961). The Code further states that this statutory remedy is in addition to any common law remedy already existing. A perusal of this statute clearly shows that parental liability for personal injuries is excluded from its scope and common law still governs such liability.

There are three situations at common law whereby a parent may be liable for the torts of his child. These could be termed the exceptions to the general rule of no parental liability. The first class of cases deals with the situation in which the child is acting as a servant or agent of the parent. In such cases, the doctrine of respondeat superior is sufficient to impose liability upon the parent, and liability does not rest upon the parent-child relationship. Hower v. Ulrich, 156 Pa. 410, 27 Atl. 37 (1893); Trahan v. Smith, 239 S.W. 345 (Tex. Civ. App. 1922). The general rules of agency govern this class of cases.

The second exception to the general rule is the situation wherein the parent furnishes or turns over to his child a chattel which, in view of the child's immaturity, is likely to be so used that it will cause harm to others. Gudziewski v. Stemplesky, 263 Mass. 103, 160 N.E. 334 (1928); Mazzocchi v. Seay, 126 W. Va. 490, 29 S.E.2d 12 (1944); Gerlat v. Christianson, 108 N.W.2d 194 (Wis. 1961). The liability of the parent arises from his active misconduct. He has actually created an unreasonable risk to others by placing a chattel in the hands of a person whose use thereof is likely to create a recognizable risk to third persons. However, it must be shown that the proximate cause of the injury was the negligence of the parent in entrusting such chattel to his child, and that an injurious result was foreseeable. Dickens v. Barnham, 69 Colo. 349, 194 Pac. 356 (1920); Hulsey v. Hightower, 44 Ga. App. 455, 161 S.E. 665 (1931).

In Mazzocchi v. Seay, supra, the court held that the complaint stated a cause of action where it was alleged that the parent was
negligent in permitting his child of tender years to possess an air rifle, the indiscriminate use of which caused injury to the minor plaintiff. The theory of this action was that the parent knew, or should have known, that the air rifle would be a dangerous instrumentality in the hands of his minor child. The court further stated that since the liability of the parent is grounded upon his own culpability, negligence must be construed as a relative term and duty dependent upon the circumstances. This reasoning was applied in Skelton v. Gambrell, 80 Ga. App. 880, 57 S.E.2d 694 (1950), wherein the court held the parent not liable where he gave his son an air rifle and the child was mature enough to control it.

The first two exceptions are not necessarily founded upon the parent-child relationship. However, the third exception, with which the principal case deals, necessarily arises from such relationship. The relationship of parent and minor child affords a sufficient basis for the affirmative duty on the part of the parent to exercise his parental control. His liability may arise out of the failure to perform definite acts to prevent the child from intentionally harming others when he knows, or has reason to know, of the necessity for exercising such control and has the ability to do so. RESTATEMENT, TORTS § 316 (1934). However, mere knowledge by a parent of a child's mischievous and reckless or vicious disposition is not of itself sufficient to impose liability upon the parent. Condel v. Savo, 350 Pa. 350, 39 A.2d 51 (1944); Norton v. Payne, 154 Wash. 241, 281 Pac. 991 (1929). Liability rests upon the subsequent failure by the parent to restrain or correct the child, where he knows the child is likely to cause injury to others. Ryley v. Lafferty, 45 F.2d 641 (D. Idaho 1930); Steinberg v. Cauchois, 249 App. Div. 518, 293 N.Y.S. 147 (1937); Thibodeau v. Cheff, 24 Ont. L. R. 214 (1911).

In Ryley v. Lafferty, supra, the court held that plaintiff's complaint stated a cause of action. It alleged that defendant's son, age sixteen, had the habit of beating smaller boys; defendant knew of his son's vicious disposition; and defendant did nothing to admonish the son or to prevent further tortious conduct. Defendant's lack of affirmative action was held to constitute participation and assent by the parent. Similarly, in Norton v. Payne, 154 Wash. 241, 281 Pac. 991 (1929), the parent had knowledge of his minor child's propensity to beat other minors with sticks, and when injury occurred, the parent was held responsible. The parent had not furn-
ished the child with the stick; the child was not acting as a servant or agent for the parent; and the parent did not actively participate in the child's misconduct. Liability was imposed because the parent had failed to exercise reasonable care to correct the child's dangerous propensities. The same result was also reached in *Ellis v. D'Angelo*, 116 Cal. App. 310, 253 P.2d 675 (1953). In this case a babysitter was injured by the child, the parent having failed to warn the plaintiff of the child's dangerous habits. But see *Bowen v. Mewborn*, 218 N.C. 423, 11 S.E.2d 372 (1940), wherein the court held that the complaint did not state a cause of action since it did not allege that the parent's action or inaction was the proximate cause of the injury occasioned by his minor child. For a collection of cases on this subject, see Annot., 155 A.L.R. 85 (1945).

It is apparent that the courts are struggling to find the appropriate basis for liability. In many cases the parent is connected with the tort of the child through his knowledge of the latter's propensities, thus constituting "acquiescence" or "consent." *Norton v. Payne*, 154 Wash. 241, 281 Pac. 991 (1929); *Thibodeau v. Cheff*, 24 Ont. L. R. 214 (1911). This is an attempt to hold the parent by forcing the case within either the rule that an actor who in any way participates is a party to the wrong, or that the "consent" constitutes an authorization to the child to act in behalf of the parent. However, the real basis for liability is that the parent has failed to exercise the care which a reasonable parent should exercise to prevent his child from creating an unreasonable risk of harm to third persons. None of these cases suggest that a parent may be liable for his failure to so rear and train his child as to make him amenable to discipline, for this would be placing a legal standard upon an intangible family right. The issue of negligence must be focused upon a particular failure of the parent to adopt reasonable measures to prevent a definite type of harmful conduct on the part of the child. Harper and Kime, *The Duty to Control the Conduct of Another*, 43 Yale L.J. 886, 893 (1934).

The third exception to the general rule is similar to the "vicious animal" doctrine. This doctrine, stated simply, is that the owner of an animal will be held liable if the animal injures a party if the owner knows of its vicious propensities and if his failure to restrain the animal is the proximate cause of the injury. *Butts v. Houston*, 76 W. Va. 604, 86 S.E. 473 (1915); *Johnson v. Mack Mfg. Co.*, 65 W. Va. 544, 64 S.E. 841 (1909); 1 M.J. *Animals* § 20 (1948).
However, this analogy cannot successfully be asserted because an animal can be chained or fenced in, whereas a human is not amenable to such measures. Parents cannot be held to the degree of liability of one harboring a vicious dog after notice of its viciousness. *Norton v. Payne*, 154 Wash. 241, 281 Pac. 991 (1929) (dictum). Therefore, the ultimate issue will resolve itself into the question of whether the parent exercised reasonable care under the circumstances.

West Virginia has not been confronted with the issue presented in the principal case. However, due to the enactment of the parental liability statute dealing with the malicious destruction of property by minors, it appears that the trend in West Virginia is toward placing more responsibility upon the parent. W. Va. Code ch. 55, art. 7A, §§ 1,2 (Michie 1961). Therefore, a complaint similar to the one in the case at bar would probably be upheld as stating a cause of action. As a practical matter, proving that the parent took no reasonable measures to restrain the child, knowing of his dangerous or vicious propensities, would present a difficult evidentiary problem. Cases seem to indicate that admonishment by the parent would relieve him of liability if such were a reasonable means of parental authority. Acts of incorrigible children are not subject to the rule propounded by the principal case, for no amount of parental discipline would be effective.

_David Mayer Katz_

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**ABSTRACTS**

**Federal Courts—Three Judge Court and Pre-emption**

The Georgia legislature enacted a statute requiring that tobacco sold at auction within that state be identified by tag according to type. Operators of the tobacco warehouses brought action in the federal district court to restrain state officials from enforcing the act, on the basis that federal legislation had pre-empted the field. A three-judge court was convened and granted the requested relief. On direct appeal to the United State Supreme Court, _held_, affirmed on the merits with no discussion of the propriety of the use of a three-judge court. _Campbell v. Hussy_, 82 Sup. Ct. 327 (1961).

It is surprising that neither the Court nor the parties questioned the convening of a three-judge court on the matter. In _Ex Parte_