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Torts--Parental Participation in the Tortious Conduct of Minor Children

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TORTS. PARENTAL PARTICIPATION IN THE TORTIOUS CONDUCT OF MINOR CHILDREN.

California courts are fond of reaffirming the common law principle that parents are not vicariously liable for the torts of their minor children.[1] At the same time, the courts agree that in certain circumstances the parent may become associated with the tort in such a way as to become liable in damages. This can occur in fact situations where the law of agency can be invoked[2] or where the parent intentionally participates in the tort.[3]

Most often, however, the question arises when the injury follows some negligent participation on the part of the parent. This negligent participation may take one of two forms. The first is negligent participation through active misconduct; working a positive injury to others by the omission to do something which a reasonable man would do, or by doing something that a reasonable man would not do.[4] The second form of negligent participation is through passive inaction, a failure to take positive steps to benefit others, or to protect them from harm not created by any active misconduct of the actor, where by reason of the pre-existing relations of the parties the law imposes a duty to do so.[5] To denote these two categories which represent approximately the distinction between "misfeasance" and "nonfeasance," this article will use the terms "active misconduct" and "passive inaction."

Since a parent will be liable prima facie for active misconduct, while liability for passive inaction will attach only in such cases where the law has raised a duty to act, the division is an important one to keep in mind. The case of *Martin v. Barrett*[6] indicates the unfortunate result of a failure to recognize and honor this distinction.

The complaint in *Martin v. Barrett* charged that the parents of twelve-year-old Lawrence Barrett had negligently participated, both by active misconduct and by passive inaction, in the tortious acts that cost five-year-old Billy Martin the sight of one eye. Lawrence's parents rented the upstairs apartment of their residence to Billy's parents and both families shared a common yard. For the charge of active misconduct, after describing Lawrence as a "careless, reckless and aggressive person" who had "teased, molested and bullied plaintiff Billy and his brother," the complaint set out that despite Lawrence's immaturity and lack of judgment, his mother and father "negligently allowed and permitted" Lawrence to have an air gun. This air gun was the instrument that caused Billy's tragedy

The mother was charged with passive inaction. It was stated that she "negligently permitted" Lawrence to fire the air gun into the common yard although she knew Billy was playing there.

The trial court dismissed the complaint and the District Court of Appeal affirmed the judgment, holding that no cause of action was set out.

To analyze the reasoning that led to this conclusion it is necessary to consider

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[1] A statement of the principle occurs in one form or other in each of the California cases cited below.

[2] Crittenden v. Murphy, 36 Cal.App. 803, 173 Pac. 595 (1918), 20 CAL. JUR. *Parent & Child* § 47.

[3] Kallenberg v. Long, 68 Cal.App. 317, 229 Pac. 57 (1924).

[4] PROSSER, TORTS § 32, 19 CAL. JUR. *Negligence* § 4.

[5] HARPER, TORTS § 79; Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. OF PA. L. REV. 217.

[6] 120 Cal.App.2d 625, 261 P.2d 551 (1953).

first the 1885 case of *Hagerty v. Powers*.[7] In that case a parent had "willfully and negligently" permitted his eleven-year-old son to have a loaded pistol in his possession, but the Supreme Court of California maintained that the parent "is not liable in damages for the torts of his child, committed without his knowledge, consent or sanction, and not in the course of his employment of the child."

The *Hagerty* case made no mention of the categories of negligent participation, but their existence was acknowledged by the Supreme Court of California in 1923 when it decided *Buelke v. Levenstadt*.[8] There the court said, "the common law rule exempting a parent from liability for the torts of his minor child [is] joined with the other rule that a parent may become liable for an injury caused by the child and made possible, and probable, through the parents' negligence."

To complete the outline of liability, the case of *Ellis v. D'Angelo*[9] must be considered. The facts in that case pitted a babysitter against a four-year-old boy who was in the habit of violently attacking people. The babysitter suffered fractured bones in both her arms and wrists during her first encounter with the child. The parents were held liable for their negligent failure to warn the babysitter and to exercise control over their child.

The case also sets forth the factors which must be present before liability can attach for harms following passive inaction. In general, the parent must know of the necessity and opportunity for exercising control,[10] and the necessity can be shown if the child has demonstrated a propensity toward the particular harmful conduct.[11]

The conclusions in the *Martin* case seem to have been developed from the following line of reasoning. In all of the cases within the orbit of the *Hagerty* and *Buelke* cases, there was no finding of active misconduct against the parent who delivered or countenanced the possession of the instrument that inflicted the harm. Therefore, the court would not consider "negligently allowing and permitting" Lawrence to have an air gun to be a source of liability in itself. Disposing of the charge of active misconduct in this way, the court then referred to the *Ellis* case and studied the requirements of liability following passive inaction. Finding no habitual propensity for Lawrence to misuse the air gun, the court concluded that no affirmative duty to control Lawrence was imposed on the mother.

These conclusions follow in perfect order and would be entitled to the highest regard except that it is an error to hold that the *Hagerty* and *Buelke* authorities preclude a finding of active misconduct under the facts of the subject case. In every applicable case in that body of authority the instrument which the parent gave or permitted the child to have was useful in nature, familiar to the public in general and of general utility. It was dangerous only when in the hands of a careless or reckless person.[12] The instrument in the *Martin* case was of no social

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[7] 66 Cal. 368, 5 Pac. 622 (1885).

[8] 190 Cal. 684, 214 Pac. 42 (1923).

[9] 116 Cal.App.2d 310, 253 P.2d 675 (1953).

[10] The court cited with approval RESTATEMENT, TORTS § 316.

[11] The court was influenced by those cases collected in 155 A.L.R. 81, which was cited.

[12] It must be kept in mind that at the time of the Hagerty case hand guns were in wide use for purposes of protection. Regard must be had to the era.

Figone v. Guisti, 43 Cal.App. 606, 185 Pac. 694 (1915) involved a charge of negligently placing a minor son within reach of a loaded revolver. However, the revolver was at the parent's place of business.

The balance of the cases deal with the use of automobiles. See Perry v. Simone, 197 Cal.