Volume 60 | Issue 2 Article 6

February 1958

Parental Liability Statute

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West Virginia Law Review

Published by the College of Law of West Virginia University. Official publication of The West Virginia Bar Association.

STUDENT NOTE

PARENTAL LIABILITY STATUTE

At common law parental relationship is not, of itself, a basis for holding a parent liable for his child's tortious acts.[1] Unless some other relationship[2] can be established or the parent's own negligence[3] is found to be the proximate cause of the injury, the child bears sole responsibility for his tortious acts. Dissatisfaction with this common law rule, which often leaves the injured party with a worthless action against an insolvent minor, has been manifested by the court's circumvention of the rule through dubiously founded agency relationships[4] and through strained applications of the "foreseeability" rule[5] in order to find that some negligent act on the parent's part is the proximate cause of the injury.

[1] Mazzocchi v. Seay, 126 W. Va. 490, 29 S.E.2d 12 (1944); Sibes v. Johnson, 16 Mass. 388 (1820); Scott v. Watson, 46 Me. 363 (1859).

[2] Condel v. Savo, 350 Pa. 350, 39 A.2d 51 (1944); Smith v. Jordon, 211 Mass. 269, 97 N.E. 761 (1912); Hower v. Ulrich, 156 Pa. 410, 27 Atl. 37 (1893).

[3] Mazzocchi v. Seay, 126 W. Va. 490, 29 S.E.2d 12 (1944); Dickens v. Barnham, 69 Colo. 349, 194 Pac. 356 (1920); Meers v. McDowell, 110 Ky. 926, 62 S.W. 1013 (1901).

[4] Wyant v. Phillips, 116 W. Va. 207, 179 S.E. 303 (1935); Watson v. Burley, 105 W. Va. 416, 143 S.E. 95 (1928); Jones v. Cook, 90 W. Va. 710, 111 S.E. 828 (1922).

[5] See Kuchlik v. Feuer, 267 N.Y. Supp. 256, 191 N.E. 555 (1933); Gudziewski v. Stemplesky, 263 Mass. 103, 160 N.E. 334 (1928); but see Mazzocchi v. Seay, 126 W. Va. 490, 29 S.E.2d 12 (1944).

As a result of this judicially expressed dissatisfaction, which in reality is an expression of the thoughts of modern society, and as a result of the increased incidents of juvenile vandalism, the legislature of West Virginia, following the lead of several other states,[6] has enacted a parental liability statute.[7]

Under West Virginia's parental liability statute[8] 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. The injured party is provided this statutory remedy (7) as an addition to and not exclusive of any common law or other statutory remedy or right of action against a parent for his child's tortious acts, and (8) may maintain this action in the justice of the peace court or other courts of competent jurisdiction.

It appears that the legislature anticipated that the principal statute, being in derogation of the common law, would present the court with a problem of determining the legislative intent; for a lengthy preface stating the legislative intent has been incorporated and enacted as part of the statute.[9] The following discussion is presented to point out that this attempt at clarification by the legislature fails to answer, and perhaps further beclouds, the many problems raised by the principal statute.

Two rules of statutory construction should be kept in mind throughout the following discussion: (1) a statute in derogation of the common law will be strictly construed;[10] and (2) a statute must be construed to effectuate the legislative intent.[11]

The statement of legislative intent does not clearly state upon what basis the parent's liability is founded. In the statement of legislative intent it is recognized that it is the responsibility of the

[6] Arizona, California, Connecticut, Florida, Georgia, Idaho, Indiana, Louisiana, Michigan, Montana, Nebraska, Nevada, New Mexico, North Dakota, Rhode Island, South Dakota, Tennessee, Texas.

[7] W. VA. CODE c. 55, art. 7A, §§ 1, 2 (Michie 1955).

[8] *Ibid.*

[9] *Id.* c. 55, art. 7A, § 1.

[10] State *ex rel.* Ballard v. Vest, 136 W. Va. 80, 65 S.E.2d 649 (1951); Newhart v. Pennybacker, 120 W. Va. 774, 200 S.E. 754 (1938); Rhodes v. J. B. B. Coal Co., 79 W. Va. 71, 90 S.E. 796 (1916); State *ex rel.* Keller v. Brymes, 65 W. Va. 451, 64 S.E. 728 (1909).

[11] Vest v. Cobb, 138 W. Va. 660, 76 S.E.2d 885 (1953); State *ex rel.* Holbert v. Robinson, 134 W. Va. 524, 59 S.E.2d 884 (1950); McVey v. Crawford, 83 W. Va. 556, 98 S.E. 615 (1919).

parent to effect the training and discipline of his children; that many parents have failed in this respect; that as a result of this parental *negligence* much of the vandalism has occurred; that because of this failure of parental responsibility (negligence?) parents should be liable.

It appears that liability is imposed upon the parent by virtue of his failure to recognize his parental responsibilities. This lack of recognition is termed negligence. Therefore, in order to maintain an action under the principal statute, is it necessary to show that one was negligent in carrying out his parental responsibilities; *i.e.*, that one was negligent in effecting the proper training and discipline of his children?

From a practical standpoint the difficulty of proving, for lack of any certain standard, that a parent was negligent in rearing his child would practically render the statute nugatory. From the standpoint of natural justice it would not seem fair to impose liability upon one who has conscientiously performed his parental duties, and through no fault of his own has a child who has no respect for the property rights of others.

The term "parent" as commonly understood means natural mother and father, but in legal understanding the term may include one who has adopted a child or one who stands in loco parentis to a child.[12] One who adopts a child is entitled to every legal right as if such child were born to him in lawful wedlock.[13] One who stands in loco parentis to a child places himself in the situation of a lawful parent without going through the formalities of adoption.[14] In that the principal statute requires that the child be living with the parent at the time he commits the act of vandalism, it appears that control of the child is an essential prerequisite to the parent's liability. One who has adopted or stands in loco parentis to a child would be in a position to exert the requisite control and it would seem that the term "parent", as used in the principal statute, would logically include one who has placed himself in either of these positions.

As stated above, control of the child seems to be an essential prerequisite to the parent's liability under the principal statute.

[12] See WORDS AND PHRASES, *Parent* (1957); BLACK, LAW DICTIONARY (4th ed. 1951).

[13] W.VA. CODE c. 48, art. 4, § 5 (Michie 1955).

[14] Lewis v. United States, 105 F. Supp. 73 (N.D.W. Va. 1952); Richards v. United States, 93 F. Supp. 208 (N.D.W. Va. 1950).

This requirement would relieve the parent of liability for the acts of his children who no longer reside in his household. In a strict sense, a child who is away at school or at camp is not living with his parents; for the parent in this instance has no more physical control over the child than he has over the child who has permanently ceased to reside in his household. However, a child who is only temporarily absent from his parent's home is likely to be dependent upon his parent for his support; so in this respect the parent retains a very effective means of control, and in light of the purpose of the principal statute what appears to be the very type of control that the legislature had in mind. Though it is probable that the legislature did not intend the phrase, "living with the parent", to exclude from coverage those parents whose children are financially dependent upon them and who are but temporarily absent from their home, the legislature's expressed intent is not so clear as to preclude the court from holding otherwise.

A situation could arise where the mother has the custody of a child and the father has the responsibility to support the child. To place the liability upon the mother, who may be dependent upon alimony payments by the father as her and her child's sole means of support, would be a harsh result; but on the other hand, to place liability upon the father, who has had nothing to do with the training and discipline of the child, would not seem to be a fair result.

The parent's liability under the principal statute is limited to those acts of his children which are criminal in nature; *i.e.*, malicious and wilful acts. The criminal law rules governing capacity of an infant to commit a criminal act divide infants into three age groups:[15] (1) an infant under seven years of age is conclusively presumed incapable of committing a crime; (2) an infant between the age of seven and fourteen years is prima facie incapable of committing a crime; (3) all persons over the age of fourteen years are presumed capable of committing a crime.

By application of the criminal law rules of capacity to the principal statute, would the acts of an infant under the age of seven come under the statute? Would the injured party be required to overcome the prima facie presumption of incapacity of an infant between the age of seven and fourteen years by clear and convincing proof?

[15] State *ex rel.* Cain v. Skeen, 137 W. Va. 806, 74 S.E.2d 413 (1953); State v. Vineyard, 81 W. Va. 98, 93 S.E. 1034 (1917).

Though the legislature gives no indication that the capacity of the infant is to be determined by the criminal law rules, it appears that the requirement that the act be "wilful and malicious" would of necessity require the plaintiff to establish that the infant is capable of performing such an act; and since the legislature provides no other standard, the court is likely to apply rules that are applicable to analogous situations.

The injured party may recover from the parent of a minor under the age of eighteen years. Does this mean that the minor must be under the age of eighteen when the action is brought, or does it mean that the minor must have been under the age of eighteen when he committed the act?

There is no express provision preventing a double recovery by proceeding against the parent under the principal statute and under the common law theory of negligence. The limitation to actual damages, not to exceed three hundred dollars, under the statute seems to indicate a contrary legislative intent, but the statute provides that the right of action and remedy granted therein is in addition to and not exclusive of any existing right of action and remedy against the parent. In that the stated legislative intent is to provide the injured party with an additional *right of action,* the court could by a strict interpretation prevent any additional *recovery* than that specifically provided for by the statute. Since the statutory theory of liability is based upon either the assumed or provable negligence of the parent, an election to seek recovery under the statute might be held res judicata in a second action brought against the parent under the common law theory of negligence.[16]

There is no indication that the injured party could not maintain an action against the child after having proceeded against the parent under the principal statute. Unless the parent's negligence was held to be the sole proximate cause of the injury, the child would not be relieved of liability for his act. But since the act of the child must be "wilful" it does not appear that the parent's negligence in rearing his child could be considered as the sole factor motivating the child to perform the act. So it would seem that unless the court advances upon the theory that the parent's negli-

[16] *Cf.* Hannah v. Beasley, 132 W. Va. 814, 53 S.E.2d 729 (1949); Marguerite Coal Co. v. Meadow River Lumber Co., 98 W. Va. 698, 127 S.E. 644 (1925).

gence "contributes" to the cause of the injury, thus holding the parent and child to be joint tort-feasor, an injured party could recover from both the parent and the child.

The principal statute, though imposing liability upon the parent for his child's act, makes no provision entitling the parent to the corresponding rights the child may possess in relation to the act. The liability of a joint tort-feasor is several as well as joint,[17] and recovery from one joint tort-feasor entitles that tort-feasor to contribution[18] from the other tort-feasor. The question of contribution between the parent and his child may arise if, in light of the preceding discussion, they are held to be joint tort-feasors. It is more likely that the question will arise as a result of an action maintained against the parents of only one of the joint tort-feasors. A holding by the court that the one parent is entitled to contribution from the parents of the other joint tort-feasors would produce an equitable result.

Though it appears, that under the principal statute the parents of joint tort-feasors may be held severally liable for their children's torts, the possibility of their being jointly liable appears to be limited to those cases where the damages do not exceed the three hundred dollar limitation.

A difficult problem may arise when the tort involves injury to both the person and his property; since recovery under the principal statute is limited to property damage. The law is settled in this jurisdiction that only a single action may be maintained to recover for both bodily injury and property damage arising out of the same tort.[19] An injured party could not maintain an action against the child to recover for his personal injuries if he had, in a previous action against the child, recovered for the property damage arising out of the same tort.[20] It is improbable that the injured party, by maintaining an action against the parent under the principal statute for the property damage involved, would forfeit his rights to proceed against the child for his personal injuries when it later appears that the child is a solvent party.[21]

[17] Muldoon v. Kepner, 91 S.E.2d 727 (W. Va. 1956); State *ex rel.* Bumgarner v. Sims, 139 W. Va. 92, 79 S.E.2d 277 (1953).

[18] W. VA. CODE c. 55, art. 7, § 13 (Michie 1955).

[19] Mills v. DeWees, 93 S.E.2d 484 (W.Va. 1956).

[20] See Mills v. DeWees, note 19 *supra.*

[21] Note 16 *supra.*

The principal statute does not require the plaintiff to join the child as a party defendant in an action against the parent. Since the child may have sufficient assets to partially satisfy a judgment rendered against him, may he be joined with his parent in a single action or must the plaintiff sue the parent under the principal statute and then proceed against the child in another action? The expense of maintaining two actions would, in many cases, deprive the plaintiff of any benefit he would otherwise have derived from the child's partial solvency.

A question of the principal statute's constitutionality may arise under the due process clause[22] of the constitution of West Virginia and it is felt that the many uncertainties presented by the statute would greatly aid the court in making a finding against the statute's constitutionality.[23]

Though the principal statute in its present form may produce the legislature's intended effect, if by nothing more than making the parent aware of his parental duties, it is submitted that the statute, with only slight revision, would produce this same effect and, at the same time, would eliminate many of the questions that are raised by the statute in its present form.

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[22] W. VA. CONST. art. III, § 10.

[23] *Cf.* State *ex rel.* Ballard v. Vest, 136 W. Va. 80, 65 S.E.2d 649 (1951); Newhart v. Pennybacker, 120 W. Va. 774, 200 S.E. 754 (1938).