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Insurance: Liability of Insurer under Personal Liability Policy for Damage Caused by Wilful Misconduct of Insured's Child--Application of New California Statute

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has been to put the lion back in his cage. Until then, protection for the individual appeared to be sacrificed at a disproportionate concern for the protection of society. How long was protection for society to continue before it became an instrument which would be used as an invitation and encouragement to law enforcing officers to violate the Constitution, thus creating as great an evil as that which it sought to destroy? Would modern scientific methods continue to be allowed for the purpose of crime detection to the degree that innocent persons be kept fearful that their privacy was subject to arbitrary invasion? It is not unreasonable to suppose that a liberal, non-exclusionary rule, especially in the light of the aforementioned decisions, could grow to such disastrous extremes. It is submitted that the scales which weigh the two conflicting needs have been correctly balanced—temporarily at least.

Henry Friedman.

INSURANCE: LIABILITY OF INSURER UNDER PERSONAL LIABILITY POLICY FOR DAMAGE CAUSED BY WILFUL MISCONDUCT OF INSURED'S CHILD—APPLICATION OF NEW CALIFORNIA STATUTE—The Supreme Court of California has reached a decision in the case of *Arenson v. National Automobile and Casualty Insurance Co.*[1] concerning insurability of a parent against liability arising from tortious acts of a child. A California statute[2] imputing wilful misconduct of a child to his parents was passed effective subsequent to the above decision. It is the purpose of this note to consider the application of this statute to the instant case to determine the probable course of similar future proceedings.

The action was by the insured for declaration of rights and determination of the insurer's liability under a public liability policy. The case hinged on the wording of the policy, wherein

> "the unqualified word 'insured' includes (a) the named insured, (b) if residents of his household, his spouse, the relatives of either, and any other person under the age of twenty-one in the care of an insured. . . ."[3]

The exclusion provision read:

> "This policy does not apply: . . . (c) to injury, sickness, disease, death or destruction caused intentionally by or at the direction of the insured. . . ."[4]

Plaintiff's minor son started a fire which damaged school property. The school district obtained judgment against the plaintiff, his liability being fixed by statute[5] imposing liability on a parent for any damage to school property caused by a wilful act of a pupil. The defendant refused to defend the action or pay the judgment on the ground that the word "insured" was to be interpreted to include that class of persons defined in the coverage clause of the policy. Hence, the intentional act of the son as "insured," it was contended, fell within the exclusion clause of the policy

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[1] 45 A.C. 85, 286 P.2d 816 (1955).
[2] CALIF. CIV. CODE § 1714.1, a 1955 enactment.
[3] See note 1 *supra* at 86, 286 P.2d at 817.
[4] See note 1 *supra* at 87, 286 P.2d at 817.
[5] CALIF. EDUCATION CODE § 16074 (1943). "Any pupil who wilfully cuts, defaces, or otherwise injures in any way any property, real or personal, belonging to a school district is liable to suspension or expulsion, and the parent or guardian shall be liable for all damages so caused by the pupil. . . ."

and the California statute[6] which exempts insurers from liability for losses caused by the wilful act of the insured. The plaintiff argued that the exclusion provision did not preclude him from being indemnified against liability for intentional injury committed by another insured in which he did not participate.

In reversing the judgment of the Superior Court of Los Angeles County and finding the defendant liable for the amount of the judgment plus interest, costs and attorneys' fees, the court looked beyond the mere words of the insurance contract to the true purpose of it. The question of the meaning of the word "insured" made operative the rule that any ambiguity in an insurance contract must be resolved against the insurer.[7] This led to the consideration of a second rule that exceptions and exclusions are construed strictly against the insurer, and liberally in favor of the insured.[8] Having thus cracked the shell, the court was in position to get at the meat of the problem, i.e., the true purpose behind the contract, considered in the light of ordinary experience and public policy.

It was considered that had the additional coverage not been included in the policy, undoubtedly the insured would have been indemnified against liability incurred through the wilful act of his son. Why, then, should the clause designed to extend coverage for the benefit of the insured be employed to deprive him of indemnification he would have had, additional coverage notwithstanding? Clearly such was not the intent of the clause. Authorities were cited in support of the proposition that a policy extending coverage to several persons creates several obligations on the part of the insurer, so that one insured is not precluded from recovering merely because an exclusion provision bars another.[9] Hence, it was concluded that the statutory provision to the effect that an insurer is not liable for loss caused by the wilful act of the insured[10] does not apply to a situation in which the insured is not personally at fault.[11]

This brings us to consideration of the statute imposing vicarious liability on parents for intentional torts of their children, which became effective shortly after judgment was rendered in the instant case. The Code reads:

> Any act of wilful misconduct of a minor which results in any injury to the property of another shall be imputed to the parents having custody or control of the minor for all purposes of civil damage, and such parents . . . shall be jointly and severally liable with such minor for any damages resulting from such misconduct.
>
> Joint and several liability of one or both parents . . . under this section shall not exceed three hundred dollars ($300) for each tort of the minor. The liability imposed by this section is in addition to any liability now imposed by law.[12]

Now it must be determined whether or not the new statute would be applicable to a case with a fact situation similar to that under consideration here; and if applied, how it would affect the decision.

In order to place this bit of legislation in its proper perspective, it may be well to briefly examine the development of the doctrine of vicarious liability of parents for torts of their children. The common law did not recognize the doctrine at all,

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[6] CALIF. INS. CODE § 533 (1935). "An insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others."

[7] Ransom v. Penn Mut. Life Ins. Co., 43 Cal.2d 420, 274 P.2d 633 (1954).

[8] Mah See v. North Am. Acc. Ins. Co., 190 Cal. 421, 213 Pac. 42, 26 A.L.R. 123 (1923); Pacific Heating and Ventilating Co. v. Williamsburg, 158 Cal. 367, 111 Pac. 4 (1910).

[9] Hoyt v. New Hampshire Fire Ins. Co., 92 N.H. 242, 29 A.2d 121, 148 A.L.R. 484 (1942).

[10] CALIF. CIV. CODE § 1714.1 (1955).

[11] Western Cas. & Surety Co. v. Aponaug Mfg. Co., 197 F.2d 673 (5th Cir., 1952).

[12] CALIF. CIV. CODE § 1714.1.

though it developed that parents could be held liable where negligence could be imputed through agency relation, or where their failure to act constituted negligence, or where the parent had directed, encouraged or ratified the act.[13] Beyond this the California courts would not venture; it remained for the Legislature to extend the doctrine. This has been accomplished by enactments in the Vehicle Code[14] imputing to the parents the negligence or wilful misconduct of a minor child in the operation of a motor vehicle; and in the Education Code imputing liability to the parents for any wilful damage caused by the pupil to property of the school district.[15]

There is no doubt that the new statute is repugnant to the common law, and therefore must be strictly construed and confined within its express limits.[16] One important point of distinction is noted between this statute and the Education Code section applied in the case. That is, the latter merely imputes *liability* to the parents, while the former imputes the *act of wilful misconduct.* It is also pointed out that liability imposed under the new statute is in addition to any liability now imposed by law. Therefore, it raises the question as to whether the statute could be used to impute the act of wilful misconduct to the plaintiff in this case, and thus reduce or destroy the liability of the defendant. Two other states[17] have passed similar statutes, but no reported cases have appeared construing them. Consequently, the matter must be resolved by application of the rules of statutory construction, whereby requirements of strict construction must be considered in the light of legislative intent.

Since the statutory liability is imposed *in addition* to any liability already provided by law, it could not be held to limit the liability of the parent to the school district, and would not therefore alter that relationship. However, since the statute is applicable to the fact situation, would the defendant in the instant case be able to rely on this statutory imputation of wilful misconduct as a defense? A strong argument could be made in the affirmative based on the wording of the statute alone. Here there was damage to the property of another resulting from wilful misconduct of the plaintiff's minor child of whom he had custody. Under the statute, this wilful misconduct would be imputed to the plaintiff "for all purposes of civil damage." Considering the words alone, it would seem that the insurer's liability here determined by the California Supreme Court was the natural consequence of an act inflicting civil damage. It may be well to note here that the word *damage,* as distinguished from *damages,* denotes actual injury and does not include a right of action or compensation.[18] Following this line of reasoning to a logical conclusion, the insured, having qualified under the provisions of the statute, would be entitled to use it as a defense, at least by way of reduction in the amount of the express limitation included in the statute.

The decision in the instant case makes it clear that a literal interpretation must be in accord with public policy, or give way to it. Following the pattern of reasoning established by the court, we must determine the true intent of the Legislature enacting the statute; and whether the result of the foregoing literal application of the statute is in harmony with that intent.

Let us look first to the purpose of the statute. The most obvious aim is to provide a satisfactory remedy for innocent third parties injured by a minor, where

[13] PROSSER, TORTS § 102 (1955 ed.).
[14] CALIF. VEHICLE CODE § 352.
[15] See note 3 *supra.*
[16] Armas v. City of Oakland, 135 C.A. 411, 27 P.2d 666 (1933); Lucas v. City of Los Angeles, 10 Cal.2d 476, 75 P.2d 599 (1938).
[17] NEB. REV. STAT. § 43-801 (Supp. 1952); MICH. STAT. ANN. § 27.1408(1) (Cum. Supp. 1953).
[18] 14 CAL. JUR. 2D 634.