NON-LIABILITY PRESUMPTION ON INFANT'S INTENTIONAL TORT REJECTED

Seaburg v. Williams,

16 Ill. App.2d 295, 148 N.E.2d 49 (1958)

The plaintiff brought an action against a five-year-old child for tortiously and wrongfully setting fire to a garage thereby destroying the garage and its contents. On appeal from a judgment sustaining defendant's "motion to strike" on the ground of "failure to state a cause of action" the appellate court of Illinois remanded, holding that the conclusive presumption that a child under seven cannot be guilty of negligence[1] did not apply to intentional tort cases.[2]

Generally, an infant is liable for his torts[3] but the courts have made an exception where the tort contained some element which is necessarily wanting in an infant.[4] In the negligence[5] and criminal[6] area the law is well settled regarding his liability. It has long been established that the common law conferred on an infant no immunity from liability in torts comparable to an infant's contractual privilege.[7]

The problem presented in the intentional tort field is whether a minor should be liable for his actions when he is incapable of realizing the wrongfulness of his act, *i.e.*, whether the child should only be re-

[1] Where a child is under seven years of age, he is incapable of contributory negligence. Between the ages of seven and fourteen he is presumed to be incapable, but this presumption is rebuttable. Over the age of fourteen he is presumed capable. Chicago City Ry. v. Tuohy, 196 Ill. 410, 63 N.E. 997 (1902). The criminal law rule is the same. WHARTON, CRIMINAL LAW § 364 (12th ed. 1932); Comment, *Incompetency as Affecting Legal Responsibility,* 3 ALA. L. REV. 165, 169 (1950-51).

[2] Seaburg v. Williams, 16 Ill. App.2d 295, 148 N.E.2d 49 (1958).

[3] 27 AM. JUR. *Infants* § 90, 91 (1940); 43 C.J.S. *Infants* § 87 (1945); 31 C.J. *Infants* § 203 n. 26 (1923); 28 OHIO JUR.2d *Infants* § 39 (1958). "In the situation where an infant does, through his agent something which he is entirely capable of legally doing himself, he should be liable for the torts of such agent within the scope of his authority." Harrison v. Carroll, 49 F. Supp. 283 (1943).

[4] "Of the latter class is an action for slander, wherein malice is a necessary ingredient, and if the infant . . . cannot be presumed to be guilty of malice, no liability attaches for his slanderous utterances." Stephens v. Stephens, 172 Ky. 780, 189 S.W. 1143 (1916). See Stone, *Liability for Damages Caused by Minors,* 5 ALA. L. REV. 1, 29 (1952-53).

[5] "[C]hildren have been recognized as a special group to whom a more or less subjective standard of conduct is applied, which will vary according to their age, intelligence and experience, so that in some cases immunity may be conferred in effect by finding merely that there has been no negligence." PROSSER, TORTS, § 109, at 788-89, (2d ed. 1955); COOLEY, TORTS § 66 (1932).

[6] Criminal law rule, *supra* note 1.

[7] The general rule applicable to contracts is that an infant may avoid liability thereon. Brown v. Wood, 293 Mich. 148, 291 N.W. 255 (1940); Lacey v. Laird, 166 Ohio St. 12, 139 N.E.2d 25 (1956); Garrard v. Henderson, 209 S.W.2d 225 (Tex. Civ. App. 1948).

sponsible for the consequences of his act when he has such maturity of mind as will enable him to foresee the consequences,[8] or whether he should be liable merely because he has the intention of doing the physical act which causes the injury.[9]

The vast majority of the courts have been more concerned with the compensation of the injured party than the moral guilt of the infant and have refused to hold an infant immune from liability,[10] although in some jurisdictions immunity has been given by statute.[11] Infants have been held liable for assault and battery,[12] trespass[13] and conversion.[14] Most of the cases have been based on the broad general principle that when a loss must be borne by one of two innocent persons it should be borne by the actor.[15]

This concept of liability without fault is an anachronistic symbol of earlier common law principles.[16] The fact that the courts in negligence cases grant immunity to an infant under certain circumstances demonstrates an inconsistency in the law. As stated by Professor Bohlen:

> If our law recognizes infants and insane persons as incapable of exercising that care for their own protection which is required of normal persons as a condition to their right to redress for injuries caused by the wrongful acts of others, and relieves them from the penalty which such lack of care would, but for their incapacity, impose, it would be inconsistent and arbitrary to penalize them by requiring them to compensate others whom they injure by conduct which, though guility in others, is, by reason of their incapacity, innocent in them.[17]

A leading case dealing with the problem is *Garratt v. Dailey*[18] where a five-year-old child pulled a chair from under a plaintiff who was in the process of sitting down. The court remanded for a determi-

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8 Unkelsbee v. Homestead Fire Ins. Co., 41 A.2d 168 (D.C. Mun. App. 1945).

9 Note, *The Tortious Infant*, 97 SOL. J. 614-17 (1953).

10 PROSSER, *op. cit. supra* note 5, at 788.

11 *E.g.*, GA. CODE: § 26-302 (1933); § 105-1806 (1933) "Infancy is no defense to an action for a tort, provided the defendant has arrived at those years of discretion and accountability prescribed by this code for criminal offenses." (Grants immunity to a child under ten years of age.)

12 Singer v. Marx, 144 Cal. App. 2d 637, 301 P.2d 440 (1956); Ellis v. D'Angelo 116 Cal. App. 2d 310, 253 P.2d 675 (1953) (four-year-old child); Garratt v. Dailey, 46 Wash.2d 197, 279 P.2d 1091 (1955) (five-year-old child).

13 Conklin v. Thompson, 29 Barb. 218 (N.Y. 1859) (trespass to chattels); Huchting v. Engel, 17 Wis. 230 (1863).

14 Smith v. Moschetti, 213 Ark. 968, 214 S.W.2d 73 (1948); Shaw v. Coffin, 58 Me. 254 (1870); Walker v. Davis, 67 Mass. 506 (1854).

15 27 AM. JUR. *Infants* § 90 (1940).

16 Ellis v. D'Angelo, *supra* note 12 (dictum).

17 Bohlen, *The Liability in Tort of Infants and Insane Persons*, 23 MICH. L. REV. 9, 31 (1924).

18 *Supra* note 12.

nation of the child's intent saying: "Without . . . knowledge [that the act was wrongful] . . . there would be no liability." This court required for liability an intention to commit a wrongful act coupled with the ability of the infant to maintain such intent. They did not base liability on mere *causation*.

Since the injury is the same whether the cause is an intentional or negligent tort no justifiable reason can be set forth for continuing the inconsistency in considering an infant's capacity for wrongful intent in negligence and criminal cases but refusing to consider his capacity in intentional tort cases.[19] If compensation regardless of the infant's ability to maintain a wrongful intent is the rule, then the law should not give immunity to infants in the negligence area, but base liability merely on causation. To do this, however, would be a regression. The ultimate basis of tort liability should be wrongfulness;[20] therefore, the courts, when considering intentional torts of infants, should make wrongfulness and not merely causation a prerequisite for liability.

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19 Note, 27 So. Calif. L. Rev. 214 (1954).
20 Note, 30 St. John's L. Rev. 119 (1955).