T H E L A W R E F O R M C O M M I S S I O N

AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

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REPORT ON THE LIABILITY IN TORT OF MINORS AND THE LIABILITY OF PARENTS FOR DAMAGE CAUSED BY MINORS

IRELAND
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CHAPTER 1: THE PRESENT LAW

THE LAW IN THIS JURISDICTION

(I) Liability of a Minor for his Wrongful Acts

(a) General Liability of a Minor in Tort[1]

The law of torts is a wide area encompassing several specific branches of liability. Some torts, (e.g. a breach of the rule in Rylands v Fletcher[2] or the obligation imposed by section 3 of the Animals Act 1985,[3]) involve strict liability. Others, notably trespass to the person, to goods and to land, will not involve liability where the defendant neither intended to do the act of which the plaintiff complains nor was negligent in its regard.[4] Still others, such as defamation or malicious prosecution, may in some circumstances require proof of a particular intent or state of mind. Finally, liability for the tort of negligence is determined by the objective standard of the "reasonable person"[5] where the conduct of an adult defendant is in question. The question of the liability of a minor in tort is thus not a simple one. We have to consider each of these several types of tort, since each has different implications for the minor. As a general introductory observation, however, it may be noted that a child will not be guilty of any tort if his or her acts were not voluntary. We will shortly be considering what "voluntariness" means in this context.

So far as torts of strict liability are concerned it would appear that minority does not afford a defence, provided, of course, that the ingredients of the particular tort are

shown to exist.

The torts of trespass to the person, to goods and to land present particular difficulties because of the general uncertainty as to the ingredients of these torts and the onus of proof. We will be examining this question in somewhat greater detail in our Report on the Liability in Tort of Mentally Disabled Persons, which we will be publishing shortly. At present we will confine ourselves to the statement that, wherever the onus of proof may lie, it seems clear that, in the absence of intention or negligence on the part of the defendant, no liability may attach to the defendant for a trespass.[6] Thus, if by reason of lack of mental capacity, a child is incapable of forming the requisite intention, he or she will not be liable for a trespass.

It is at this point that the analysis becomes more complicated. Unlike in criminal law, where a great deal of intellectual effort has been invested in the development of concepts of voluntariness, intention and responsibility, there has been a dearth of detailed judicial consideration of these concepts in tort law. We thus, on occasion,[7] find the courts using these terms interchangeably, with little attempt to provide a clear definition of their meaning or to analyse the important policy issues involved.

When we come to apply these concepts to minors these difficulties are compounded. The crudity of definition tends to work with particular effect where their position is concerned. The concept of voluntariness involves the direction and control over conduct by a conscious mind. Thus, for example, a person's movements when asleep or in the course of an epileptic attack are not voluntary;[8] moreover, to take an example given in an English decision[9] in 1616, "if a man by force take my hand and strike you", my

act will not be voluntary.

All these examples relate to involuntary conduct where it may be assumed that the actor is normally capable of voluntary conduct. Problems arise, however, where the question concerns conduct by persons who may not normally be capable of voluntary conduct - mentally disordered persons and young children. Here the courts have not yet articulated clear criteria for determining voluntariness. The actions of very young children have been held not to be voluntary: thus, in the Canadian decision of Tillander v Gosselin,[10] where a three-year-old child removed an infant from her carriage and dragged her over 100 feet, fracturing her skull, Grant, J., of the Ontario High Court, said: "I do not believe that one can describe the act of a normal three-year-old child in doing injury to the baby plaintiff in this case as a voluntary act on his part". Where, however, the child is somewhat older, the courts take the view that his or her conduct is voluntary,[11] even though the child may lack maturity of judgment and a sound appreciation of the seriousness of his or her acts.

So far as intention is concerned, the courts require that the actor should have acted with the purpose of causing the effect in question or, perhaps, if lacking that purpose, with knowledge that such effect is substantially certain to be produced by his or her conduct.[12] Again, so far as children are concerned, once this intention is established, questions of maturity of judgment and of sound appreciation of the seriousness (medical, financial or moral) of the act are not relevant to the determination of liability.[13] This creates a significant incongruity[14] since a child's negligence[15] and contributory negligence[16] are determined by criteria which take far greater account of the child's immaturity and lack of judgment.

(b) Contributory Negligence[17]

The classic statement of the relevant legal principles regarding contributory negligence was made by O'Byrne, J. in Fleming v Kerry County Council[18]:

> "In the case of a child of tender years there must be some age up to which the child cannot be guilty of contributory negligence. In other words, there is some age up to which a child cannot be expected to take any precautions for his own safety. In cases where contributory negligence is alleged against a child, it is the duty of the trial Judge to rule, in each particular case, whether the plaintiff, having regard to his age and mental development, may properly be expected to take some precautions for his own safety and consequently be capable of being guilty of contributory negligence. Having ruled in the affirmative, it becomes a question of fact for the jury, on the evidence, to determine whether he has fallen short of the standard which might reasonably be expected from him having regard to his age and development. In the case of an ordinary adult person the standard is what should be expected from a reasonable person. In the case of a child, the standard is what may reasonably be expected, having regard to the age and mental development of the child and the other circumstances of the case."

A number of aspects of this statement of the law will require further consideration.

(i) **Minimum Age**

O'Byrne, J. is clearly correct in stating that "there must be some age up to which the child cannot be guilty of contributory negligence". As Chief Baron Palles observed in Cooke v Midland Great Western Ry. of Ireland[19],

> ".... the doctrine of contributory negligence is entirely grounded upon the fact that man is a reasonable animal, and has no application to the case of a child of such an age as to be incapable of appreciating the danger, and reasoning in reference to it, any more than if he had been a brute animal."

Manifestly it would be nonsense to speak of a six-month-old infant as being guilty of contributory negligence. It is not easy, however, to specify exactly when a child does become capable of contributory negligence.

The approach favoured by O'Byrne, J. is for the court to determine in the particular case, having regard to the age and mental development of the particular child, whether he was capable of contributory negligence, and if so, for the jury to determine whether in the circumstances he was in fact guilty of it. This reflects the normal division of functions in tort cases, but the courts have been tempted to hold that at a particular age the child cannot be guilty of contributory negligence, however intelligent and experienced he or she may be. Such an approach might seem justified where the child is extremely young - an infant in arms for example - but, once the child is a little older, the danger of confusion in the court's role becomes a real one.

Some decisions have clearly recognised the true function of the courts on this question. Thus, in the Canadian decision

of Gargotch v Cohen[20], Hogg, J. said:

> "Some of the cases have stated the age at which a child cannot be said to come within the principle of contributory negligence, but apparently the more modern decisions do not attempt to fix an arbitrary limit as to age. It has been held that intelligence and not age is the test to apply in deciding whether a child has been, or can be, guilty of contributory negligence."

Bearing in mind that some courts have not in fact taken this course and have instead made overbroad assertions as to capacity at a particular age (without regard to subjective factors) let us examine the decisions in more detail. In Donovan v Landy's Ltd.[21], Kingsmill Moore, J. expressed the view (which appears to have been obiter) that the trial Judge had been correct in ruling that the plaintiff, a 6½-year-old boy, "obviously intelligent"[22], who had "scutted"[23] on a bread van, was capable of contributory negligence. Most courts in common law jurisdictions are very reluctant to hold children much under this age capable of contributory negligence.[24] Thus in Kaplan v Canada Safeway Ltd.[25], Disbery, J.,of the Saskatchewan Queen's Bench expressed the opinion that "[i]t would be absurd .... to impose upon this three-year-old plaintiff the duty of exercising reasonable care or to expect her to take precautions for her own safety".[26]

A similar reluctance to regard a child of three years as being capable of contributory negligence is apparent in an English decision[27], but throughout the common law world courts have on occasion been disposed to recognise that young children may be capable in certain circumstances of contributory negligence.[28]

With regard to older ages, the courts have had litt e

difficulty in finding the plaintiff child capable of contributory negligence. In Behan v Thornhill[29], the Supreme Court upheld the verdict of Davitt P., dismissing the action for negligence brought by a nine-year-old plaintiff arising out of a collision with the defendant's car. The plaintiff was described in the evidence as "a healthy boy", "bright", "intelligent", "bright at school" and "bright for his age". Davitt P. stated that he had "seldom seen a brighter boy in the witness box".[30] He also stated:

> ".... I think that a boy of nine years is capable of contributory negligence. It has been held in some cases that younger boys could not be capable of contributory negligence, but I am satisfied that a boy of nine years can be capable of contributory negligence."[31]

Similarly, in Courtney v Masterson[32], Black, J., in the High Court, stated that he was

> "not prepared to accept the contention that a boy of ten years is incapable of contributory negligence."

By the time the child reaches the age of twelve years, this issue - if it arises at all[33] - will almost certainly be resolved against him.[34]

(ii) **Standard to be Applied in Determining Whether Child was Guilty of Contributory Negligence**

Assuming that the child is considered capable of contributory negligence, the question arises as to what standard of behaviour is to be applied to him. There is some degree of uncertainty as to the law on this question in

this country. As has been mentioned, in Fleming v Kerry County Council[35], O'Byrne, J. stated that this is

> "a question of fact for the jury, on the eivdence, to determine whether he has fallen short of the standard which might reasonably be expected from him having regard to his age and development."

O'Byrne, J. expanded on this approach by stating that

> "[i]n the case of an ordinary adult person the standard is what should be expected from a reasonable person. In the case of a child, the standard is what may reasonably be expected, having regard to the age and mental development of the child and the other circumstances of the case."[36]

In Duffy v Fahy[37], the Supreme Court referred to this statement of the law. Lavery, J. stated:

> "The phrase used by O'Byrne, J. [in] Fleming v Kerry Co. Co., 'age and mental development', is susceptible of meaning either the mental development of the individual concerned or the mental development of the normal or average child of that age.
>
> In Yachuk v Oliver Blais Co. Ltd.[38] .... the Judicial Committee of the Privy Council were asked to fix a standard of care for the particular child, but considered it unnecessary to say whether that should be done: taking the view that the child concerned had no special knoweledge and that the question, therefore, did not arise.
>
> There was also the position in Fleming v Kerry Co. Co., and it was the position here.

> It is, therefore, unnecessary to consider the matter further or to express an opinion thereon.
>
> If a case should arise where a claim is made that a higher or a lower standard of care is to be applied in the case of an invididual child or, for that matter, any person suffering from a defect as in the Scottish case of Leitch v Glasgow Corporation,[39] such case will have to be considered and should not be prejudged now."[40]

In Kingston v Kingston[41], Walsh, J. stated obiter:

> "The standard of care to be expected from child plaintiffs has .... in practice varied somewhat in the case of children over the age of seven years. The test would, however, on the whole, appear to have remained an objective one although varying with the age: see the judgment of Lavery J. giving the judgment of the Supreme Court in Dufffy v Fahy[42] and also the judgment of O'Byrne J. in Fleming v Kerry County Council[43] ...."[44]

In McNamara v Electricity Supply Board[45], the Supreme Court was called on to determine the contributory negligence of an eleven-year-old boy who was injured when climbing on the defendant's electricity sub-station. The boy had been warned by his father not to go to the sub-station. He was aware of the existence of a number of notices around it warning persons of the danger but claimed that he had never read them although he was able to read. The jury found that he had not been negligent and the defendant appealed against this finding (among others).

It is difficult to discern unanimity among the members of the Court as regards the proper standard to be applied.

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Walsh, J. stated that

> "the test to be applied is that stated by O'Byrne J. in Fleming v Kerry County Council[46], which is that it is for the jury to determine whether the boy fell short of the standard which might be reasonably expected from him having regard to his age and his development."[47]

In this passage and the passage[48] following afterwards, Walsh, J. favoured a subjective standard, whilst considering that a more objective standard would have yielded the same result.

Henchy, J. considered that the relevant standard was that

> "to be expected from a boy aged 11 years of the plaintiff's education and general background ...."[49]

Griffin, J. did not refer to the standard in express terms but he appears to have favoured the subjective approach to the extent that he considered[50] the plaintiff's capacity to read - rather than that of the ordinary eleven-year-old - to be of major significance.

Budd, J. concurred[51] with the judgment of Walsh, J. The brief treatment[52] of the issue by FitzGerald, C.J. does not indicate a clear leaning towards either the objective or subjective approach.

In Brennan v Savage Smyth & Co.[53], in 1982, the Supreme Court again considered the question of a child's contributory negligence. There a 7½-year-old child was injured when he was crushed by a reversing van. The child had been "scutting" on the rear bumper. He had pretended to run away from the van, to make the driver think that he was not "scutting" on the bumper. The driver was unable to

see the child when he was reversing. The accident occurred on a service road near a large complex of corporation flats. The Supreme Court held on the evidence that the driver had been negligent, although there was some disagreement as to the basis of this holding. On the question of the child's contributory negligence, the Supreme Court unanimously altered the jury finding of 5% to 25%. O'Higgins, C.J. said:

> "In my view, the finding of 5% against a plaintiff found guilty of contributory negligence is almost an assertion by the jury that such a plaintiff was really blameless. I think that the circumstances would require to be really special to justify such a finding. I do not think that they are so in this particular case. While the plaintiff was only 7½ at the time of the accident, there was no question raised as to his intelligence nor as to his knowledge of what he was doing. He was a child of the environment, well used to vans, lorries and cars and, since he deliberately sought to deceive the driver lest he be stopped, fully aware that 'scutting' was dangerous and wrong. On his own evidence he tried it twice with the defendants' van and it was as the result of the second attempt that he found himself in danger. At this stage I do not think that he realised the danger but he was there because of his own fault and his persistence in doing something which he knew was wrong."[54]

In this passage, O'Higgins, C.J. appears without question to endorse the subjective formula of a child's age, intelligence and experience. The other judgments do not consider the question in great detail. It is worth noting Henchy, J.'s observation that the plaintiff, although only 7½ years old, had "furtively, wilfully and in a way that he knew to be prohibited and to be fraught with the risk of

injury, put himself in the position of danger which resulted in the accident".[55] The general tenor of this statement suggests a subjective rather than objective approach.

Although the question is still to some degree uncertain[56], it would appear that the better view is that the contributory negligence of a child in this country is to be determined by his age, his mental development and possibly his general experience - in other words, by what is referred to as the subjective test. It would surely be straining the language of O'Byrne, J. very far to suggest that he was proposing that the standard of mental development of an "ordinary" child of the same age as the plaintiff should be applied. If he had intended to propose such a standard, he would surely have said so in clearer terms. What he did say would appear to be consistent only with the subjective approach.

The subjective approach has widespread support in the common law provinces of Canada[57], in South Africa[58] and in the common law jurisdictions[59] of the the United States[60]. The position in England is uncertain[61]. In Australia in the wake of McHale v Watson,[62] there is considerable uncertainty as to the extent (if at all) to which the intelligence and experience of a child should be taken into account.

(iii) **Effect of the Civil Liability Act 1961**

Section 34(1) of the Civil Liability Act 1961[63] introduced a system for the apportionment of liability in cases where the plaintiff was guilty of contributory negligence. It provided that in such cases

> "the damages recoverable .... shall be reduced by such

> amount as the court thinks just and equitable having regard to the degrees of fault of the plaintiff and the defendant ...."

The question has arisen in the United States[64], Australia[65] and South Africa[66] as to whether, in making this determination, regard is to be taken of the youth of the child not only in determining, initially, if he is negligent but also, having decided that he was, in determining the "degree of fault" to be attributed to him. It has been argued - successfully in South Africa, but not so in the United States or Australia - that to have regard to the child's youth as a factor in mitigation of his responsibility is unfair once he has been adjudged negligent according to the reduced standard of care appropriate to children. In effect, it is argued, this is allowing the plaintiff to have undue allowance made for his youth. Against this, it has been said that preserving the distinction does "not import two different tests but merely temper[s] the wind to the shorn lamb."[67]

It would appear that in this country[68] the child's youth will be permitted to be taken into consideration in determining his degree of fault under section 34(1) of the Civil Liability Act 1961[69].

(c) **Negligence**

The position regarding the negligence of a child is not entirely certain in the absence of judicial authority. There have been statements[70] to the effect that minority does not afford a defence to an action for negligence but the better view[71] appears to be that the negligence of a child should be judged by the same standard as that regarding his contributory negligence[72]. Despite strong

pressure from certain academic commentators, the courts in the United States have maintained the same approach[73]. However, a qualification to the standard of conduct that is generally applied to children has been recognised in a number of common law jurisdictions, including Australia[74], New Zealand[75], Canada[76] and the United States[77]. Courts there have held that where a child engages in a dangerous activity normally performed by an adult - such as driving a car or operating a power boat - he must be judged by the standard appropriate to adults. This approach does not appear to have found any explicit support as yet in our law. With regard to licensed drivers of seventeen years, the question is more of theoretical than of practical significance, since there will ordinarily be no reason, applying the subjective test of minority, to impose a more indulgent standard on the minor than would apply to an adult driver[78].

The Adult Activities Doctrine[79]

We must now examine in more detail the development of the law which we have just mentioned, which has not yet been considered by an Irish court. This concerns the "adult activities" doctrine whereby a child who performs an activity which requires adult maturity or skill, such as driving a car, will be held to an adult standard of care, without regard to his age, intelligence or experience.

The development of this doctrine can best be understood through an examination of the experience in the United States. The leading decision[80] is Dellwo v Pearson[81] where, in 1961, the Supreme Court of Minnesota decided whether a minor was liable for injuring the plaintiff when operating a boat with an outboard motor.[82] The court

conceded that the subjective standard was proper and appropriate to assess the contributory negligence of a child,[83] but stated that "this court has previously recognized that there may be a difference between the standard of care that is required of a child in protecting himself against hazards and the standard that may be applicable when his activities expose others to hazards."[84] The court noted that, in the modern world, motor vehicles are readily available and so the court would "be skeptical of a rule that would allow motor vehicles to be operated to the hazard of the public with less than the normal minimum degree of care and competence."[85]

In the central passage of the decision, Loevinger, J. stated:

> "To give legal sanction to the operation of automobiles by teen-agers with less than ordinary care for the safety of others is impractical today, to say the least. We may take judicial notice of the hazards of automobile traffic, the frequency of accidents, the often catastrophic results of accidents, and the fact that immature individuals are no less prone to accidents than adults. While minors are entitled to be judged by standards commensurate with age, experience, and wisdom when engaged in activities appropriate to their age, experience, and wisdom, it would be unfair to the public to permit a minor in the operation of a motor vehicle to observe any other standards of care and conduct than those expected of all others. A person observing children at play with toys, throwing balls, operating tricycles or velocipedes, or engaged in other childhood activities may anticipate conduct that does not reach an adult standard of care or prudence. However, one cannot know whether the operator of an approaching automobile,

> airplane, or powerboat is a minor or an adult, and usually cannot protect himself against youthful imprudence even if warned. Accordingly, we hold that in the operation of an automobile, airplane, or powerboat, a minor is to be held to the same standard of care as an adult."[86]

The court conceded that there undoubtedly were problems attendant upon the view but argued that there were problems in any rule that might be adopted on the question.[87] It noted that the most recent tentative revision of the Restatement[88] had adopted a broader rule than it favoured, whereby a child would be held to the adult standard whenever he engaged "in an activity which is normally undertaken only by adults, and for which adult qualifications are required."[89] The court considered it unnecessary in the case before it to adopt a rule in such a broad form and therefore expressly left open the question whether or not that rule should be adopted in Minnesota. It concluded that it was sufficient for the present to say that no reasonable differentiation between different types of motor vehicles could be made and that "a rule requiring a single standard of care in the operation of such vehicles, regardless of the age of the operator, appears to us to be required by the circumstances of contemporary life."[90]

Dellwo v Pearson was followed one year later by Neilsen v Brown.[91] There the Oregon Supreme Court imposed an adult standard of care in determining whether a sixteen-year-old licensed driver of a car had been guilty of gross negligence in its operation. The court was clearly influenced by the statutory requirement to have a licence to drive a car.[92]

In 1962, the Illinois Appellate Court in Betzold v Erickson[93] was called on to decide the standard of care that should be applied to a thirteen-year-old driver of a lorry,

where the statute prohibited granting a licence to a person of that age.[94] The court imposed the adult standard, arguing that the statute, in effect, declares that persons below the statutory age "do not possess the requisite care and judgment to operate motor vehicles on the public highways without endangering the lives and limbs of other persons."[95] The court stated that the statute was designed to protect the public lawfully using the highways.[96]

The court recognised that the failure to have a driver's license "does not of itself necessarily establish a causal connection between the operation of the motor vehicle and the injury."[97] Nevertheless, it argued:[98]

> "the defendant had no right to be operating the truck in question. All 13-year-olds fall within the same category so there can be no standard of care for such persons under the same or similar circumstances. The only standard of care that he could be judged by, is the standard of care required and expected of licensed drivers. We are of the opinion that this is the degree of care the defendant was required to exercise and not that of a child of his age, experience and capacity generally."[99]

The adult activities doctrine has been widely applied.[100] It is most frequently found in cases involving children driving cars,[101] motorcycles,[102] motor scooters,[103] tractors,[104] lorries,[105] motorized go-carts,[106] snowmobiles[107] and minibikes.[108] The adult standard, however, has not generally been applied to children riding bicycles,[109] in spite of the dangers associated with this activity for young and old alike.[110]

The adult activities doctrine has proved difficult to apply once the perspective shifts away from the highway.[111] In

Purtle v Shelton,[112] the majority of the Arkansas Supreme Court held that an adult standard of care should not be applied to a sixteen-year-old defendant who injured a companion with a high-powered rifle when hunting.[113] The court had "no doubt" that deer hunting is a dangerous sport[114] but could not say that deer hunting is an activity normally engaged in only by adults. According to the court, "[a] child may lawfully hunt without a hunting license at any age under sixteen .... We know, from common knowledge, that youngsters only six or eight years old frequently use .22 caliber rifles and other lethal firearms to hunt rabbits, birds and other small game."[115]

The court argued that, if it imposed an adult standard in the circumstances of the present case, it would have to be prepared to explain why the same rule should not apply where the gun was an ordinary shotgun, where the minor was hunting rabbits, or where a six-year-old was shooting at tin cans with an air rifle, "[n]ot to mention other dangerous activities, such as the swinging of a baseball bat, the explosion of firecrackers, or the operation of an electric train."[116] The majority was "unwilling to lay down a brand-new rule of law, without precedent and without any logical or practical means of even surmising where the stopping point of the new rule might ultimately be reached."[117] Subsequent decisions regarding the use of guns are in accord.[118]

The courts have refused to apply the adult standard not only where the shooting is related to hunting but also in cases where no question of a hunting rationale arises. Thus, in LaBarge v Stewart,[119] the standard appropriate to children was applied where a revolver fired when its sixteen-year-old owner was attempting to demonstrate to a fifteen-year-old guest how Russian roulette was played.[120] Also, in Thoman v Iman,[121] the same standard was applied where an eleven-year-

old child took a shotgun (which was there to protect the family against intruders) from his parents' bedroom and accidently killed his young cousin.[122] In the latter case, however, the court referred to the fact that "[i]n the rural districts of this state children .... have always used guns both for target practice and hunting under differing circumstances" as a reason for not imposing the adult standard.[123]

In Goss v Allen, the New Jersey appellate court applied the adult standard of care to a seventeen-year-old skier.[124] The Supreme Court reversed.[125] It found nothing in the record to support the appellate court's conclusion that skiing was an activity which might be dangerous to others and was normally undertaken only by adults.[126] The Supreme Court considered it "judicially noticeable that skiing as a recreational sport, save for limited hazardous skiing activities, is engaged in by persons of all ages."[127]

The court did not dispute the general proposition that "certain activities engaged in by minors are so potentially hazardous as to require that the minor be held to an adult standard of care."[128] It considered that "[d]riving a motor vehicle, operating a motor boat and hunting would ordinarily be so classified."[129] The court noted, without further clarification, that as to the activities mentioned, New Jersey law requires that a minor must be licensed and must first demonstrate the requisite degree of adult competence.[130]

The dissent is worthy of particular attention since it goes to the core of the conceptual rationale for the adult activities doctrine put forward by the majority. Justice Schreiber considered that there were "several inherent difficulties in and inequitable consequences"[131] of the rule adopted by the majority:

> "What criteria are to be employed by the jury to ascertain whether an activity is 'potentially hazardous'? If a 'potentially hazardous' activity is one which results in serious or permanent injury, then almost any activity might fall within that category. The injured person who has lost the sight of an eye resulting from a carelessly thrown dart, a stone, or firecracker, the death caused by a bicycle, or an individual seriously maimed due to an errant skier - all are indisputable proof of 'potentially hazardous' activity. The majority prescribes no guideline except to imply that whenever licensing is required, the 'potentially hazardous' test is met. But the State does not impose a licensing requirement on all 'potentially hazardous' activities and whether one has a license or not is often not relevant in measuring conduct of a reasonably prudent person. Whether the driver of an automobile is licensed, for example, is not relevant in adjudicating if the automobile was being driven in a reasonably prudent manner."[132]

The imposition of an adult standard on a child was taken to its furthest extent in the New York decision of Neumann v Shlansky.[133] The plaintiff was struck on the knee by a golf ball driven by the defendant, an eleven-year-old boy. The boy had "taken lessons and play[ed] regularly at his club."[134] He was playing a par three hole of about 170 yards and the plaintiff was within 150 to 160 yards of him leaving the green of the hole when he struck the shot. The defendant shouted "fore" but was not heard by the plaintiff.[135]

The trial judge charged the jury that the defendant was to be held to the standard of care of an adult and not to the usual standard of care of a child. The jury returned a verdict for the plaintiff. The defendant's motion to set

aside the verdict and for a new trial on the grounds that the jury charge was erroneous as a matter of law was denied.[136]

Marbach, J. considered that the analogy with driving a car was sufficiently strong to apply the same increased standard of care:

> "Just as a motor vehicle or other power-driven vehicle is dangerous, so is a golf ball hit with a club. Driving a car, an airplane or powerboat has been referred to as adult activity even though actively engaged in by infants .... Likewise, golf can easily be determined to be an adult activity engaged in by infants. Both involve dangerous instruments .... No matter what the age of a driver of a car or a driver of a golf ball, if he fails to exercise due care serious injury may result. Driving a car, it is true, is not a game as golf may be. However, golf is not a game in the same way that football, baseball, basketball or tennis is a game. It is a game played by an individual which in order to be played well demands an abundance of skill and personal discipline, not to mention constant practice and dedication. Custom, rules and etiquette play an important role in this game. Foremost among these is the fact .... that one does not hit a ball when it is likely that the ball could or will hit someone else for the obvious reason that someone could get hurt."[137]

The court stressed that the defendant had considerable experience in learning and playing golf, sometimes in the company of adults, which meant that "[t]his particular infant defendant was for all purposes on the golf course as an adult golfer."[138] This reference to the individual circumstances of the defendant bears a striking similarity

to the subjective test, which the court was at pains to reject. It met this by arguing, unconvincingly, that in contrast to the approach it favoured, the subjective standard "does not adequately consider the objective nature of the game, the inherent risks involved and the undisputed fact that a golf ball is a dangerous missile capable of inflicting grievous harm no matter who hits it."[139]

In his concluding remarks, Marbach, J. appeared to backtrack from the clear adherence to the view that an adult standard should be imposed. He stated:

> "When you have, as we have here, a situation where there is potentially an inherently dangerous object hit by someone who despite his age is for all practical purposes just like an adult on the golf course then it is this Court's opinion that he shoud be treated like an adult and held to an adult standard of care. It may be true that, hypothetically, a six year old could appear on the course for the first time and hit a ball which would hurt someone and the objective standard might not be applicable, but that would be the exception rather than the rule. People who play golf on a golf course know or should know that a golf ball can cause serious injury just as a car may cause serious injury and they should exercise the same degree of care."[140]

The effect of this equivocation is difficult to assess. Apparently it concedes that the adult standard is not to be applied to all children who play golf. If it is not to apply to a first-time player aged six years, the question arises as to whether it applies to one aged seven, eight, or eleven, the age of the plaintiff in the present case.[141] Of course many six-year-old children, apart for having little physical competence when attempting to strike a golf

ball, will not appreciate the dangers to others involved in their act. In contrast, most eleven-year-old children will have far greater understanding of these dangers. The real negligence of the defendant in this case lies, not in making a poor shot, but in deciding to make a shot at all at the time he did. Perhaps the court, in spite of its invocation of the adult activities doctrine, was making a distinction which may be more easily understood - and indeed supported - by reference to the classic standard applicable to children.

On appeal, the Supreme Court affirmed in a single sentence, "In short, when an infant participates with adults in a sport ordinarily played by adults, on a course or field ordinarily used by adults for that sport, and commits a primary tortious act, he should be held to the same standard of care as the adult participants."[142]

It may be argued that this criterion for the imposition of an adult standard of care is both too broad and too narrow: too broad because it extends to all sports played by adults, many of which have no inherent dangers for others; too narrow because it requires that the child's tortious act be committed when he or she is participating with adults in the sport. Assuming for the moment that the adult standard is ever appropriate for children, there seems little sense in making its application depend on the contingent and largely irrelevant question of whether or not the minor is accompanied by an adult when he or she acts carelessly.

Gulotta, J., in dissent, did not think "a valid analogy can be drawn between driving a golf ball and driving an automobile. It is true that harm can result from either, but so can it from baseball, football, archery and many other activities and surely we cannot have a special rule for each."[143] Nor could he accept that golf was an activity normally engaged in only by adults. Natural experience

contradicted this assertion: many teenagers were accomplished golfers, and members of school teams often attained scores of championship calibre.[144] On further appeal, the New York Supreme Court, Appellate Division, affirmed in a memorandum decision.[145]

In New Zealand the adult activities doctrine has also been favoured, but with far less conceptual analysis. In Taurunga Electric Power Board v Karora,[146] the Court of Appeal held that a seventeen-year-old cyclist could be judged by the same standard as an adult as regards his contributory negligence arising out of his failure to observe traffic regulations relating to cycling on the left-hand-side of the highway. Myers, C.J. discussed this important issue in the following passage which, having regard to its importance merits extended quotation:

> "The negligence alleged .... against the .... boy consisted of various breaches of the traffic regulations relating to bicycles, and if those breaches were made out it is difficult to see prima facie how they could be anything else than cogent evidence of negligence. The question now involved, however, is simply whether as a matter of law the deceased boy was entitled to be excused by the jury from the consequences of his negligence on the ground that the law does not require the same degree of care to be exercised by a normal youth of sixteen or seventeen years of age when riding a bicycle as an adult person; or rather whether, as a matter of law his age could be taken into consideration as a factor excusing his negligence if such negligence were proved to the satisfaction of the jury. There has never yet been a decision to that effect, and, if it were the law, it would be exceedingly unfortunate and would constitute an added terror to the difficulties and dangers of

> modern traffic conditions. Regulation 22 of the Traffic Regulations, 1936,[147] creates penal offences, and under our law every person of or over the age of fourteen years is in substantially the same position so far as responsiblity to the criminal law is concerned: Crimes Act, 1908, s. 42. Moreover, a person of the age of fifteen years is entitled, subject to satisfactory evidence of his qualifications, to a motor-driver's license: Motor Vehicles Act, 1924, s. 21. It would be idle to contend, therefore, that a motor-driver of sixteen or seventeen years was entitled on account of his youth to be excused from the consequences of his negligence as such driver. Now, seeing that Reg. 22 applies to 'every rider' of a bicycle and that bicycles are used and ridden by thousands of young persons, I can see no reason in principle why any lower standard of care should be permitted in the case of a normal person of sixteen or seventeen years old than in the case of a person of or over the age of twenty-one years, or why the age of the younger person should be a factor in deciding whether or not he has committed a breach of the regulations and has thereby been guilty of negligence."[148]

The Chief Justice considered that two Australian decisions[149] relied upon by the trial judge were not relevant as they were master-and-servant cases "to which special considerations may apply".[150]

Myers, C.J. conceded that "[t]here might well be a question of some difficulty in the case of a very young child who sustains an injury by accident while riding a bicycle or tricycle"[151] but considered that that question could be left open for determination when it might arise.

In a concurring judgment Smith, J. considered that to allow

a youth of seventeen years observe the standard merely of bicyclists of his own age would be a "dangerous doctrine"[152] but he stressed that, with respect to children under the age of fifteen years, their age should be taken into account.

Taurunga[153] is an important decision in that it goes further than decisions in other countries, notably the United States,[154] in imposing an adult standard on child cyclists.

Taurunga may be contrasted with the later decision of Ralph v Henderson and Pollard Ltd.,[155] where Richmond, J. declined to hold that an adult standard of care should have been articulated when the jury were being directed on the question of the contributory negligence of a 16-year-old employee injured by an unfenced saw at his place of employment. Richmond, J. did not dispute the principle of imposing an adult standard on a child defendant "engaged in dangerous adult activities such as driving a car or handling industrial equipment",[156] but he did not think that this principle could apply to the case before him as there was "no question of the plaintiff's work being harmful to others".[157] He noted, however, that the jury had been left "entirely .... to decide for themselves"[158] the standard of care which the reasonable person of the age and experience of the plaintiff should have exercised in the circumstances as they existed. It was, he thought, a question of fact for the jury to decide whether that standard should be fixed at any lower level than would be expected from an adult, and, he added, "for all I know they may have well (sic) accepted the latter standard".[159]

In Australia two decisions on the standard appropriate to a minor engaging in an adult activity are worthy of note. In Tucker v Tucker,[160] Reed, J., of South Australia's Supreme Court imposed liability on a 16½-year-old driver of a motor vehicle. He paid no attention to the driver's age, and

determined the question of the driver's negligence in accordance with the adult standards, although there was evidence that the driver (at all events at the time of the trial two years later) possibly lacked the intelligence of an adult.[161] The decision is of poor analytic quality and provides no principled basis for imposing the adult standard.

A contrasting approach was favoured by the Supreme court of Victoria in Broadhurst v Millman.[162] The Full Court[163] held that the trial judge had erred in failure to make it clear in his instructions to the jury that in determining whether the plaintiff cyclist, aged 15½ years, had been guilty of contributory negligence, the age of the cyclist was a relevent consideration. Neither Tucker v Tucker[164] nor Taurunga Electric Power Board v Karora[165] was cited in this decision and may well not have been brought to the court's attention.

(II) Liability of Other Persons for Minor's Wrongful Act

According to the decided cases, a parent is not as such liable for the torts of his or her children.[166]

Parents[167] may, however, be liable for torts committed by their children in the following circumstances:

(a) Where the Parent has Directed, Authorised or Ratified the Act of the Minor

> "It seems clear that if the parent has directed, or consented to, or ratified, the child's acts which cause

> the damage, the plaintiff will be able to recover damage from the parent as an independent tortfeasor: qui facit per alium facit per se."[168]

This has generally been considered to be the position by the commentators,[169] but the authorities are sparse.

In Waters v O'Keeffe,[170] the children of the defendants, without their authority erected a gate on their property. The plaintiff was injured when it fell on him when he was climbing it. The defendants were held not liable for his injuries since their children had acted without their authority.

Moon v Towers[171] is the leading English authority. There, the Court held that there was no evidence of ratification on the facts of the case. There was some division, however, as to whether the parent would have been liable if ratification had been established. Erle, C.J. stated:

> "I do not mean to decide whether or not the father could be rendered liable by his subsequent ratification of the act of the son, because I am of opinion that there was no evidence that he did so ratify it."[172]

This would suggest some doubt as to the question of the principle of liability based on ratification but another statement[173] by the Chief Justice appears to assume that liability could attach on such a basis.

Williams, J. also appears to leave open the question of liability based on ratification,[174] but he favoured a broad application of the concept of ratification,[175] on the assumption that it would give rise to parental liability.

(b) **Where there is a Relationship of Master and Servant Between Parent and Child**

A parent may be vicariously liable for the torts committed by his child where a master-servant relationship exists between them.[176] Liability may be imposed not only where there is an express contractual relationship between parent and child (as, for example, where a doctor employs his daughter as a receptionist) but also where no formal contractual relationship exists between them. In many common law jurisdictions, children driving cars owned by their parents have been regarded by the courts in a service or agency relationship, so that liability is imposed on the parents in relation to the children's negligence.[177] These decisions have generally been regarded as sui generis, being considered to be no more than a device adopted by the courts to enable injured persons to recover compensation from insurance companies.[178] The decision of Moynihan v Moynihan,[179] however, adopts a different approach.

The facts briefly were that a two-year-old infant was injured when visiting her grandmother's home where she was scalded by a teapot as a result of the alleged negligence of her aunt, an adult woman who lived with her mother - the infant's grandmother. The infant sued her grandmother,[180] claiming that she was vicariously responsible for the negligence of her daughter, the infant's aunt. The trial judge, Gannon, J., withdrew the case from the jury but the Supreme Court[181] reversed.

Walsh, J., who delivered the majority judgment (with which O'Higgins, C.J. concurred) based the liability on the hospitality extended to the plaintiff by the defendant:

> "The negligence attributed to [the daughter] was not the casual negligence of a fellow guest but may be

> regarded as the negligence of a person engaged in one of the duties of the household of her mother, the defendant, which duties were being carried out in the course of the hospitality being extended by the defendant. The nature and limits of this hospitality were completely under the control of the defendant, and to that extent it may be said that her daughter .... in her actions on this occasion was standing in the shoes of the defendant and was carrying out for the defendant a task which would primarily have been that of the defendant, but which was in their case assigned to [her daughter]. As the defendant was the person providing the hospitality, the delegation of some of that task to her daughter .... may be regarded as a casual delegation. [The daughter]'s performance of it was a gratuitous service for her mother. It was within the control of the defendant to decide when the tea would be served and where it would be served and, indeed, if it was to be served at all. It was also within the control of the defendant to decide how it was to be served."[182]

Walsh, J. stressed that

> "This power of control was not in any way dependent upon the relationship of mother and daughter but upon the relationship of the head of a household with a person to whom some of the duties of the head of the household had been delegated by that head. The position would be no different, therefore, from that of a case where the head of a household had requested a neighbour to come in and assist in the giving of a dinner-party because she had not any, or not sufficient, hired domestic help.[183] It would produce a strange situation if in such a case the 'inviter' should be vicariously liable for the hired domestic

> help who negligently poured hot sauce over the head of a guest but should not be equally liable for similar negligence on the part of the co-helper who was a neighbour and who had not been hired. In my view, in the latter case the person requested to assist in the service, but who was not hired for that purpose, is in the de facto service of the person who makes the request and for whom the duty is being performed."[184]

A further passage of Walsh, J.'s judgment is of direct relevance in the present context. He stated:

> "Most, if not all, of the cases of gratuitous service in respect of which a vicarious liability has been imposed upon the person for whom the service performed relate to motor cars, but these cases confirm the view that, even if the doctrine of vicarious liability depends upon the existence of service, the service does not have to be one in respect of which wages or salary is paid but may be a gratuitous service or may simply be a de facto service. For example, in the present case if the defendant had requested or permitted her daughter .... to drive the plaintiff home in the defendant's motor car and the plaintiff had been injured through [the daughter's] negligence, there would have been no doubt about the vicarious liability of the defendant. It may well be, as has been suggested by one noted writer,[185] that the fact that this imposition of vicarious liability has apparently been confined to motor-car cases is because it was developed as a means of reaching the insurance company of the owner of the car. Whatever may be the reasons for the development of the doctrine in a particular area, the reasons cannot mask the basic principle of law involved."[186]

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Henchy, J. dissenting, saw

> "no justification for stretching the law so as to make it cover the present claim when, by doing so, the effect would attach to persons for casual and gratuitous acts of others, as to the performance of which they could not reasonably have been expected to be insured. .... it would be unfair and oppressive to exact compensatory damages from a person for an act done on his behalf, especially in the cases of an intrinsically harmless act, if it was done in a negligent manner which he could not reasonably have foreseen and if - unlike an employer, or a person with a primarily personal duty of care, or a motor-car owner, or the like - he could not reasonably have been expected to be insured against the risk of that negligence."[187]

Moynihan v Moynihan[188] would appear to be of some significance in relation to the liability of parents for the torts of their children. Nevertheless it should be stressed that the decision proceeds on the basis of liability for control of domestic hospitality, which was "not in any way dependent upon the relationship of mother and daughter".[189]

(c) Where the Parent is Negligent in Affording his Child an Opportunity of Injuring Another

A parent may be negligent in affording his child an opportunity of injuring another.[190] The negligence may consist of a wide range of behaviour, which may be summarized conveniently under three headings.

(i) **Dangerous Things**

It may be negligent for a person to leave dangerous things within access of a child in circumstances where injury to the child or another is foreseeable. A clear case is where a person leaves a loaded gun within reach of a young child. Liability will not depend on the relationship between parent and child that may exist in such a case but rather on the foreseeability of harm.[191] The leading Irish decision on the question is Sullivan v Creed.[192] There the defendant, a farmer who had been shooting rabbits on his property, left his gun loaded and at full cock standing inside a fence on his lands. His fifteen-year-old son, not realizing that the gun was loaded, pointed it at play at the plaintiff and injured him severely. A verdict for the plaintiff was upheld.

In the Court of Appeal, FitzGibbon, L.J. stated:

> "The scope of the duty is the scope of the danger, and it extends to every person into whose hands a prudent man might reasonably expect the gun to come, having regard to the place where he left it. The ground of liability here is not that the boy was the defendant's son, but the fact that the gun was left without warning, in a dangerous condition, within reach of persons using the pathway, and the boy was one of the very class of persons whom the defendant knew to be not only likely but certain to pass by, viz. his own household."[193]

A parent (or other person) may also be liable where he or she negligently entrusts a dangerous thing to a child in circumstances where injury to the child or another is foreseeable. In the English decision of Newton v

Edgerley,[194] Lord Parker, C.J. observed that whether or not the entrustment was negligent ".... must depend upon the exact facts of every case". In Newton, liability was imposed on the father of a twelve-year-old boy who allowed his son to own a .410 gun but who had instructed him not to use it when other children were present. He had given the boy some instruction in how to use the gun but had never instructed him on its use when others were present. The Court in Newton distinguished Donaldson v McNiven,[195] where the father of a thirteen-year-old was exempted from responsibility where he allowed the child to have an air rifle, on the ground (inter alia) that, in Donaldson, the point had never been taken that it was, itself, negligent on the part of the defendant to allow his son to have an air rifle at all.

In Gorely v Codd[195] the father of a sixteen-year-old boy, academically retarded by five and a half years but otherwise of ordinary mental development, who entrusted his son with a BSA .22 gun was exempted from responsibility when the boy shot another teenager (also mentally retarded), since the Court considered that the father had adequately instructed his son in the use of the gun. In Bebee v Sales,[197] however, liability was imposed when the defendant father allowed his fifteen-year-old son to continue using an air gun after he had received a complaint of misuse by the child of the gun. In Court v Wyatt[198] liability was imposed on the father of a fifteen-year-old boy who entrusted him with an airgun although he knew that the child was of such a disposition that "there was a real likelihood that he would not obey [any] instructions and ignore .... warnings". In Rogers v Wilkinson[199] the father of a twelve-year-old boy who was involved in "what might be called an ordinary shooting accident" involving the ricochet of a pellet was exempted from responsibility, since he had adequately instructed his son in the use of the gun.

It would appear that liability relating to use of guns by children may also arise under the Firearms Act 1925.[200] Persons under the age of sixteen years are not entitled to hold a firearm certificate.[201] It is unlawful for any person to sell to another a firearm or ammunition unless the other person produces a firearm certificate or proves to the former's satisfaction that he is legally entitled to have the firearm or ammunition with having a firearm certificate therefor.[202] The word "sell" is very broadly defined so as to include letting on hire, giving and lending.[203] It would appear, therefore, that a parent who lawfully possesses a gun would be in breach of the law, with consequent possibly civil liability based on this statutory breach, if he gives the gun to his child who does not possess a firearm certificate and who proceeds to injure another person.[204]

(ii) Children with Dangerous Propensities

The second basis of negligence on the part of a parent may arise where a parent, who knows or ought to know[205] of a particular dangerous propensity of his or her child fails to protect others against injury likely to result from it. Thus, for example, if the parent is aware that his or her child has attacked other persons previously[206] or has displayed a tendency to steal[207] or to set fire to property[208] or drive dangerously[209], the parent may be liable if he fails to take the necessary steps to protect others from harm likely to result from a repetition of this conduct.

The steps that the parent will be required to take will depend on the circumstances of the case. The proper approach may be to discipline the child, encourage him to behave differently, remove him from likely sources of temptation or warn his potential victim. Clearly the age

of the child and the nature of the danger will greatly affect this question. It is settled, however, that the parent is not an insurer in such cases: his reasonable best may just not be enough to prevent the injury, in which case he will not be liable to the victim.[210]

(iii) **Lack of Proper Control**

The third and final basis of liability in negligence on the part of a parent arises where the parent fails to control the child adequately so that an unreasonable danger to others - or indeed the child[211] - results.

In Curley v Mannion,[212] in 1965, the Supreme Court held that it might be negligence for the owner and driver of a car to permit his passenger to open a door without ensuring that other roadusers would thereby be endangered. In this case, the 13-year-old daughter of the driver opened a door in the path of a cyclist. Ó'Dálaigh, C.J. stated that, in his judgment:

> "a person in charge of a motor car must take resonable precautions for the safety of others, and this will include the duty to take reasonable care to prevent conduct on the part of passengers which is negligent. In the present case that duty is, it seems to me, reinforced by the relationship of parent and child; and a parent, while not liable for the torts of his child, may be liable if negligent in failing to exercise his control to prevent his child injuring others."[213]

Walsh, J. considered that the steps which the person in charge of a car should take to protect others from injury must be determined in the light of the exact circumstances

of each case:

> "In this case the defendant by reason of the fact that he was the parent of the tortious child could be held to have had an authority over the child. By reason of his proximity to the child he could be held to have been in a position to exercise that authority."[214]

In the English decision of Carmarthenshire County Council v Lewis,[215] the House of Lords discussed the question in relation to a nursery school, from which a four-year-old child escaped onto the highway, causing the death of the plaintiff's husband who crashed his lorry when attempting to avoid him. The case proceeded on the basis that the duty of the teacher in charge of the child "was that of a careful parent",[216] and throughout the speeches, an appreciation of the implications of the decision for parents, more particularly mothers, is apparent. In discussing the question of the duty to be imposed on the defendant, Lord Reid stated:

> "The appellants say that it would be unreasonable to apply th[e] principle [of reasonable foreseeability] here because if such a duty is held to exist it will put an impossible burden on harassed mothers who will have to keep a constant watch on their young children. I do not think so. There is no absolute duty; there is only a duty not to be negligent, and a mother is not negligent unless she fails to do something which a prudent or reasonable mother in her position would have been able to do and would have done. Even a housewife who has young children cannot be in two places at once and no one would suggest that she must neglect her other duties, or that a young child must always be kept cooped up .... What precautions would have been practicable and what precautions would have been

> reasonable in any particular case must depend on a great variety of circumstances."[217]

There are few decisions on this subject, but it is easy to envisage cases where a parent's negligent control of a child may lead to injury to another. The escape onto the highway, as in Lewis,[218] is a classic case; consciously allowing a child to place himself in a position of danger which is likely to induce a rescue attempt is another example.

Two general aspects of parental liability remain to be considered.

The first relates to the relevance of the age of the child

Clearly, where the child is very young, the parents' responsibilities are very high and they will not normally be allowed to excuse themselves by having relied on their young children to behave in a particular manner, when their immaturity and inexperience would not warrant that trust. It has been well observed, however, that

> "[a]s they approach maturity, and as an aid in their attaining it, adolescents require more freedom, and hence less supervision, than their young children. As a child grows older there are fewer situations in which his parents have the ability to control him. Concomitantly, as he grows older there should be fewer situations in which they have a legal obligation to do so."[219]

The precise age at which parents cease to be responsible either vicariously or personally for injuries caused by their children is a question of some uncertainty. On principle it would appear that the fact that the child has

reached full age should not of itself extinguish the liability of a parent under two of the three headings of liability considered above[220] but that clearly a Court would be reluctant in the extreme to impose liability on parents in respect of injuries caused by their adult children unless the facts were somewhat exceptional.

The second area of uncertainty relates to the question of which parent is responsible under the headings of liability considered above

The decisions on parental liability do not contain any clear analysis of this question. Usually the father alone is sued; sometimes both parents are defendants; most rarely, the mother alone is sued. Clearly, the question of who is the proper defendant depends greatly on the facts of the case. If a father has supplied his child with a gun, he rather than the mother will appear to the plaintiff to be the more obvious defendant. If a mother who works in the home lets her child escape onto the highway from a store when she is shopping, it is not likely to occur to the plaintiff to sue the father who is at the time working in an office some miles away. In other words, the specific factual circumstances of the case have tended usually to point to one of the parents as the more appropriate defendant.

Having regard to constitutional, statutory and judicial developments, it would appear that the liability of parents would not depend on their sex, but rather on the particular factual circumstances of each case, against a legal background of equality of legal responsibilities relative to the upbringing of their children.

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(III) Liability of Parents and Other Persons Arising from Criminal Acts of Minors

Section 99(1) of the Children Act 1908[221] provides that

> "Where a child[222] or young person[223] is charged before any court with any offence for the commission of which a fine, damages or costs may be imposed, and the court is of opinion that the case would be best met by the imposition of a fine, damages, or costs, whether with or without any other punishment, the court may in any case, and shall if the offender is a child, order that the fine, damages, or costs awarded be paid by the parent or guardian of the child or young person instead of by the child or young person, unless the court is satisfied that the parent or guardian cannot be found or that he has not conduced to the commission of the offence by neglecting to exercise due care of the child or young person."

The expression "guardian" includes

> "Any person who, in the opinion of the court having cognizance of any case in relation to the child [or] young person .... or in which the child [or] young person .... is concerned, has for the time being the charge of or control over the child [or] young person ...."[224]

A number of questions[225] regarding the section may be mentioned briefly. It is not clear whether liability under the section may be capable of being imposed on the parent when the child is in the charge of another - a schoolmaster or local authority, for example. Nor is it clear whether the concept of "neglecting to exercise due care" of the

child is based on objective or subjective criteria.

The Law in Northern Ireland

The law in Northern Ireland is substantially similar to what has been described above. No proposals for reform of this area of the law have been made in Northern Ireland.

CHAPTER 2 LIABILITY OF MINORS IN TORT: PROPOSALS FOR REFORM

Introduction

In this chapter we will analyse the policy basis of the present law relating to the liablity of minors for their wrongful act, and the liability of parents for damage caused by their children. We will begin by considering the subject of the liability of minors for their wrongful acts.

Liability of Minors for the Wrongful Acts

At the risk of oversimplification we will divide our analysis into three sections: first, we will consider the question of a minor's contributory negligence and negligence; secondly, we will examine the question of a minor's liability for torts requiring a general or specific intention on the part of the defendant; and finally we will consider torts involving neither intention nor negligence on the part of the defendant.

(1) Contributory Negligence and Negligence

(a) Contributory Negligence

(i) The Relevant Criteria

Under present law, as we have mentioned,[1] some courts have been tempted to ask two questions in determining whether a child has been guilty of contributory negligence: first, whether the child was of such an age as to be capable of

contributory negligence; and second, where the child was so capable, whether the child was in fact guilty of contributory negligence, having regard to his or her age, mental development and experience.

Let us consider possible avenues for reform. The first - and most radical - approach would equate the standard applicable to minors with that applicable to adults. There seems to us very little to be said in favour of this proposal[2] other than that it might be considered in some way to reflect the standard of "the reasonable person" of negligence law. Against this, we are of the view that such a standard would be manifestly unfair in that it would apply to a minor a standard of behaviour which on account of no fault of his or her own the minor child could not attain.[3] Whatever might be said in this regard in relation to the minor's negligence in terms of accident compensation,[4] contributory negligence raises no similar considerations, since imposition of an adult standard would result in a minor failing to obtain compensation to which he or she would be entitled if judged by a standard which took account of his or her lack of maturity and his or her inexperience.

A second possible solution would be for the standard of a minor's contributory negligence to be determined by that appropriate to a reasonable child of the same age as the plaintiff. In favour of this solution it may be argued that it most closely resembles the standard applicable to adults, whereby subjective considerations of intelligence and physical capacity will largely be ignored.[5] If the policy of negligence law is to "eliminat[e] the personal equation ....",[6] it may be considered that reference to the child's age is a sufficient concession to his or her youth.

As against this, it may be argued that reference to the child's age alone could yield an unsatisfactory result in a

number of cases. Children mature at widely differing times. At certain stages of their development children show marked distinctions in their mental development.[7] The yardstick of age would appear to us to impose a standard which could be unfair to child-defendants by penalising the slow developer, while being indulgent to the precocious child.

A third possible solution would be for the standard to be determined by that appropriate to a reasonable child of the same age and mental development as the plaintiff, without regard to the extent of the plaintiff's experience of the world.

This approach meets much of the criticism made against the second solution discussed above. Thus, where the mental development of a child is slower (or faster) than that of the average child of his age, the standard would allow the court to have regard to the difference. As against this, however, the proposed solution might be considered susceptible to criticism from differing standpoints.

From the objective standpoint, it might be argued that, where a person is an adult, his poor "mental development" may sometimes be related to his slow pace in maturing but on other occasions it is related to his inherent lack of capacity which will not improve with age. As a general rule, an adult who lacks intelligence is held accountable by the standards of a reasonable adult. Why, therefore, should a child who lacks intelligence not be required to reach the standard of a reasonable child? To eliminate this difference in policy, it would, of course, be possible for the law to specify that, where the child's lack of mental development was related to inherent mental incapacity which would not be likely to improve as he grew older, he would not be permitted to rely on this condition as an

excuse for his careless disregard of his safety but, to the extent that his lack of mental development was attributable to slow maturation, he should be excused.

Whether this distinction could easily be made in practice is, however, very doubtful. We suspect that it would make the task of the judge or jury unnecessarily complex, for the sake of a most theoretical notion of consistency of treatment between adults and minors.

This possible solution might also be criticised from the subjective standpoint. It might be argued that reference only to the child's age and mental development does not provide a sufficiently accurate reflection of the circumstances of the child in failing to have regard also to the child's experience.

There appears to us to be some merit to this criticism. It might be considered somewhat harsh to judge the lack of caution of an inexperienced child who knew little of the world and its dangers by the same standard as that of a child who had considerable experience of both.[8]

The fourth solution, which arises out of the previous criticism, is for the standard to be determined by that appropriate to a reasonable child of the same age, mental development and experience as the plaintiff. This is, of course, the approach taken by the courts under the present law. The advantages and disadvantages of this solution should by now be plain. The principal advantage is that it ensures that the child will not be judged by a standard higher than he or she can reasonably be expected to attain. There would appear to be three principal disadvantages. The first is that the solution would hold the bright child to a standard higher than that applicable to average children of his or her age. While at first sight this might be regarded

as the necessary consequence of excusing the child who lacks normal intelligence, brief consideration of the problem will show that this is not so. The standard might be so defined as to allow due consideration to be given to factors of intelligence and experience lowering, but not raising, the child's capacity for caution. Such a criterion would hold the very intelligent child only to the standard of care appropriate to the average child of his or her age and experience. Overall, we consider that a qualification to the rule, drafted on these lines, would not be advisable. It might be difficult to apply in practice and there is the more fundamental objection in principle that, since the special rules regarding children are based on the view that a child is usually unable to reach the standard appropriate to an adult, a bright child should not be permitted to avail himself or herself of this reduced standard to any extent greater than is necessary to take account of his or her particular degree of incapacity.[9]

In opposition to this proposed solution it might be argued, secondly, that an adult may not normally plead his or her inexperience as a reason for not being held guilty of contributory negligence: why, therefore, should a child be able to have this factor taken into account? As against this it might be argued that lack of experience, in varying degrees, is a distinctive feature of being young[10] and that the law relating to contributory negligence should take it into account in determining the standard appropriate to the particular child.

A final objection to referrring to the child's experience is that it may on occasion appear to penalise children living in communities with inadequate recreational and other resources. The very inadequacy of these resources may result in the children playing in situations of potential danger, especially near traffic. The children will, in

time, develop a degree of experience of these dangers. If this experience is used "against" them as a reason for finding them guilty of contributory negligence, this may be considered unjust to them. We appreciate the force of this objection. It should, however, be noted that experience in vacuo is not relevant: only where the experience has been such as to educate the child as to the need for care should it be taken into account. If it lacks this quality, then it will not affect the child's capacity to take care; if it does have this quality, then it follows from the application of the subjective test that it should be taken into account, as one of several factors, in determining the issue of the child's contributory negligence.

Having considered the advantages and disadvantages of these four solutions, we consider that, on balance, the fourth solution, which represents the present law, offers the best approach to the criteria for determining the contributory negligence of children.

(ii) **Minimum Age for Capacity for Contributory Negligence**

The question of minimum age for capacity to be guilty of contributory negligence raises some difficult issues. It would appear to be incontrovertible that an infant of six months, for example, should not have the issue of his capacity for negligence referred to the jury for their determination. In this regard, the present law adopts a satisfactory approach. There are, however, some important problems associated with the present law. Three of them appear to require consideration.

First, there is a wide variation in the reported decisions as to what is the minimum age at which a child may be guilty of contributory negligence. This suggests that the relevant

principles, although clear to comprehend in theory, are not so easy to apply in practice. The courts have tended to address the question of the capacity of children in general of a particular age, rather than the capacity of the child in question.

Second, the concept of "capacity" for contributory negligence suggests that the question is of an objective general nature. This may not be the best way of approaching the problem.[11] At a very young age, a child may have the capacity to be careless in basic but trifling matters - such as letting his plate fall, for example - whilst having no capacity to comprehend more complicated dangers, and consequently no capacity to be careless in regard to them. To perceive "capacity" as an "all-or-nothing" concept rather than a relative question, depending on the particular circumstances of the case, may lead to difficulties.

In dealing with such a complex phenomenon as the development of personal responsibility for one's behaviour, it may be considered to be far too simple an approach to reduce the issue (even as a preliminary question) to whether at a particular age children in general attain a capacity for legal responsibility. The manifest differences in the timing of development between different children makes this question a futile - even misleading - one to ask.

On account of these problems, it may be argued that, instead of requiring two questions[12] to be determined, the law should merely require the court to determine whether the child was guilty of contributory negligence, having regard to the circumstances of the case, including the age of the plaintiff as well as his intelligence and experience.

Such an approach appears to us to have much to recommend it.

It would remove the difficulties affecting the "capacity for contributory negligence" approach. One apparent objection to it might be that it is preposterous for the law to fail to exclude in specific terms the possibility of an infant of six months being considered negligent. On reflection, however, this does not amount to a serious criticism of the "single question" approach, which will yield the same solution as the "capacity for contributory negligence" approach, without any of the complications and possibilities for an unjust result associated with the latter approach.

Accordingly, we recommend that, instead of two questions, only one question should require determination, namely, whether, having regard to the circumstances of the case, including the age of the minor plaintiff, as well as his or her intelligence and experience, the minor was guilty of contributory negligence.

(iii) Maximum Age at which the Contributory Negligence of a Minor should be Judged by Subjective Standards

We must now consider the question as to the age at which the contributory negligence of a minor should cease to be judged by the subjective standard and should instead be judged by the objective standard applicable to adults. Three main possibilities present themselves:

(1) A specified age could be prescribed by the legislation, below which the subjective standard should be applied;

(2) the subjective standard should be applied throughout minority and no longer;

(3) a more discretionary approach could be adopted enabling (or requiring) the court to apply the objective adult

standard where the particular minor is sufficiently mature to justify such an application.

Our preference is for the first of these possible solutions. Before mentioning why we came to this conclusion we should explain why we rejected the other two solutions.

The second solution did not appeal to us because it would involve distinctions that seem difficult to defend on policy grounds. As a result of the enactment of the Age of Majority Act 1985, which came into force on 1 March 1985, a person ceases to be a minor on attaining the age of eighteen or on marrying, whichever age is the younger. If the subjective test of contributory negligence were to cease to apply once a person is no longer a minor, then a married sixteen-year-old, for example, who is of slow mental development, would be judged by an adult standard when his or her unmarried twin, of the same mental development, would be judged by a lower standard. We consider that, on balance, justice requires that a person should not be required to behave according to a standard which he or she cannot in fact reasonably attain, by reason of the legal consequence of majority having attached to the act of marrying. It could, nevertheless, be argued that, if the distinctive rules of the law of contract appropriate to minors no longer apply to a person who has reached full age by marrying, then the same consequence should take place in regard to the law of contributory negligence. We appreciate the force of this argument. A distinction between contract and contributory negligence, so far as the minor is concerned, is, however, worth noting. Contract involves the free assumption of a legal relationship with another party, whereas contributory negligence lacks this dimension of the exercise of autonomy. Marriage involves such an important exercise in free choice that it is reasonable for the law to conclude that, if a person has sufficient

maturity to marry, he or she also has sufficient maturity to enter into other contracts. But the fact of marriage does not, of itself, imply an adult capacity to take care for one's own safety. Thus, for example, a 15-year-old married person may not drive a car on the public roads. Moreover, the law of contract contains several features, including rules relating to duress, undue influence and inequality of bargaining power, which are designed to protect vulnerable persons. These rules can assist young people who have reached full age on marrying. The rules for contributory negligence contain no similar deference to adult plaintiffs. In rejecting the second possible solution, we should stress that we do so only after much consideration and with a full appreciation of its force.

Of the three possible solutions we have set out, we rejected the third because we do not think it affords a conceptually clear criterion for moving from the subjective to the objective test. The problems may be perceived from a passage in a judgment favouring the third approach where it was stated that:

> "[o]nce a youth's intelligence, experience and judgment mature to the point where his capacity to perceive, appreciate and avoid situations involving an unreasonable risk of harm to himself or others approximates the capacity of an adult, the youth will be held to the adult standard of care."[13]

As will be seen from this statement, before the "adult" test can be applied it must be considered appropriate, judged by the subjective standard of the youth's "intelligence, experience and judgment". It would seem to us, therefore, a confusing redundancy for the legislation to provide that, where the subjective test showed that the youth could be judged by the standard appropriate to an adult, the "adult

standard" should replace the subjective standard: in truth, the subjective standard has "done the work" in such a case, and has already provided the answer to the question of what standard should be applied to the particular youth.

We favour the first solution because it offers the courts a clear and workable rule. The only question is what age should be specified at which a person should move from the subjective to the objective test. In our view, the debate may be limited to one between the ages of sixteen, seventeen and eighteen. Each suffers from the potential for a limited degree of arbitrariness but we have come to the conclusion that sixteen would best represent the dividing line. Accordingly, we recommend that the maximum age at which the subjective test should be applied for all persons is sixteen years.

(b) Negligence

(i) Our General Approach

We now turn to the question of the negligence of minors. The present law relating to the negligence of minors appears to be the same as that relating to their contributory negligence.[14] We must consider whether the standard of care for children in negligence should be more objective than that in relation to their contributory negligence. The degree of increased objectivity could range from deleting the reference to the child's experience or mental development to applying the full adult standard in respect of his or her conduct.[15]

The principal argument in favour of distinguishing between negligence and contributory negligence along these lines is that it will encourage increased compensation for accident

victims.[16] While compensation of accident victims is without question a desirable social policy, we doubt whether the imposition of a standard of care not otherwise defensible by reference to the child's capacity may be justified on this account.

Accordingly, we recommend that the standard of care for negligence should be the same as that which we have already proposed for contributory negligence, namely, that the standard should be determined by that appropriate to a reasonable child of the same age, mental development and experience as the defendant. We also recommend that the proposals we have made above regarding the minimum and maximum ages for contributory negligence should apply in similar fashion to negligence.

(iv) Minors Performing Adult Activities

We must now consider whether, as an exception to the general rule, the standard of care required of a minor should be that of an adult where the minor performs "adult activities" such as driving a car, using a gun[17] or, possibly, playing sports normally played by adults.[18] As we have mentioned, courts in the United States,[19] Canada,[20] Australia[21] and New Zealand[22] have, to differing extents, imposed an adult standard on a minor who performs at least some of these activities. The arguments for and against imposing an adult standard will be considered in turn.

(a) Arguments in Favour of Imposing Adult Standard

Several arguments have been made in judicial decisions and in academic commentary in favour of imposing an adult standard on minors performing adult activities. Let us

consider some of the principal ones.

The first argument is that "when a young person is engaged in an adult activity, which is normally insured, the policy of protecting the child from ruinous liability loses its force".[23] This argument does not greatly appeal to us. Although the existence of insurance may make the imposition of an adult standard on a minor a matter of theoretical rather than practical significance to him, it seems to us that the existence of insurance should not, of itself, be a ground for imposing an adult standard if that imposition cannot be justified on other grounds.[24]

The second argument is somewhat more metaphysical. It is that "when the rights of adulthood are granted, the responsibilities of maturity should also accompany them".[25] This argument has some plausibility, since it may be considered fair to expect that if, for example, the keys of a car are given to a teenager he should behave in a responsible fashion and not abuse his freedom. It may, however, be argued that the teenager does not become any more mature simply because he is permitted to engage in the activity in question. Nor is his or her ability to drive a car improved by the legal permission to drive.

The argument appears to us to break down completely when we consider the position in relation to unlicensed young drivers, joyriders perhaps or underage drivers. Manifestly these drivers have been "granted" no "rights of adulthood" by the legislature, so far as driving the car is concerned.

Where the "adult activity" is not one for which any licence or permission from any agency of the State is required, the concept of the "rights of adulthood" being "granted" to the minor becomes somewhat unconvincing. To regard a twelve-year-old golf-player, for example, as having been granted a "right of adulthood" seems to us a curious way of assessing

his position.

The third argument is that "the legitimate expectations of the community are different when a youth is operating a motor vehicle than when he is playing ball."[26] The argument has been expressed in greater detail in the decision of Dellwo v Pearson,[27] which has already been quoted,[28] and in Daniels v Evans,[29] where the court interpreted provisions of the New Hampshire motor vehicle code as indicating "an intent on the part of our legislature that all drivers must, and have the right to expect that others using the highways, regardless of their age and experience, will, obey the traffic laws and thus exercise the adult standard of care."

The argument proceeds on the basis of detrimental reliance - namely, that when drivers proceed down the road, they do so with the legitimate assumption that all other drivers will be driving at an adult standard. The simple refutation of the argument is that the drivers can make no such assumption. In general terms, they must be bound by notice of the fact that among the motoring community there are drivers - adult and minor - who are incompetent, thoughtless, intoxicated, hard of hearing, poor sighted, feeble or distracted.[30] More specificially, if they turn their attention to youthful drivers, they will probably be aware of the tendency among young people (whether teenagers or in their early twenties) to drive fast and, on occasion, recklessly. They will also appreciate that young drivers will necessarily tend to lack experience. The only assurance from the law upon which they may legitimately rely is that a young driver, if duly licensed, has succeeded in passing a driving test. What conclusion they care to draw from this fact is a matter for themselves, but it would surely be a travesty of the position to suggest that drivers may rely on young drivers to drive with care and competence

when it is common knowledge that as a group they are less likely to do so than adults.

We think that the argument may also be criticised for ignoring the contingent and surprising ways in which accidents caused by minors (as well as adults) occur. The notion of a potential victim of injury from childhood games being able to protect himself or herself from harm by prior preparation[31] will be misplaced in many cases, as where, for example, the stone from a catapult fired from a second-storey window hits the plaintiff on the back of the head.

The fourth argument is that "[w]hen a society permits young people of 15 or 16 the privilege of operating a lethal weapon like an automobile on its highways it should require of them the same caution it demands of all other drivers".[32]

This approach was clearly articulated in the case of Robinson v Lindsay:[33]

> ".... [W]hen the activity a child engages in is inherently dangerous .... the child should be held to an adult standard of care."

There are two main difficulties with this approach. First, it offers no principled basis for imposing an adult standard of care on minors who happen to engage in "inherently dangerous" activities while applying a more sensitive standard to minors engaged in other activities which, though not inherently dangerous, are on particular occasions extremely dangerous - indeed possibly more so than some "inherently dangerous" activities.[34] Secondly, almost as many definitional uncertainties surround the concept of an "inherently dangerous activity" as used to be associated wiht the long-discredited concept of an "inherently dangerous thing".[35]

It may be argued that driving a car or a motorcycle is not, generally, an "inherently dangerous activity". Of course it may become so when the driver is an immature teenager of slow mental development, or, for that matter when a drunken 50-year-old is at the wheel. But it would not necessarily be so where the driver is a 15-year-old, mature boy with plenty of experience of the responsible use of motor vehicles off the highway. If what constitutes and "inherently dangerous activity" must inevitably depend (inter alia) on the individual circumstances of the actor, we have a doctrine far different from the "adult activities" doctrine currently applied by the courts in several foreign jurisdictions. For, on this analysis, there should be no simplistic imposition of an adult standard of care on every teenage driver; instead, in every case the court would have to determine whether, having regard to the driver's particular circumstances and the activity in which he or she engaged was an "inherently dangerous" one. Apart from the complexity that this procedure would involve, it would also have the unfortunate result that those very factors which generally contribute to relieving a child from the attribution of negligence or contributory negligence - his or her age, intelligence and mental development - would add weight to the millstone subjecting the child to an adult standard of care.[36]

One way of avoiding these difficulties would be for the court to hold that certain activities invariably are "inherently dangerous", without regard to context. Thus "driving a car" would be categorised as "inherently dangerous", whether the driver is young and immature or is adult, experienced and expert. The price of this approach, of course, is the loss of credibility where the activity is being performed by a competent person. It is true that, even in such circumstances, the activity has a potential for danger but almost every activity has this potential. It is

the total context which determines the degree of dangerous potential of an activity. Thus, where an expert driver drives a car carefully down a suburban road at 6 a.m. on a sunny summer's morning, the potential for danger is small, less in fact than if a cyclist were to travel recklessly at speed along a crowded footpath. This type of comparison and balancing of risks is the essence of negligence law, and the process could be restricted unduly if particular activities had to be categorised as "inherently dangerous" without regard to the actual likelihood or gravity of injury, the social utility of the activity on the particular occasion and the cost of prevention.

(ii) Conclusion and Recommendation

Having considered the arguments for and against the imposition of an adult standard of care on a minor where he performs adult activities, we consider and accordingly recommend that, having regard to the inherent injustice and uncertainty of this approach, no such qualification to the general criteria for determining the negligence and contributory negligence of children should be introduced into our law.

Does this mean, therefore, that, where a child drives a car on the road, possibly having taken it without the consent of the owner, these criteria will make it likely that the child may be found not to be negligent if his or her incompetent driving results in injury to another roaduser? The answer must be that, for all practical purposes, it will not. First, it should be noted in this context that we have already proposed that at sixteen the negligence of a child should be determined by the standard of care appropriate to an adult. For children who drive cars under that age, the reference to the child's age, intelligence and experience

provides no avenue of escape in the overwhelming majority of cases. Virtually no child over the age of three of four could credibly assert that he or she was unaware of the dangers of driving a car on the road, at a young age, without proper training. Moreover, the possibility of liability attaching to the child for breach of statutory duty[37] or to the child's parents or other persons having care of the child for negligent control should also be taken into account.

Nevertheless, it remains possible that in a very small number of cases application of the criteria apropriate to children could result in a child being relieved of liablity in circumstances where liability would attach if the adult standard of care were to be applied. Our law could, of course, impose an adult standard of care in such instances and hold the child liable. But it may be argued that to do so would offend against the principle of justice, since the law would thus require the child to act according to a standard beyond his or her capacities. However attractive this may be as a pragmatic solution, we consider that it should not be accepted because of its injustice.

We consider that society as a whole should bear the responsibility of compensating victims of injury involving motor vehicles on the roads where the driver of the car causing the injury is a child, and by reason only of his or her particular age, mental development and experience is free from liability which would otherwise attach if the adult standard of care were to apply. For this very small band of cases, we recommend that there be established a fund for compensation to be paid for by the State. So as to prevent misunderstanding of our proposals we wish to stress the following facts.

(a) The compensation fund would relate only to injuries

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on the road where the driver of a motor vehicles is a child under the age of sixteen.

(b) Recourse to the compensation fund would not be possible where the child was found liable in negligence or, conversely, where the child was found not to have been liable in negligence in cases where, applying the adult standard of care, no liability would have been involved.

(c) If a party to the proceedings other than the minor is held to have been liable for the injury, that party, rather than the compensation fund, should compensate the victim of the injury.

We do not consider it to be our function to enter too far into the realm of economic policy by attempting to prescribe how the fund should be established and administered. We should, however, mention some practical matters relating to the legal aspects of our proposal. In cases involving injuries on the road involving the use of a motor vehicle where the driver is a child under the age of sixteen, the judge or jury, as the case may be, should determine first whether, applying the criteria applicable to determining the negligence of children, the driver was negligent. If the answer is that he or she was, then no question of recourse to the fund arises, and the case will proceed, as is usual, to consider the question of the plaintiff's contributory negligence, if any. If, however, the answer is that the child was not guilty of negligence, then the judge or jury, as the case may be, should determine whether, applying the adult standard of care, the driver would have been liable in negligence. If the answer is that he or she would not, then again no question of recourse to the fund arises.

It is only where the answer to this second question is in

the affirmative that the fund is relevant. In such circumstances, the issue of the plaintiff's contributory negligence (if any) should also be determined and apportionment made, according to the respective degrees of departure by the plaintiff[38] and the defendant "from the standard of behaviour to be expected from a reasonable man or woman in the circumstances"[39] rather than by reference so far as the defendant is concerned, to the standard of behaviour to be expected from a reasonable child of his or her age, intelligence and experience.

The fund would have to compensate a plaintiff guilty of contributory negligence, not for the total amount of his or her damages, but instead for the amount subject to the deduction of whatever sum may be apportioned for contributory negligence.

We must also consider the position arising where there is recourse to the fund and the minor driver counterclaims against the plaintiff. Should the minor be entitled to whatever compensation he or she may obtain, without a duty to hand over part of all of this award to the fund? On first thought perhaps it might seem fair that the child should be placed under an obligation to hand it over, but on a more considered judgment it becomes clear that it would be unjust to deprive the minor of compensation merely because of the fact that, through no fault of his or her own, the plaintiff was injured and received compensation from the fund.

Finally it is worth noting that the victims of injury on the road face many significant problems in the practical matter of obtaining compensation.[40] For example, the driver may be unidentified, uninsured or without resources.[41] This field is a very large one, well beyond the scope of the present Report which is concerned only with the specific

issue of the liability in tort of minors and of parents.

Torts of Trespass to the Person, to Goods and to Land

We must now consider the question of the liability of a minor for the torts of trespass to the person, to goods and to land. Irish law could benefit from a clear modern statement by the courts of the present status of some old rules relating to these torts generally. In particular it would be desirable to be clear on the questions of where the onus of proof lies and on the exact nature of "fault" in these torts.

In this Report we will proceed on the basis that, wherever the onus of proof may lie, a defendant is not liable where his or her act was done neither negligently nor with the intention of bringing about the contact which constitutes the trespass.

The exact scope of the concept of negligence in this context is not clear. We do not consider that it is necessary to attempt to resolve this problem here. We are satisfied that, whether or not the concept of negligence in actions for trespass carries with it the notion of "duty" which attaches to the tort of negligence, the only question that is of any practical significance in relation to minors is the standard of care. On that question we consider that the detailed recommendations which we have already made should also apply in the present context.

The question of intention, however, raises a different issue. As we have seen, a minor will be liable where he has such mental capacity that he is able to "will the consequences" of his act.

Is this a sound approach or is it too simplistic? Let us examine a criticism which could be made regarding it.

A very young child may be aware of the probable consequences of his or her actions and may actively desire to bring them about but it may be argued that this species of "intent" should not be regarded as the same, psychologically or morally, as that of an older person. The young child's lack of maturity, lack of full appreciation of the consequences of his or her action and incompletely developed sense of moral responsibility will all serve to differentiate his or her conduct from that of an older person.

As against that, it may be replied that even for adults the torts of trespass to the person, to goods and to land are relatively insensitive to the psychological and moral forces that may have encouraged the actor to behave as he or she did. The law seeks to resolve a simple question: whether the actor intended to do something which constitutes an unpermitted contact with the person, goods or land of another. If the actor did, the law is not at all concerned with why he or she did so or what it felt like, unless the actor puts forward some ground which fits into a recognised, well-defined privilege or justification - consent, for example, or self-defence.

Why, therefore, it may be argued, should children be treated differently, provided they are aware, in the simplist sense, of the probable immediate effects of their actions and desire to bring these results about? One reason for distinguishing between adults and children here is that the limitations on a child's perspective are not something exceptional: they are a normal part of being a child. On this basis it may be argued that the law should not ignore the inevitable limitations of the child's perceptions by

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reference to another group - adults - for whom a narrowness of perspective is an exceptional rather than inherent phenomenon.

A further argument in favour of introducing a more sophisticated rule for trespass by a child is that the present law of trespass contrasts starkly with the law of negligence and contributory negligence, where the principles are sensitive to the child's lack of mental development.

The problem with making the torts of trespass to the person, goods and land more sensitive to children's immaturity is, of course, that the change may introduce undue uncertainty into our law, as well, perhaps, as resulting in deserving plaintiffs being denied compensation. For example, where a gang of 12-year-olds beat up an old woman, it would be particularly unjust if an unduly lenient criterion of responsibility were to deny the woman compensation.

We fully appreciate the force of this concern. But fear of an unduly lenient criterion of responsibility can not justify the imposition of one that is manifestly too harsh. It must be the obligation of the law to establish a criterion of responsibility for children which fully harmonises with their capacity, no more and no less. After much consideration we recommend that in proceedings against a child under sixteen for trespass where it has been established that the child's action was voluntary and intentional, liability should be imposed unless the child can show, to the satisfaction of the Court, that, having regard to his or her age, mental development and experience, he or she had not such personal responsibility for the action that it would be just to impose liability on the child for the action. This test has clear echoes of the approach favoured in negligence proceedings. Although there one is dealing with conduct that is not necessarily

intentional, we consider that the analogy is helpful. It should be noted that, in our proposed modification of the present law, the onus of seeking relief from liability rests on the defendant. We appreciate that the test for exemption is expressed in general terms, but we consider that this must necessarily be so in order to give the court sufficient flexibility.

(c) Torts in Which a Specific Intention or Other State of Mind is an Ingredient

We do not see any difficulty with the existing law in relation to torts (such as malice in defamation or malicious prosecution, for example) which require proof of a specific intention or other state of mind as an ingredient of the commission of the tort. We recommend no change in the existing law on this matter.

Other Torts

Finally we must refer to torts other than those which we have already considered. Some of these torts involve strict liability, others involve distinctive rules attaching to particular torts, still others include, in varying degrees, the concept of negligence as an element which must, or may, be present in their commission.

We are satisfied that, so far as they relate to minors, they operate satisfactorily and that there is no need for general proposals for change. We consider that, so far as negligence is an element of these torts, the recommendations which we have already made regarding the tort of negligence should apply where the negligence of a child falls to be considered in the context of these torts.

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CHAPTER 3 LIABILITY OF PARENTS AND OTHER PERSONS FOR DAMAGE CAUSED BY MINORS: PROPOSALS FOR REFORM

In this chapter we will examine the law relating to the liability of parents and other persons for damage caused by minors. The present law on this subject has not generated any substantial public controversy. It might, therefore, be considered that it would be best not to propose any changes in the present principles of liability. Nevertheless, in view of our recommendations on the subject of the liability of minors in tort, made in chapter 3, it seems to us advisable to examine the question of the liability of parents as well.

Should Parents Be Vicariously Liable for Their Minor Children's Torts?

Perhaps the best way of approaching the question is to analyse critically the proposal that parents should be vicariously liable for torts committed by their minor children. For the purpose of this discussion we will assume that the children are living with their parents.

In favour of this approach two principal arguments appear to merit consideration.

First, it may be argued that, if it is fair to impose vicarious liability on employers for the torts committed by their employees, there is much to be said for imposing vicarious liability on parents. In some respects, rearing a family has parallels with running a business;[1] moreover, tracing liability to the parents as a more likely financial

source of compensation in the family than the children would be analogous to imposing liability on the employer.[2]

Secondly, it may be argued that it is frequently difficult and potentially unfair for an injured person to discharge the burden of proof of establishing that the parents are liable under the present law. The injured person rarely will have information establishing that the parents authorised or ratified the tort and he may well find it hard to discover the previous history of the propensities of the child who caused the damage. His plight, it may be argued, is somewhat different from that of the "ordinary" plaintiff who finds it difficult to prove his case on the facts. In the case of parental liability, the principles for imposing liability, although arguably fair in their expression, characteristically create an evidential problem for the injured person. The law has assisted plaintiffs in other cases where under evidential difficulties occur,[3] and it may be considered that it should do so in the present context.

These arguments may, however, be criticised in a number of respects.

The first argument may be criticised on the basis that the analogy between parents and employers is not entirely helpful. A business exists for commercial purposes and the expenses involved in vicarious liability may be regarded as costs inherent in operating the enterprise. The family, however, is not primarily directed towards impersonal economic goals. While an analogy may be drawn between financially solvent parents (contrasted with their impecunious children) and employers (contrasted with their employees who may have less financial resources), it is no more than an analogy and it may be regarded as an undue extension of the "loss distribution" approach into an inappropriate area.[4]

The second argument may be criticised on the basis that it exaggerates the particular difficulties facing the victim of injuries caused by children. Proof of the legal ingredients of many torts[5] requires the plaintiff to establish facts not readily accessible to him. Moreover many instances of negligence involve factual problems of proof for plaintiffs. To impose vicarious liability on parents may be considered to be too drastic a solution to one particular instance of a problem that arises in many areas of tort law.

It is worth noting, in this context, that at a conference organised by the Institute of Comparative Law, of the University of Ottawa, in 1963, a number of participants from civil law jurisdictions expressed the opinion that the common law approach was preferable to that of the civil law since it appeared to them to be:

> "more in harmony with the greater liberal attitudes and habits of today's youth, for which society as a whole is responsible, and which makes the task of controlling and supervising the ever-growing number of young people increasingly more difficult of accomplishment."[6]

We are of the view that it would be unjust to parents to impose vicarious liablity on them for the torts of their minor children to an extent greater than under the present law.[7]

Should Parents Be Strictly Liable for Damage Caused by Their Minor Children?

Next we must consider whether parents should be strictly liable for damage caused by their minor children.[8]

The first argument in favour of strict liability is based on analogies that may seem somewhat unfortunate: it has been said that having a child under one's care causes problems not dissimilar to those arising from having wild animals under one's control[9] or to bringing upon one's property things likely to do danger if they escape.[10] The law imposes strict liability in both these instances and it has been suggested that it should do so also in relation to damage caused by children.

Secondly it may be argued that making parents strictly liable for damage caused by their minor children fits in well with the policy of partial exemption of minors from liability in tort. It may be said that childhood should not be regarded in isolation. If the victim of an injury inflicted by a child is unable to obtain compensation from the child on account of the child's lack of maturity, then it may be considered reasonable and fair for him to look to the parents for compensation rather than allow the parents to hide behind the child's exemption from legal liability. The fact that many parents consider it their moral responsibility to compensate those injured by their children[11] may be seen as supporting this view.

As against the first of these arguments it can be said that rearing children should not be regarded as similar in any way to owning wild animals or to bringing dangerous materials onto one's property. Parenthood fulfils a vitally important social and moral function, which should be supported by the law and no law should equate children with wild animals.

As to the second argument it may be criticised on the basis that it fails to establish why parents (rather than other persons or the State, for example) should have to compensate an injured person merely because their own children, who

caused the injury, lack sufficient maturity to be legally liable. Even though parents may represent a convenient financial target, their moral responsibility does not increase in direct proportion to their children's lack of responsibility.

The strict liability approach seems to us to be too drastic a solution, and one capable of working injustice on parents in cases where they have in fact done their best and where their child is incorrigible and deceitful, for example, and despite their best, reasonable efforts, succeeds in injuring another person.

Should There Be a Presumption of Parental Negligence Where a Person is Injured By a Minor Child?

We must now consider the more moderate proposal that the law should create a presumption of parental negligence where a person is injured by a minor child. This approach is favoured in many civil law jurisdictions, including Belguim,[12] France,[13] the Federal Republic of Germany,[14] Italy[15] and Switzerland.[16] A similar approach is favoured in Eastern Europe.[17] In Central and South America, the provisions relating to the liability of parents and others for damage caused by minors generally are on the same lines as those in European civil law jurisdictions. Some countries include specific provision to the effect that:

> "Parents will always be responsible for the delicts or quasi-delicts committed by their minor children, if they knowingly provide them with a bad education or have allowed them to acquire vicious habits."[18]

In favour of this approach, it may be argued that it would give effect, in a far more balanced way, to the policy of

encouraging parents to take reasonable steps to ensure that their children do not injure others, while at the same time ensuring that this burden is not so heavy that injustice would be done to them.

One of the principal advantages to the proposal is that parents who can show that they have in fact behaved reasonably will not be prejudiced. On the other hand, as we have mentioned, the injured person may have no direct knowledge at all as to how the parents have acted and, as a result, not be in a position to establish negligence on their part. For this reason alone, the presumption of negligence may be considered to work more fairly, without being oppressive on careful parents - in contrast to an approach based on vicarious or strict liability.

The arguments against this proposal reflect considerations similar to those already mentioned in opposition to the more radical proposals to introduce a principle of vicarious or strict liability.

First, it may be argued that a presumption of negligence would work unfairly in some instances. Where a person was injured by a young child, it could well be the case that neither the injured person nor the parents would have any means of finding out how exactly the injury was caused. The availabe evidence, in sum, might be entirely silent on the circumstances of the injury. In such a case the parents might be no more able to establish that they were not negligent than the plaintiff could show that they were. Placing the parents under a presumption of negligence in such instances would mean that parents who were not in fact negligent would be liable merely because the circumstances of the injury could not be known. This may be considered unjust to parents who have not been guilty of any lack of care in the control of their children.

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Secondly, it may be argued that there is not sufficnet reason to create a presumption of negligence in relation to parents where no similar presumption exists in relation to employers[19] or producers of goods. Being a parent is scarcely a reason for being subjected uniquely to the burden of such a presumption.

Thirdly, although in itself it would not amount to an argument against creating a presumption of parental negligence, it is a fact that such a presumption would involve very considerable difficulties, so far as policy and drafting are concerned.

Among others, the following difficult questions may be raised. Would the presumption apply to both parents equally in every case? Could it be held to apply to one parent only, after the evidence has been presented? Would it apply without regard to the marital status of the parents, and without regard to the presence or absence of a personal relationship between the parent and the child?[20] What effect would a court order for custody or access have on the presumption? Would the presumption apply to persons in loco parentis to the child? To step-parents? To baby-sitters? Could the presumption attach to an institution, such as a boarding-school, for example? Would the presumption apply to damage caused by minors of all ages[21] or only apply to minors under a specified age,[22] such as 16, for example? Would it ever apply to persons who have reached full age? To what damage would it apply? Should it be limited to cases where the minor acted wilfully or negligently or should it apply even where the minor has done no wrong.

We mention these difficulties, not because we consider them insurmountable, but because they show that what might at first seem a simple and sensible idea is certainly not

simple and raises issues of policy that have no obvious or easy answer.

We have come to the conclusion, on balance, that it would not be desirable to introduce a presumption of parental negligence in regard to damage caused by minor children. We are satisfied that the present law is based on just and workable principles of liability so far as the negligence of parents is concerned.

Other aspects of the present law relating to the liability of parents for the torts of their children appear to us to be satisfactory and not to be in need of statutory change.

CHAPTER 4 SUMMARY OF RECOMMENDATIONS

A. Liability of Children for their Wrongful Acts

(i) The standard for determining whether a child was guilty of contributory negligence should be that appropriate to a reasonable child of the same age, mental development and experience as the plaintiff.

(ii) The court should not determine, as a preliminary question, whether the plaintiff child was of an age to be capable of contributory negligence.

(iii) The maximum age at which the standard proposed in para. (i), supra, should apply should be 16 years.

(iv) The standard for determining whether a child was guilty of negligence should be the same as that proposed in paragraph (i) above and the other proposals made in paragraphs (ii) and (iii) above should apply in similar fashion to negligence.

(v) The "adult activities" doctrine should not become part of the law.

(iv) A compensation fund should be established to compensate persons injured by child drivers where the children, by reason of the application of the standard of care proposed in paragraph (i), as opposed to the adult standard of care, are held not to have been negligent.

(vii) In proceedings against a child under sixteen for trespass to the person, to goods or to land, where it has been established that the child's action was

voluntary and intentional, liability should be imposed unless the child can show, to the satisfaction of the Court, that, having regard to his or her age, mental development and experience, he or she had not such personal responsibility for the action that it would be just to impose liability on the child for the action.

(viii) No change should be made in the law in relation to torts requiring proof of a specific intention or other state of mind as an ingredient of their commission.

(ix) In other torts, so far as negligence is an element in their commission, the recommendations made in regard to the tort of negligence should apply.

B. Liability of Parents for Damage Caused by Their Children

(x) Parents should not be vicariously liable for their children's torts.

(xi) Parents should not be strictly liable for damage caused by their children.

(xii) A presumption of parental negligence should not be introduced.

(xiii) The present rules as to parental negligence should continue to apply.

FOOTNOTES TO CHAPTER 1

1 See generally, McMahon & Binchy, 65-72, Salmond & Heuston, 128, 407-410, Winfield & Jolowicz, 688-689, Clerk & Lindsell, paras. 2-33-2-36, 11-81-11-83, Fleming, 22-23, Alexander, Tort Liability of Children and Their Parents, ch. 14 of D. Mendes da Costa ed., Studies in Canadian Family Law, at 850ff. (1972), Bohlen, Liability in Tort of Infants and Insane Persons, 23 Mich. L. Rev. 9 (1924), Dunlop, Torts Relating to Infants, 5 West. L. Rev. 116 (1966).

2 L.R. 3 H.L. 330 (1868), aff'g L.R. 1 Ex. 265 (1866).

3 Amending section 1 of the Dogs Act 1906 by introducing strict liability for owners of dogs where the dogs injure people in the course of attacking them. Some qualifications apply in relation to liability for attacks on trespassers (which are determined by ordinary negligence principles) and to plaintiffs who are guilty of contributory negligence.

4 See McMahon & Binchy, 127-128.

5 See McMahon & Binchy, 150-154.

6 Contra O'Brien v McNamee, [1953] I.R. 86 (High Ct., Davitt, P., 1952).

7 Cf. e.g., Tillander v Gosselin, [1967] 1 O.R. 203 (High Ct., Grant, J.).

8 Cf. Stokes v Carlson, 240 S.W. 2d 132 (Missouri, 1951).

9 Weaver v Ward, Hob. 134, 80 E.R. 284 (K.B., 1616). See also O'Brien v McNamee, [1953] I.R., at 88:

> "If a man is sitting on a wall and is pushed so that he falls into someone's land and thereby commits trespass his act is involuntary and he is not liable in tort...."

10 Supra.

11 Cf. O'Brien v McNamee, supra.

12 Cf. the United States Restatement (Second) of Torts, s. 13, comment on clause (a). No Irish court has yet been called on to determine the question of liability where the actor lacks the desire to bring about the result but has substantial certainty that his conduct will in fact bring it about.

13 See, e.g. Garratt v Dailey, 46 Wash. 2d 197, 279 P.2d 1019 (1955), Baldinger v Banks, 201 N.Y.S. 2d 629 (1960).

14 Cf. Fleming, 22-23.

15 Cf. pp.13-14.

16 Cf. pp. 4ff.

17 See generally, Salmond & Heuston, 408, Winfield & Jolowicz, 155, 688, Clerk & Lindsell, paras. 2-33, 11-81-11-83, Fleming, 107-108, Williams, 355-356 Morrison, Tort, ch. 5 of R. Graveson & F. Crane Eds., A Century of Family Law, 1857-1957, at 105-106 (1957), Alexander, supra, at 855-858, Charlesworth & Percy, para. 2-78.

18 [1955-1956] Ir. Jur. Rep. 71, at 72 (Sup. Ct., 1953).

19 [1908] I.R. 242, at 268 (K. B. Div., 1906).

20 [1940] O.W.N. 479, at 480. In accord is Sheasgreen v Morgan, [1952] 1 D.L.R. 48, at 61-62 (B.C. Sup. Ct., Manson, J., 1951). See also Farrall v Stokes, 54 S. R. (N.S.W.) 294, at 298 (per Maxell, J., 1954). Charlesworth & Percy, para. 3-31, (footnote references omitted) explains:

> "There is no age below which, as a matter of law, it can be said that a child is incapable of contributory negligence. Expressions can be found referring to children 'too young to be capable of contributory negligence' or 'of such a tender age as to be regarded in law as incapable of contributory

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negligence'. However, these must be taken to be referring to children found, on the facts of a particular case, to have been so young that contributory negligence could not be attributed to them."

21 [1963] I.R. 441, at 449 (Sup. Ct., 1962).

22 Id., at 446 (per Kingsmill Moore, J.).

23 ".... [A] special local word .... coined to describe the practice" of stealing rides or slowly moving vehicles: id. (per Kingsmill Moore, J.).

24 In Brien v McGarry, 62 I.L.T.R. 166, at 167 (Circuit Ct., Davitt, J., 1927), Davitt, J. stated that "[i]t is extremely doubtful if a child of 6 years could be considered capable of contributory negligence ...." In Griffin v Daniels, 86 I.L.T.R. 38 (High Ct., Maguire, J., 1951), the defence of contributory negligence was not even raised against a seven-year-old "scutting" on a taxi. In Curran v Lapedus, 72 I.L.T.R. 246 (Circuit Ct., Shannon, J., 1938), rev'd, 73 I.L.T.R. 89 (High Ct., O'Byrne, J., 1939), the court relied on Brien v McGarry, in relation to two girls, aged 5 and 6 years, respectively, Shannon, J., stating (at 248): "It cannot be contended that anything they did could be in law described as contributory negligence ...." In Finnegan v The Irish Shell Co., 71 I.L.T.R. 200 (Circuit Ct., 1937), however, Sheehy, J., relying largely on Scottish authorities, stated that "whilst accepting the view that a boy of five may in certain circumstances be guilty of contributory negligence", he also adopted the dictum of Lord Justice Clark McDonald in Plantza v Glasgow Corporation, 47 Sc. L. R. 688 (1910) that it might be "difficult" to hold such a child to have been guilty of contributory negligence. The same judge referred again to Plantza in O'Rourke v Cavan U.D.C., 77 I.L.T..R. 16 (Circuit Ct., Sheehy, J., 1942) in exempting an 8-year-old child from contributory negligence where the child had climbed on a tripod. In Brown v Foley, [1932] L.J., I.F.S. 205 (High Ct., O'Byrne, J.), O'Byrne, J. would "offer no comment" on the ability of a child of 4½ years to be guilty of contributory negligence. During argument with counsel, who submitted that "[i]t might be very unlikely that a child of four-and-a-half years could be guilty of contributory negligence but it was not legally impossible", O'Byrne, J. stated: "I thought the dividing line was between

seven and nine". In Cullen v Heagney, [1931] L.J., I.F.S. 149, Judge Shannon "rejected the contention that a four-years-old child could not be guilty of contributory negligence, it appearing from the circumstances that the boy was familiar with the spot from which he emerged and the public road into which he ventured". Cf. Anon., Motorists, Children and Contributory Negligence, 72 I.L.T.& S.J. 119, at 120 (1938). In Ryan v Madden, [1944] I.R. 154 at 157 (High Ct., O'Byrne, J., 1943) O'Byrne, J., stated in respect of a five-year-old child injured when sliding down the bannisters at school:

> "In the case of an older child, the question of contributory negligence would arise and might be the determining factor. Having regard to the tender age of the plaintiff, it does not arise in this case."

In Macken v Devine, 80 I.L.T.R. 121 (Circuit Ct., Gleeson, J., 1946) a 3½-year-old plaintiff who fell down unguarded steps was held not guilty of contributory negligence since he "had not sufficient sense to understand the risk and was incapable of appreciating the danger".

25 68 D.L.R. (2d) 627 (Sask. Q. B., Disbery, J., 1968) (child seated in shopping cart in supermarket injured when employee pulled cart against obstacle). See also Tillander v Gosselin, 60 D.L.R. (2d) 18, at 20 (Ont. High Ct., Grant, J., 1966) (aff'd 61 D.L.R. (2d) 192n (C.A., 1967) (speaking of child aged one week less than 3 years: "It is clear that a child of such tender years could not be guilty of negligence")..

26 Id., at 630. The reference to "absurd" was inspired by the statement by Kerwin, C.J.C., in McEllistrum v Etches, [1956] S.C.R. 787, at 793, that

> "It should now be laid down that where the age is not such as to make a discussion of contributory negligence absurd, it is a question for the jury in each case whether the infant exercised the care to be expected from a child of like age, intelligence and experience."

27 Gardner v Grace, 1 F. & F. 359, 174 E.R. 763 (1858) (whilst Channell, B. stated that "[t]he doctrine of contributory negligence does not apply to an infant of tender age", it should be noted that he proposed that the parties settle in an action involving the alleged

contributory negligence of a child aged $3^{1}/_{4}$ years; it appears that he did not consider the issue of the child's contributory negligence to be a closed one). The rule expressed by Channell, B. has been criticised as being "scarcely satisfactory, because it is difficult to say what is or is not a tender age": Smith, 243 (2nd ed., 1884). In Carmarthenshire County Council v Lewis, [1955] A.C. 549 (H.L.(Eng.)), where a four-year-old boy, momentarily left unattended by his teacher, walked from his classroom onto the road, Lord Reid stated, obiter (at 563): "Of course the child was not old enough to be responsible". In Thomas v British Railways Board, [1976] Q.B. 912 (C.A.), the defence of contributory negligence does not appear to have been raised where the plaintiff, aged 2 years was injured by a train when she sat on the railway line.

28 The Scottish courts have perhaps evinced a stronger tendency to do so than the English courts: Cf. Winfield & Jolowicz, 155.

29 62 I.L.T.R. 65 (Sup. Ct., 1928).

30 Id., at 65.

31 Id.

32 [1949] Ir. Jur. Rep. 6, at 7 (High Ct., Black, J.). See also, O'Gorman v Crotty, [1946] Ir. Jur. Rep. 34 (High Ct., O'Byrne, J., 1945) ($10\frac{1}{2}$-year-old boy held capable of contributory negligence).

33 In Daly v Lawless, [1952] Ir. Jur. Rep. 20 (Sup. Ct., 1953) where the plaintiff was "about 12 years of age", the issue was not discussed, the child being held to have been guilty of contributory negligence in standing "in a precarious position" on a tractor driven by the defendant.

34 Cf. McLaughlin v Antrim Electricity Supply Co., [1941] N.I. 23 (C.A., 1940).

35 Supra, at 72.

36 Id., at 72-73.

37 [1960] Ir. Jur. Rep. 69 (Sup. Ct.). The Court in Duffy was composed of Lavery, Kingsmill Moore and Maguire, JJ. In Fleming, it was composed of Maguire, C.J., O'Byrne, Lavery, Kingsmill Moore and O'Daly, JJ.

38 [1949] A.C. 386, at 396.

39 1920 S.C. 590 (elderly widow, almost blind, injured in tramway accident).

40 Supra, at 74-75.

41 Supra.

42 Supra.

43 Supra.

44 Supra.

45 [1975] I.R. 1 (Sup. Ct., 1974), noted by McMahon, Note, 91 L. Q. Rev. 323 (1975).

46 Supra.

47 Id, at 17-18.

48 "If the jury believed that he did not read the notices and that he did not understand that there was a danger - and a serious danger - must they hold that, at his age and having regard to the other matters which occupied his mind while playing his games around the area, he fell short of the standard expected of a boy of his age in not reading and appreciating the effect of the notices or in not appreciating, from the construction or the appearance of the sub-station, that it was a place which could seriously injure him by the discharge of electricity if he entered it? I think that on the evidence the jury were entitled to accept that the

plaintiff did not actually know the danger, and I do not think the evidence is such that the jury must find that he ought to have known of it - even applying the fully objective standard or measuring him by what is to be expected of the ordinary eleven-year-old boy whose experience of the sub-station always appears to have been that of a boy playing cowboys and Indians or other similar games around the immediate area of the sub-station." Id, at 18.

49 Id., at 27.

50 Id., at 36.

51 Id., at 21.

52 Id., at 8.

53 [1982] I.L.R.M. 223 (Sup. Ct.).

54 Id., at 227.

55 Id., at 232.

56 In Courtney v Masterson, supra, the objective test appears to have been expressed by Black, J., but the subjective test was not in issue there. In McLaughlin v Antrim Electricity Supply Co., supra, the subjective test was favoured. Finnegan v The Irish Shell Co., supra, despite an apparently clear statement by Sheehy, J. of the objective test, on closer analysis may be seen to favour the subjective approach. O'Gorman v Crotty, supra, is ambiguous, but appears to favour the objective test. Byrne v Corporation of Dun Laoghaire, [1940] Ir. Jur. Rep. 40 (High Ct., Hanna, J., would appear to favour the subjective test. In Tiernan v O'Callaghan, 78 I.L.T.R. 36 (Circuit Ct., Fawsitt, J., 1944), the subjective test was applied to a seven-year-old child of limited intelligence.

57 Cf. McEllistrum v Etches, [1956] S.C.R. 787, Wade v Canadian National Ry., 80 D.L.R. (3d) 214 (Sup. Ct. Can., 1977) (per Laskin, C.J., dissenting but dissent not affecting this issue. Spence and Dickson, JJ.

concurring with the Chief Justice), Strehlke v Camenzind [1980] 4 W.W.R. 464, 111 D.L.R. (3d) 319 (Alta. Q.B., Cawsey, J.), Sgro v Verbeck, 111 D.L.R. (3d) 479 (Ont. H. Ct., Craig, J., 1980), Wessell v Kinsmen Club of Sault Ste. Marie Ontario Inc., 137 D.L.R. (3d) 96 (Ont. H. Ct., Walsh, J., 1982).

58 The position is somewhat confused: cf. McKerron, 59-60.

59 Cf. Prosser & Keeton, 179ff.

60 But not in Louisiana, where the civil law system prevails.

61 Cf. Salmond, 408, Charlesworth & Percy, paras. 3-30-3-33, Williams, 355-356. There is a surprising dearth of authorities which discussed the issue in clear terms, so one may only infer from the somewhat loose language in some of the decisions what position the Court favoured on the question. In Lynch v Nurdin, 1 Q. B. 29, at 36, 113 E.R. 1041, at 1043 (1841), Lord Denman, C.J. stated, in relation to a six- year-old plaintiff that "ordinary care must mean that degree of care which may reasonably be expected from a person in the plaintiff's situation: and this would evidently be very small indeed in so young a child". Whilst this statement "has always been regarded as an authoritative statement of the law relating to the contributory negligence of children" (Charlesworth & Percy, supra, fn. 17, para. 1212), there have been decisions which are difficult, if not impossible, to reconcile with it. In Hughes v Macfie, 2 H. & C. 744, 159 E.R. 308 (1863), the tender years of the plaintiff did not avail where he meddled with a cellar lid placed by the defendant in a dangerous condition on the highway, and a similar approach is apparent in Mangan v Atterton, L.R. 1 Ex. 239 (1866). These decisions have been doubted and criticised (cf. Clark v Chambers, 3 Q.B.D. 327, at 339 (per Cockburn, C.J., 1878), Beven, Torts, vol. 1, 180-182 (4th ed., by W. Byrne & W. Gibb, 1928), and would probably be decided differently today. In Yachuk v Oliver Blais Co. Ltd., supra, the objective view of the child's age alone (rather than his intelligence and experience as well) appears to have been favourd by the Privy Council on appeal from Canada. The fact that the Judicial Committee cautioned that "a more debatable question would have arisen" if it had been established that the nine-year-old plaintiff had had greater knowledge of the dangerous properties of gasoline than

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would normally be imputed to a child of his age does not, it is submitted, affect the position, since the general principles of contributory negligence, whether in relation to adults or children, will take account of the plaintiff's superior knowledge. In Gough v Thorne, [1966] 1 W.L.R. 1387 (C.A.), the objective view was apparently favoured, but the court in exempting the plaintiff from any fault under this test, had no need to consider the subjective approach. In Jones v Lawrence, [1969] 3 All E.R. 267 (Cumming-Bruce, J., 1968), the objective test was again favoured, but again the plaintiff's success under that test may have rendered consideration of the subjective approach irrelevant. In Culkin v McFie & Sons Ltd., [1939] 3 All E.R. 613 (Croom-Johnson, J.) and in Lay v The Midland Ry. Co., 34 L.T. 30 (Exch. Div., 1875) the objective test appears to have been favoured.

62 McHale v Watson, 115 Comm. L. R. 199 (High Ct. of Austr. 1966), aff'g 111 Comm. L. R. 384 (Windeyer, J. 1964), noted, 3 Adelaide L. Rev. 118 (1967). Applying the "ages only" test are Mye v Peters, 68 S.R. (N.S.W.) 298 (C.A. 1967), Broadhurst v Millman, [1976] V.R. 208 (1975); Charles v Zadow, 28 S.A.S.R. 492 (Sup. Ct., 1981); and (more tentatively) Beasley v Marshall, 17 S.A.S.R. 456 (Sup. Ct., 1977). Other decisions have articulated a hybrid test: see Chan v Fong, 5 S.A.S.R. 1 (Sup. Ct., Walters, J. 1973); Cameron v Commissioner of Railways, [1964] Qd. R. 480 (Sup. Ct., Lucas, J.). Still others have applied the test of "age, intelligence and experience": see Westmoreland v Schultz, 2 S.A.S.R. 286n (Mitchell, J. 1972); Wiech v Amato, 6 S.A.S.R. 442 (Sup. Ct., Zelling, J. 1973). Several courts have expressed uncertainty as to precisely what standard McHale v Amato, supra, at 445, Andrews v Armitt (No.2), [1971] 2 S.A.S.R. 273, 282 (Sup. Ct. (In Banco), per Bray, C.J. 1971).

63 No. 41 of 1961.

64 Cf., e.g., Brice v Milwaukee Automobile Co., 76 N.W. 2d 337 (Wis. Sup. Ct., 1956).

65 Cf. Griffiths v Doolan, [1959] Qd. R. 304 (Sup. Ct., Wanstall, J., 1982), Broadhurst v Millman, [1976] V. R. 208 (Sup. Ct., 1975), Westmoreland v Schultz, [1972] 2 S.A.S.R. 286n (Mitchell, J.) Aubrey v Carter, [1962] W.A.R. 51 (Hale, J.).

66 Cf. McKerron, 59-60.

67 Griffiths v Doolan, supra, at 313.

68 Cf. Purtill v Athlone U.D.C., [1968] I.R. 205, at 213 (Sup. Ct., judgment of Walsh, J.), Brennan v Savage Smyth & Co., [1982] I.L.R.M. 223 (Sup. Ct.).

69 Supra.

70 Cf. McHale v Watson, 115 C.L.R. 199, at 224-226 (High Ct. Austr., per Menzies, J., dissenting, 1957).

71 Cf. Salmond & Heuston, 408, Fleming, 107-108.

72 Cf. however, Kingston v Kingston, supra, at 67 (per Walsh, J.).

73 See, e.g., Dunn v Teti, 280 Pa. Super. 399, 421 A. 2d 782 (1980).

74 Cf. pp. 26-27.

75 Cf. pp. 24-26.

76 Ryan v Hickson, 7 O.R. (2d) 352, 55 D.L.R. (3d) 196 (High Ct., Goodman, J., 1974).

77 Cf. pp. 14-24.

78 Cf. pp. 58-59.

79 See Epstein et al., 127-130, Prosser & Keeton, 181-182, Galiher, Degree of Care Required of Minors While Performing Adult Tasks, 17 Defence L. J. 657 (1968); Longeteig, the Minor Motorist - A Double Standard of Care?, 2 Idaho L. Rev. 103 (1965); Comment, A Proposal for a Modified Standard of care for the Infant Engaged in an Adult Activity, 42 Ind. L. J. 405 (1967); Comment, Torts-Contributory Negligence - Minor Motor Vehicle

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Operator Held to Adult Standard of Care, Daniels v Evans, 47 B. U. L. Rev. 450 (1967); Note, Torts - The Standard of Care Required of a Minor Operator of a Motor Vehicle, 24 Ark. L. Rev. 379 (1970); Note, Torts -The Standard of Care of a Minor Using Dangerous Instrumentalities, 26 Ark L. Rev. 243 (1972); Note, Motor Vehicles - Negligence - Standard of Care for Minor-Adult Standard of Care applied to Seventeen-Year-Old Defendant Motorist - Reiszel v Fontana, 35 Alb. L. Rev. 606 (1971); Note, Torts: Applications of Adult Standard of Care to Minor Motor Vehicles Operators, [1962] Duke L. J. 138; Note, Contributory Negligence of Children, 18 S. Car. L. Rev. 648, at 655-656 (1966); Note, Torts: Standard of Care Applied to Minors in the Operation of Dangerous Instrumentalities, 3 Tulsa L. J. 186 (1966); Note, Negligence - Application of Adult Standard to Minor, 33 Tenn. L. Rev. 533 (1966).

80 See Galiher, supra, at 661; Comment, Recommended: An Objective Standard of Care for Minors in Nebraska, 46 Neb. L. Rev. 699, 702 (1967); see also 47 B.U.L. Rev. 450, 451 (1967) (new trend away from subjective standard).

81 259 Minn. 452, 107 N.W. 2d 859 (1961).

82 259 Minn., at 453, 107 2d at 860.

83 259 Minn., at 457, 107 N.W. 2d at 862-863. In Miller v State, 306 N.W. 2d 554 (Minn. 1981), however, the Minnesota Supreme Court held, "This statement did not .... limit our holding in Dellwo to minor defendants. Rather, it indicated that the standard of care of a child was only proper when minors are 'engaged in activities appropriate to their age, experience, and wisdom,' .... operating a motor vehicle not being one of such activities." Id., at 555 (citations omitted).

Miller leaves the law of Minnesota regarding the standard to be applied in determining the negligence and contributory negligence of children in an uncertain state. It is clear at least that where children engage in such activities as driving an automobile, airplane, or powerboat, an adult standard determine both their negligence (Dellwo) and contributory negligence (Miller). It is equally clear that where children engage in "activities appropriate to their age, experience, and wisdom," such as "play[ing] with toys, throwing balls, operating tricycles or velocipedes, or

.... other childhood activities," Dellwo, 259 Minn., at 458, 107 N.W. 2d, at 863, the standard of care appropriate to children will be applied. But these two opposite types of activities scarcely exhaust the range of possible conduct in which children may engage. Children every day perform actions which fall within a middle range; they ride horses, (Mortenson v Hindahl, 247 Minn. 356, 77 N.W. 2d 185 (1956)) or bicycles, they cross streets, attend churches, temples or synagogues, and attend baseball games, (Aldes v Saint Paul Ball Club, 251 Minn. 440, 88 N.W. 2d 94 (1958)). The dictum in Roberts v Ring, 143 Minn. 151, at 152-153, 173 N.W. 437, at 438 (1919), would apply the adult standard in cases where the child is the defendant. Miller is capable of an even broader interpretation, extending the adult standard to determine contributory negligence as well as negligence in these cases. This would be a radical development which would abrogate the adult activities doctrine since the adult standard would be imposed on a child not because the activity was in any sense an adult one, but merely because it was not a distinctively childish one.

84 259 Minn. at 457, 107 N.W. 2d at 863 (citing Roberts, 143 Minn. at 152, 173 N.W. at 438).

85 Id.

86 Id.

87 Id.

88 Restatement, Torts, Tentative Draft No. 4, 283A, comment c (1959).

89 259 Minn. at 459, 107 N.W. 2d at 863. It is interesting to note that in a related area of tort law, the Minnesota Supreme Court in Felcyn v Gamble, 185 Minn. 357, 241 N.W. 37 (1932), held that the "family automobile" doctrine should not be extended to motorboats. In accord are Grindstaff v Watts, 254 N.C. 568, 119 S.E. 2d 784 (1961). Contra, Quattlebaum v Wallace, 156 Ga. App. 519, 275 S.E. 2d 104 (1980); Stewart v Stephens, 225 Ga. 184, 166 S.E. 2d 890 (1969). See generally Prosser & Keeton, 73, at 524-527; Fridman, The Doctrine of the "Family Car": A Study in Contrasts, 8 Tex. Tech. L. Rev. 323, 329-330 (1976);

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Saseen, Motorboat Collisions and the Family Purpose Doctrine, 2 Ga. St. B.J. 473 (1966); Comment, Agency's Stepchild: The Family Purpose Car Doctrine, 3 Ga. St. B.J. 112, at 114-119 (1966); [1962] Duke L. J. 138, 142.

90 259 Minn. at 459, 107 N.W. 2d at 863-864.

91 232 Or. 426, 374 P. 2d 896 (1962).

92 The court wrote:

> "to adopt the suggested rule of the Restatement so far, at least, as the operation of automobiles by minors is concerned, may be an innovation on the law of Oregon, but if so it is one that is justified by 'the circumstances of contemporary life' .... We may agree that, as the New Hampshire court said in the Charbonneau case in respect to their statute, when the legislature of this state provided that a license to operate an automible shall not be issued to any person under the age of 16 years .... it did not undertake to deal with the rule of care. Nevertheless, we think that the statute could have been enacted only upon the assumption that it is reasonably consistent with the public safety to permit children 16 years of age and over to drive automobiles upon the public highways. In this respect no distinction has been made between children covered by the statute and adults. This being the policy implicit in the law, we think it to be not only logical but salutary to judge the behavior of children in a case of this kind by the same standard that is applied to adults. And we see no reason for a different rule where the question is not merely one of ordinary negligence, but of gross negligence or reckless driving.
>
> At the time of the accident out of which this case arose the defendant was nearly 17 years of age. There is nothing to suggest that she was not an entirely normal person physically and mentally. She had previously driven for a year under a learner's permit .... and for nearly a year under an operator's license. It is our view that when she assumed that responsibility of driving an automobile pursuant to a license issued by the state, she put off the things of a child for the purpose of that activity and should be held accountable for injury to another caused by departure from standards expected to be

observed by persons of mature years.

232 Or. at 451-452, 374 P. 2d at 908 (citations omitted).

93 35 Ill. App. 2d 203, 182 N.E. 2d 342 (1962).

94 35 Ill. App. 2d, at 209, 182 N.E. 2d at 345.

95 Id.

96 Id.

97 Id.

98 35 Ill. App. 2d, at 209-210, 182 N.E. 2d at 345.

99 On the general question of failure to obtain a driving licence, see Gregory, Breach of Criminal Licensing Statutes in Civil Litigation, 36 Cornell L. Q. 622 (1951) (negligence arising from breach of licensing statutes). See also Mohowald v Beckrich, 212 Minn. 78, 2 N.W. 2d 569 (1942) (lack of driver's licence is not evidence of driver's negligence); Prosser & Keeton, 226; cf. Goss v Allen, 70 N.J. 442, 451, 360 A. 2d 388, 394 (1976) (Schreiber, J., dissenting) (whether licence has been obtained is not relevant in determining standard of care).

100 Cf. Prosser & Keeton, 182 ("now the rule in half the states").

101 Gunnells v Dethrage, 366 So. 2d 1104 (Ala. 1979) (minor defendant held to adult standard); Neudeck v Bransten, 233 Cal. App. 2d 17, 43 Cal. Rptr. 250 (1965) (16-year-old defendant driver held to adult standard); Wagner v Shanks, 56 Del. 555, 194 A. 2d 701 (1963) (minor driver held to adult standard); Dawson v Hoffmann, 43 Ill. App. 2d 17, 192 N.E. 2d 695 (1963) (17-year-old driver held to same standard of care as adult); Ryan v C.& D. Motor Delibery Co., 38 Ill. App. 2d 18, 186 N.E. 2d 156 (1962) (adult standard applied in determining contributory negligence of 19-year-old driver); Allen v Ellis, 191 Kan. 311, 380 P. 2d 408 (1963) (16-year-old driver held to adult standard of care); Constantino v Wolverine Ins.

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Co., 407 Mich. 896, 284 N.W. 2d 463 (1979) (minor driver held to same standard of conduct as adult); Miller v State, 306 N.W. 2d 554 (Minn. 1981) (adult standard applied in determining contributory negligence of minor driver); Wollaston v Burlington N., Inc., 612 P. 2d 1277 (Mont. 1980) (17-year-old driver held to adult standard in determining contributory negligence); Reiszel v Fonana, 35 A.D. 2d 74, 312 N.Y.S. 2d 988 (1970) (17-year-old driver held to adult standard); Carano v Cardina, 115 Ohio App. 30, 184 N.E. 2d 430 (1961) (adult standard applied to 17-year-old driver in negligence claim); Baxter v Fugett, 425 P. 2d 462 (Okla. 1967) (emphasis on statutory requirements); Nielsen v Brown, 232 Or. 426, 374 P. 2d 896 (16-year-old driver held to same standard as adult); Krahn v LaMeres, 483 P. 2d 522 (Wyo. 1971) (16-year-old driver held to adult standard of care); cf. Smedley v Piazzolla, 59 A.D. 2d 940, 399 N.Y.S. 2d 460 (1977) (adult standard not applied to child under four years old, who released emergency brake of automobile or placed vehicle in gear); Comment, supra, note 33, at 706, n. 37 (anticipating issue arising in Smedley v Piazzola). But cf. Mahon v Heim, 165 Conn. 251, 332 A. 2d 69 (1973) (subjective standard to children applied to determine negligence of appropriate 17-year-old driver of truck; any change in the law should be effected by legislature). See generally 97 A.L.R. 2d 872 (1964) (discussion of primary and contributory negligence of minors engaged in operating motor vehicles).

102 Harrelson v Whitehead, 236 Ark. 325 S.W. 2d 868 (1963) (15-year-old plaintiff driver held to adult standard in contributory negligence claim); Prichard v Veterans Cab Co., 63 Cal. 2d 727, 408 P. 2d 360, 48 Cal. Rptr. 904 (1965) (17-year-old plaintiff operating motorcycle n course of work held to adult standard); cf. NcNall v Farmers Ins. Group, 181 Ind. App. 501, 392 N.E. 2d 520 (1979) (15-year-old driver held to adult standard); Daniels v Evans, 107 N.H. 407, 224 A. 2d 63 (1966) (19-year-old driver held to adult standard in contributory negligence claim), noted in 9 Ariz. L. Rev. 134 (1967); Williams v Esaw, 214 Kan. 658, 522 P. 2d 950 (1974) (14-old-old driver held to adult contributory negligence standard); Davis v Waterman, 420 So. 2d 1063 (Miss. 1982) (13-year-old driver held to adult contributory negligence standard); Tipton v Mulinix, 508 P. 2d 1072 (Okla. 1973) (14-year-old driver held to adult standard of care); (contributory negligence of 19-year-old plaintiff determined by adult standard).

It is worthy of note that "it is uniformly held" that cars - the prime example of the adult activities

doctrine - are not "inherently dangerous instrumentalities". Grindstaff v Watts, 254 N.C. 568, at 571, 119 S.E. 2d 784, at 786-787 (1961). Of course, parents and others may be held liable for entrusting automobiles to a child or other person whom they have reason to believe to be incompetent. Id. at 571-572, 119 S.E. 2d at 787; 2 Shepard's Causes of Action, 313-316 (1983); Kent, Parental Liability for the Torts of Children, 50 Conn. B. J. 452, at 462 (1976): [1962] Duke L. J. 138, at 142 n.22. In a number of decisions the courts have held that parents who permit their unlicensed children to drive are guilty of negligence per se. Liability is generally imposed on these parents where the minor's negligent driving causes injury. See Chiniche v Smith, 374 So. 2d 872 (Ala. 1979); Harkwick v Bublitz, 254 Iowa 1253, 119 N.W. 2d 886 (1963); Kempf v Boehrig, 95 Wis. 2d 435, 290 N.W. 2d 562 (Ct. App. 1980); cf. Carter v Montgomery, 226 Ark. 989, 296 S.W. 2d 442 (1956) (no liability to parent as unlicensed child entirely innocent of any negligence). In some cases, courts have rested parental liability on the incompetence, rather than the negligence, of the driver. See, e.g. Nault v Smith, 194 Cal. App. 2d 257, 14 Cal. 889 (1961). This approach has received support among the commentators. See, e.g. Woods, Negligent Entrustment: Evaluation of a Frequently Overlooked Source of Additional Liability, 20 Ark. L. Rev. 101, at 109-110 (1966); Note, Negligent Entrustment in Alabama, 23 Ala. L. Rev. 733, at 750-751 (1971). This distinction is of some importance in relation to the adult activities doctrine. If the minor's incompetence, rather than negligence, is the test, then the question of parental laibility will not be deflected into the irrelevant issue of whether the minor's negligence is to be determined by the adult or the child standard of care.

103 Medina v McAllister, 202 So. 2d 755, 759 (Fla. 1967) (minor old enough to be granted motor vehicle operator's license "should be held to assume responsibility for care and safety in its operation in the light of adult standards, whether the minor is charged with primary or contributory negligence"); Garatoni v Teegarden, 129 Ind. Ap. 500, 154 N.E. 2d 379 (1958) (15-year-old motor scooter driver held to adult contributory negligence standard); Adams v Lopez, 75 N.M. 503, 407 P. 2d 50 (1965) (16-year-old driver held to adult contributory negligence standard), noted in 3 Tulsa L. J. 186, 186 (1966); Powell v Hartford Accident & Indem. Co., 217 Tenn. 503, 398 S.W. 2d 727 (1966) (14-year-old minor held to adault contributory negligence standard). In Powell, the dissent wrote:

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> "The majority opinion seems .... to approbate the so-called rule of reason based upon the 'adult activity' theory. This, to my mind, is to kneel at the feet of the Golden Calf in the favor of a soporific phrase. After prolonged consideration, I am unable to demarcate the beginning or ending of the import or impact of this dubious phrase."

Id., at 736 (Creson, J., dissenting); see also 33 Tenn. L. Rev. 533, at 533 (1966) (discussing Powell); cf. City of Austin v Hoffman, 379 S.W. 2d 103 (Tex. Civ. App. 1974) (children of 14 or over held to adult standard of care, children under 14 held to children's standard of care).

104 Jackson v McCuiston, 247 Ark. 862, 448 S.W. 2d 33 (1969) (relying in part on the fact that 14-year-old tractor driver had been trained in operation of tractor), noted in 24 Ark. L. Rev. 379, at 379 (1970); Goodfellow v Coggburn, 98 Idaho 202, at 204, 560 P. 2d 873, at 875 (1977) (in spite of statutory exemption permitting unlicensed person to operate farm machines temporarily on highway, general statutes regulating operation of motor vehicles did "not indicate any intent to exempt children from their requirements"); cf. Mack v Davis, 76 Ill. App. 2d 88, 221 N.E. 2d 121 (1966) (17-year-old plaintiff, driving a farm tractor on public highway, not held to adult standard due to nature of the activity and his inexperience). In an action against the employer for failure to instruct plaintiff as to operation of tractor, the Mack, court applied a standard of care appropriate to a minor, stating:

> "[T]he activity here involved is not of the same nature as the driving of automobiles on our public streets. The operation of farm tractors is frequently entrusted to minors. The substantial part of the operation is not on public highways and involves no particular hazard or danger to the public generally."

Id., at 125-126, Norby v Klukow, 249 Minn. 173, 81 N.W. 2d 776 (1957) (applying to a 14-year-old driver of a tractor the standard of care of "an ordinarily prudent boy of his age under the same or similar circumstances").

105 Betzold, 35 Ill. App. 2d 203, 182 N.E. 2d 342 (13-year-old defendant lorry driver held to standard of care of adult licensed driver).

106 Ewing v Biddle, 141 Ind. App. 25, 216 N.E. 2d 863 (1966) (11-year-old go-cart driver held to adult contributory negligence standard).

107 Robinson v Lindsay, 92 Wash. 2d 410, 598 P. 2d 392 (1979) (13-year-old experienced snowmobile driver held to adult standard of conduct). The Washington Supreme Court imposed an adult standard based on whether the child engaged in an "inherently dangerous" activity rather than an adult activity.

> "Such a rule protects the need of children to be children but at the same time discourages immature individuals from engaging in inherently dangerous activities. Children will still be free to enjoy traditional childhood activities without being held to an adult standard of care. Although accidents sometimes occur as the result of such activities, they are not activities generally considered capable of resulting in "grave danger to others and to the minor himself if the care used in the course of the activity drops below that care which the reasonable and prudent adult would use ...."

Id., at 413, 598 P. 2d at 394 (citing Daniels, 107 N.H. at 408, 224 A. 2d at 64) (minor held to standard of adult where activity can result in grave danger to others or himself).

108 Fishel v Givens, 47 Ill. App. 3d 512, 362 N.E. 2d 97 (1977) (14-year-old minibike driver held to adult standard in contributory negligence claim); Perricone v DiBartolo, 14 Ill. App. 3d 514, 302 N.E. 2d 637 (1973) (13-year-old driver held to adult standard in contributory negligence claim), Demeri v Morris, 194 N.J. Super 554, 477 A. 2d 426 (1983) (12-year-old using "dirt bike", a small motorcylce designed for use off the highway, held to adult standard when using it on the public road).

109 Williams v Gilbert, 239 Ark. 935, 395 S.W. 2d 333 (1964) (seven-year-old bicycle rider held to standard of someone his own age and intelligence); Davis v Bushnell, 93 Idaho 528, 465 P. 2d 652 (1970) (eight-year-old held to like child's standard of care); Conway v Tamborini, 68 Ill. App. 2d 190, 215 N.E. 2d 303 (1966) (14-year-old held to like child's standard of care); Bixenman v Hall, 251 Ind. 527, 242 N.E. 2d 837 (1968) (13-year-old held to like child's standard of care); Ransom v Melegi, 18 Mich. App. 476, 171 N.W. 2d 482 (1969) (12-year-old

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held to like child's standard of care); Caradori v Fitch, 200 Neb. 186, at 189, 263 N.W. 2d 649, at 652 (1978) ("We are not prepared, even assuming the wisdom of the Minnesota rule, to place the activity of bicycling in the same category as power boating"); cf. Murchinson v Sykes, 223 Miss. 754, 78 So. 2d 888 (1955) (nine-year-old not held to adult standard). Contra, Ewing, 141 Ind. App. at 31, 216 N.E. 2d at 866-867 (listing bicycles along with motor vehicles as potentially dangerous instrumentalities); Sagor v Joseph Burnett Co., 122 Conn. 447, 190 A. 258 (1937) (child held to adult standard in violation of traffic statute). In Warning v Kanabec County Co-operative Oil Ass'n, 231 Minn. 293, 42 N.W. 2d 881 (1950), the Minnesota Supreme Court applied the subjective standard of "the degree of vigilance that an ordinarily prudent boy of his age, mental capacity, and intelligence is capable of using" when considering the contributory negligence of a 10-year-old cyclist. 231 Minn., at 298, 42 N.W. 2d at 883. The same approach was favoured in Steinke v Indianhead Truck Line, 237 Minn. 253, 54 N.W. 2d 777 (1952), where a 15-year-old cyclist was held guilty of contributory negligence as a matter of law, when in spite of substantial familiarity with the area, he darted out in front of the defendant's vehicle. 237 Minn., at 257-259, 54 N.W. 2d at 780.

It is interesting to note that the courts have not extended the family automobile doctrine to bicycles. Pflugmacher v Thomas, 34 Wash. 2d 687, 209 P. 2d 443 (1949); cf. Calhoun v Pair, 197 Ga. 703, 39 S.E. 2d 180 (1944) (per curiam); Note, 14 Wake Forest L. Rev. 699, at 706 (1978).

110 Cf. Goss v Allen, 70 N.J. 442, at 453 n.2, 360 A. 2d 388, at 394 n.2 (1976) (Schreider, J., dissenting).

111 According to the court, "It appears .... from the cases, that the most critical factor, in balance, in requiring greater care by minors, seems to be the motor-powered nature of the vehicle which was being operated by the teenager." Fishel v Givens, 47 Ill. App. 3d 512, 519, 362 N.E. 2d 97, 102 (1977).

112 251 Ark. 519, 474 S.W. 2d 123 (1971), noted in 26 Ark. L. Rev. 243, at 243 (1970); see also Annot., 47 A.L.R. 3d 620 (1973).

[113] Justice Fogelman strongly dissented. Purtle, 251 Ark. at 523, 474 S.W. 2d at 126 (Fogelman, J., dissenting).

[114] 251 Ark., at 522, 474 S.W. 2d at 125.

[115] Id.

[116] 251 Ark., at 522, 474 S.W. 2d at 126.

[117] 251 Ark., at 522-523, 474 S.W. 2d at 126; cf. Jackson v McCuiston, 247 Ark. 862, 448 S.W. 2d 33 (1969) (earliest decision imposing adult standard on minor who drove a tractor).

[118] LaBarge v Stewart, 84 N.M. 222, at 225-226, 501 P. 2d 666, at 670 (1972); Thomas v Inman, 282 Or. 279, at 285-286, 578 P. 2d 399, 403 (1978); Prater v Burns, 525 S.W. 2d 846, 851 (Tenn. Ct. App. 1975); cf. In re S.W.T., 277 N.W. 2d 507, at 514 n.4 (Minn. 1979) (court emphasised that it did "not decide standard of care applicable in civil cases involving juvenile misuse of firearms").

It is well established that parents and other persons who leave guns within easy access of children may be liable in negligence if the children inflict injury. See Gargiulo, Liability for Leaving a Firearm Accessible to Children, 17 Clev. Mar. L. Rev. 472 (1968); Braun, Fireworks, Explosives, Guns, and Minors, 15 Clev. Mar. L. Rev. 566, at 574 (1966).

[119] 84 N.M. 222, 501 P. 2d 666 (Ct. App. 1972).

[120] 84 N.M., at 225-226, 501 P. 2d at 670.

[121] 282 Or. 279, 578 P. 2d 399 (1978).

[122] 84 N.M., at 285, 578 P. 2d at 401.

[123] 84 N.M., at 286, 578 P. 2d at 403.

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[124] 134 N.J. Super. 99, 338 A. 2d 820 (Sup. Ct. App. Div. 1975).

[125] Goss v Allen, 70 N.J. 442, 360 A. 2d 388 (1976), noted in 30 Rutgers L. Rev. 790 (1977).

[126] 70 N.J. at 447, 360 A. 2d at 391.

[127] 70 N.J., at 447, 360 A. 2d at 390.

[128] Id.

[129] Id.

[130] Id.

[131] 70 N.I., at 453, 360 A. 2d at 394 (Schreiber, J., dissenting).

[132] Id., at 453-454, 360 A. 2d at 394 (Schreiber, J., dissenting) (footnote omitted). In Farm Bureau Insurance Group v Phillips, 116 Mich. App. 544, 323 N.W. 2d 477 (1982), the Michigan Court of Appeals held that building a fire was not a "dangerous or adult activity" in respect of which an adult standard of care should be imposed. The Court was of opinion that "[t]he building of fires is a normal and expected activity engaged in by young members of youth organisations, such as the Boy Scouts". It was more closely analogous to the use of firearms than to driving an automobile, in the Court's view.

[133] 58 Misc. 2d 128, 294 N.Y.S. 2d 628 (N.Y. Cty Ct. 1968), aff'd, 63 A.D. 2d 587, 312 N.Y.S. 2d 951 (N.Y. App. Term 1970), aff'd, 36 A. 2d 540, 318 N.Y.S. 2d 925 (1971).

[134] 58 Misc. 2d at 129, 294 N.Y.S. 2d at 634.

[135] 58 Misc. 2d, at 128, 294 N.Y.S. 2d at 630.

[136] Id.

[137] 58 Misc. 2d, at 132-133, 294 N.Y.S. 2d at 634 (citations omitted).

[138] 58 Misc. 2d, at 133, 294 N.Y.S. 2d at 634-635.

[139] 58 Misc. 2d, at 133-134, 294 N.Y.S. 2d at 635.

[140] Id.

[141] For commentary on the Neumann case, see 33 Alb. L. Rev. 434 (1969).

[142] 63 Misc. 2d at 587, 312 N.Y.S. 2d at 951 (citations omitted).

[143] 63 Misc. 2d, at 589, 312 N.Y.S. 2d at 953 (Gulotta, J., dissenting).

[144] Id.

[145] 36 A. 2d 540, 318 N.Y.S. 2d 925 (1971).

[146] [1939] N.Z.L.R. 1040 (C.A.), noted by Anon., Comment, 18 Can. Bar Rev. 67 (1940). Cf. Campbell, Criminal Law, ch. 11 of Robson at 375.

[147] This is the regulation which imposed an obligation on cyclists (among others) to stay on the left-hand side of the highway.

[148] [1939] N.Z.L.R., at 1044-1045.

[149] Watson v Charles Anderson & Co., 8 N.S.W.S.R. 100 (1908) and Hunt v Brassware Ltd., 26 N.S.W.S.R. 449 (1926) in both of which the plaintiff was a child employed by the defendant who was injured when operating machinery in the course of his employment.

[150] [1939] N.Z.L.R., at 1045.

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151 Id., at 1045-1046.

152 Id., at 1048.

153 Supra.

154 See p. 109, for reference to the many decisions in the United States rejecting the application of the "adult activities" doctrine to child cyclists.

155 [1968] N.Z.L.R. 759 (Sup. Ct., Richmond, J., 1967). It does not appear that Tarunga was cited to the court.

156 Id., at 763.

157 Id.

158 Id.

159 Id.

160 [1956] S.A.S.R. 297 (Sup. Ct., Reed, J.).

161 [1976] V.R. 208 (Sup. Ct. 1975).

162 Gowans and Menhennitt, JJ; Dunn, J., considered that, in view of the way the trial had been handled generally, an implicit reference to the age of the cyclist could be read into the trial judge's instructions to the jury.

163 [1956] S.A.S.R. 297 (Sup. Ct., Reed, J.).

164 [1939] N.Z.L.R. 1040 (C.A.).

165 See Fleming, 643-644.

166 See generally, Salmond & Heuston, 410-411, Fleming, 643-644, Winfield & Jolowicz, 689-690, Clerk & Lindsell,

para. 2.37, Alexander, supra, at 863-871, McMahon & Binchy, 181-184, Binchy, Liability in Tort of Parents for Damage Caused by their Children, 74 Incorp. L. Soc. of Ireland Gazette 35 (1980), Waller, Visiting the Sins of the Children: The Liability of Parents for Injuries Caused by their Children, 4 Melbourne U. L. Rev. 17 (1963), Bromley, 325-326, Charlesworth & Percy, para. 2-134, Anon., Dangerous Toys, 64 I.L.T. & S.J. 223, at 225 (1930), Eversley, 414-415. In Moon v Towers, 8 C.B. (N.S.) 611, at 615, 141 E.R. 1306, at 1308 (1860), Willes, J., stated:

> "I am not aware of any such relation between a father and son, though the son be living with his father as a member of his family, as will make the acts of the son more binding upon the father than the acts of anybody else."

In Donaldson v McNiven, [1952] 2 All E.R. 691, at 692 (C.A.), Lord Goddard, C.J., stated:

> "Some people have thought that parents ought to be responsible for the torts of their children, but they are not."

See also, to similar effect, Rogers v Wilkinson, The Times, 19 January 1963, p. 4, cols. 3-4, at col. 3 (Q. B. Div., Thesiger, J.). The decision of North v Wood, [1914] 1 K.B. 629 is similar in its result.

167 Generally, what is stated below in relation to parents applies also to other persons having charge of the child.

168 Waller, Visiting the Sins of the Children: The Liability of Parents for Injuries Caused by their Children, 4 Melbourne U. L. Rev. 17, at 19 (footnote references omitted) (1963). For a discussion of the meaning of "ratification", see Atiyah, Vicarious Liability, 318-320 (1967).

169 Cf. Fleming, 643, Stone, Liability for Damage Caused by Minors: A Comparative Study, 5 Ala. L. Rev. 1, at 25-26 (1952).

170 [1937] Ir. Jur. Rep. 1 (High Ct., Hanna, J., 1936).

171 8 C.B. (N.S.) 611, 141 E.R. 1306 (1860).

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172 Id., at 614 and 1307, respectively.

173 ".... I think there was no evidence to go to the jury of an adoption of the trespass by the father so as to make it his act": id., at 615 and 1307, respectively.

174 "If the court has been of opinion that there was evidence that the defendant had ratified and adopted the act of his son in causing the plaintiff to be apprehended and taken before a magistrate, a question of very general importance would have been raised. But it becomes unnecessary to consider that, inasmuch as the majority of the court have come to the conclusion that there was no evidence of ratification to go to the jury.": id.

175 ".... I incline to think, that, where an act is done by an agent in the course of his emplolyment for a principal, the agent, as in this case, being an unemancipated member of the family of the principal, and the latter allows his agent to go on with it and to take steps which could only be taken at the expense of the principal, the jury may fairly take these matters into their consideration as some evidence of ratification.": id., at 615 and 1307-1308, respectively.

176 See Salmond & Heuston, 410-411, Bromley, 325, Waller, at 21ff., Fleming, 643.

177 See Fleming, 643, Waller, at 21-24, Atiyah, Vicarious Liability,131 (1967).

178 In Ireland there has been no real need to foster this approach because, since 1933, legislation has imposed vicarious liability on car owners based on consensual user: see now the Road Traffic Act 1961, section 118 (no. 24). See generally, Osborough, The Vicarious Liability of the Vehicle Owner, 6 Ir. Jur. (N.S.) 77 (1971). Beechinor v O'Connor, [1939] Ir. Jur. Rep. 86 (High Ct., O'Byrne, J., with jury) is a decision involving a son driving his parent's car. See also Maher v Great Northern Railway Co. (Ireland), [1942] I.R. 206 (Sup. Ct., 1941). For a comparison with the equivalent provision in Northern Ireland, originally introduced in 1934, see Sheridan, Note: Irish Private Law, 2 Int. & Comp. L. Q. 397 (1953) (correcting his

error in 1 Int. & Comp. L. Q. at 199 (1952)).

179 [1975] I.R. 192 (Sup. Ct.).

180 But not her aunt: id., at 199 (per Henchy, J.).

181 O'Higgins, C.J. and Walsh, J.; Henchy, J. dissenting.

182 [1975] I.R., at 197.

183 Cf. the decisions in the United States holding that visits by persons to a friend's house to perform similar acts of good neighbourliness may raise the status of the visitor from that of licensee to invitee. See Prosser, Business Visitors and Invitees, 20 Can. Bar Rev. 357, at 386-387 (1942). Generally, however, the Courts will regard such persons as licensees: see Shipley, Annotation, 25 A.L.R. 2d 598, at 605-608 (1952).

184 [1975] I.R., at 197.

185 Atiyah, Vicarious Liability, 134 (1967), makes an observation on these lines. So also does Fleming, An Introduction to the Law of Torts, 174 (1967).

186 [1975] I.R., at 199-200. Cf. Hahn v Conley, 45 Austr. L. J. R. 631, at 636 (High Ct. Austr., per Barwick, C.J., 1971):

> "In any case, in my opinion, where it is sought to make parents or blood relations liable to their children or relatives because of particular situations those who have to try the facts ought not to indulge in undue subtlety in order to create liability even in these days when the consequence of so many breaches of duty have been passed on by insurance to be borne by others."

187 Id., at 202-203.

188 Supra.

189 [1975] I.R., at 197. (Emphasis added.)

190 See generally Salmond & Heuston, 411, Fleming, 643-644, Bromley, 325-326, Waller, supra, at 24-29, Fridman, Children and Nelgigence, 117 New L. J. 35, at 36 (1967), Kime & Harper, The Duty to control the Conduct of Another, 9 Indiana L. J. 498, at 506-509 (1934).

191 Cf. Dixon v Bell, S.M. & S. 198, 105 E.R. 1023 (1816), Lynch v Nurdin, 1 Q.B. 29, at 35, 113 E.R. 1041, at 1043 (per Lord Denman, C.J., 1841).

192 [1904] 2 I.R. 317 (Ct. App., 1903). The decision has been widely cited and discussed in common law jurisdictions in decisions relating to parental negligence. See, e.g., Reida v Lund, 18 Cal. App. 3d 698, 96 Cal. Rptr. 102 (Ct. App., Second Dist., 1971), Dickens v Barnham, 69 Colo. 349, 194 P. 356 (Sup. Ct., 1920), Salisbury v Crudale, 41 R.I. 33, 102 A. 731 (Sup. Ct., 1918) (describing the decision as being "of great weight"), Thibodeau v Cleff, 24 O.L.R. 214 (Div. Ct., 1911), Kenealy v Karaka, 26 N.Z.L.R. 1118 (C.A., 1906).

193 [1904] 2 I.R., at 340.

194 [1959] 1 W.L.R. 1031, at 1032 (Manchester Assizes, Lord Parker, C.J.), noted in 76 L. Q. Rev. 15 (1960).

195 Supra.

196 [1966] 3 All E.R. 891 (Lincoln Summer Assizes, Nield, J.).

197 32 Times L.R. 413 (K.B.Div., Lush and Rowlatt, JJ., 1916).

198 The Times, 24 June, 1960, p. 12, col. 2 (Q.B.Div., Donovan, J.).

199 The Times, 19 January 1963, p. 4, cols. 3-4 (Q.B.Div., Thesiger, J.).

200 No. 17 (as amended).

201 Section 8(1)(a) of the 1925 Act, as amended by section 17 of the Firearms Act 1964 (no. 1).

202 Section 10(2) of the 1925 Act, as amended by section 19 of the 1964 Act.

203 Section 10(6)(b) of the 1925 Act, as amended by section 19 of the 1964 Act.

204 Cf. Hinds v Direct Supply Co. (Clapham Junction) Ltd., The Times, 29 January, 1966, p. 15, cols. 6-7 (Q.B. Div., Mackenna, J.) (defendant shop which sold air pistol to fifteen-year-old in breach of statute liable in negligence for injuries caused by him. Defendant conceded that if it had sold the gun to the fifteen-year-old, there was a prima facie case that it was negligent, and Court considered that if the sale fell within the terms of the statutory provision (section 19(1) of the Firearms Act 1937 (1 Edw. 8 & 1 Geo. 6, c. 12) "there should be judgment for the plaintiffs"). Mackenna, J. was of the view that "[e]ven if section 19 did not give a right of action it was at least an expression by the legislature that in ordinary circumstances persons under 17 were too young to buy these dangerous things": id., col. 8. See further, Alexander, Legislation and the Standard of Care in Negligence, 42 Can. Bar Rev. 243, at 260-261 (1964).

205 On principle, it would appear that a parent who culpably fails to learn of his child's particular dangerous tendency should not be able to shelter behind this negligently occasioned ignorance. Nevertheless, there are some decisions which appear to require proof of something akin to scienter on the part of the parent: see, e.g., Streifel v Stroz, 11 D.L.R. (2d) 667 (B.C. Sup. Ct., Whittaker, J., 1957). Whilst it is no doubt true that in most cases the parent will be likely to be presumed ignorant of his child's vicious propensity in the absence of proof of knowledge of it on his part, there are also cases where the proof of the child's propensity is so clear and strong that it should not be necessary to adduce specific evidence of knowledge by the parent.

206 Cf. Gorely v Codd, supra, at 896, Court v Wyatt, supra,

Michand v Dupuis, 30 N.B.R. (2d) 305 (Sup. Ct., Q.B.D., Richard, J., 1977), Ryley v Lafferty, 45 F. 2d 641 (Dist. Ct., D. Idaho N. D., 1930), Norton v Payne, 154 Wash. 241, 281 P. 991 (Sup. Ct., 1929), Hannert v Speier, 214 Ky. 46, 281 S. W. 998 (Ct. Apps. 1926), Singer v Marx, 144 Cal. App. 2d 637, 301 Ky., P. 2d 440 (Dist. Ct. App., 2nd Dist., 1956); cf. Ballou, Recourse for Rape Victims: Third Party Liability, 4 Harv. Women's L. J. 105, at 145-148 (1981).

207 Cf. Streifel v Stroz, 11 D.L.R. (2d) 667 (B.C. Sup. Ct., Whittaker, J., 1957).

208 Cf. Thibodeau v Cleff, 24 O.L.R. 214 (Div. Ct., 1911), Agensini v Olsen, 277 App. Div. 1006, 100 N.Y.S. 2d 338 (App. Div., 2nd Dept., 1950).

209 Cf. LeLarge v Blakney, 21 N.B.R. (2d) 100 (Sup. Ct., Q.B.D., Dickson, J., 1978).

210 Cf. Zuckerbrod v Burch, 88 N. J. Super. 1, 210 A. 2d 425 (Super. Ct. App. Div., 1965).

211 Cf. Gambino v DiLeo, 17 D.L.R. (3d) 167 (Ont. H. C., Osler, J., 1970), Arnold v Teno, 83 D.L.R. (3d) 609 (Sup. Ct. Can., 1978), McCallion v Dodd, [1966] N.Z.L.R. 710.

212 [1965] I.R. 543 (Sup. Ct.).

213 Id., at 546.

214 Id., at 549-550.

215 [1955] A.C. 549 (H.L.(Eng.)), noted in 71 L.Q. Rev. 161 (1955), and briefly discussed by V.T.H. D[elany], Injuries to Schoolchildren: The Principles of Liability, 28-29 Ir. Jur. 15, at 18-19 (1962-1963). The decision of the Court of Appeal in this case is described as involving "a rather extreme extension of the liability of school managers and schoolteachers", by the editor of The Irish Law Times and Solicitors' Journal, in vol. 88, p. 13 (note) (1954). The liability of teachers and school proprietors has been the subject of a number of

decisions in Ireland, see, e.g., Ryan v Madden, supra, fn. 24, Healy v Dodd, [1951] Ir. Jur. Rep. 22 (High Ct., O'Byrne, J.), Courtney v Masterson, supra, fn. 32, Mulligan v Doherty, unreported, Supreme Ct., 17 May 1966 (52-1965), Smith v Jolly, High Ct., O'Hanlon, J., with jury, 17-18 May 1984, reported in the Irish Times, 18 May 1984, p. 8, cols. 4-5 and 19 May 1984, p. 18, col. 5, Boyle v O'Tauma, Circuit Ct., Judge Martin, 2 September 1985, Irish Times 3 September 1985, p. 8, col. 5-6. See generally Linehan, The School Teacher and the Law of Negligence: A Summary and Reappraisal, 31 Ir. Jur. 38 (1965), Anon., School Teachers and School Managers - Their Liability for Negligence, 88 I.L.T.& S.J. 1, (1954), Binchy, Schools' Liability for Negligence, 78 Incorp. L. Soc. of Ireland Gazette 153, 185 (1984). For a recent consideration of the "prudent parent" test, see Hanson Hoyano, The "Prudent Parent": The Elusive Standard of Care, 18 U. Br. Col. L. Rev. 1 (1984).

216 [1955] A.C., at 561 (per Lord Goddard).

217 Id., at 566.

218 Supra.

219 Alexander, supra, at 867. Cf. Hewer v Bryant, [1970] 1 Q.B. 357, at 369 (C.A., 1969), where Lord Denning, M.R., described the parental right to custody as

> ".... a dwindling right which the courts will hesitate to enforce against the wishes of the child, and the more so the older he is. It starts with a right of control and ends with little more than advice."

220 It appears clear that parental negligence is not necessarily extinguished by the child reaching full age since the parent may in certain cases be under a duty to take steps to prevent his adult child causing injury to another. Liability in such instances will depend on issues of foreseeability, risk and control: cf. O'Sullivan v Creed, supra. The fact that, since the Age of Majority Act 1985 came into force, it is possible for a person of less than 18, and in some extremely rare cases less than 16, to have attained full age, by marrying, is also relevant. The attainment of full age in such circumstances would be a factor, possibly a very

important one in determining the question of the liability in negligence of a parent, but it would not seem possible to attribute to it any hard and fast legal consequences in this sphere. Similarly, liability based on a master-servant relationship will not necessarily cease to apply by reason of the child's reaching full age: Moynihan v Moynihan, supra. With regard to liability based on the fact that the parent has directed, authorized or ratified the act of his child, the position is less clear since, although the liability proceeds on a type of agency basis, it would appear to be strongly associated with the parental rights and duties of rearing the child. It may well be that this basis of liability terminates when the child reaches full age.

221 8 Edw. 7, c. 67. As to the mode of recovery of sums ordered to be paid, see section 99(5) of the Children Act 1908, as amended by section 107(4) of the Defence Act 1954. Cf. Cullen v A.G., [1979] I.R. 394 (High Ct., Hamilton, J., 1977), analysed by Casey, 11 Ir. Jur. (n.s.) 326 (1977).

222 A "child" is a person under the age of fifteen years: Children Act 1908, section 131 (8 Edw. 7, c. 67), as amended by the Children Act 1941, section 29(1) (no. 12).

223 A "young person" is a person who is fifteen years of age or upwards and under the age of seventeen years: Children Act 1908, section 131 (8 Edw. 7, c. 67), as amended by the Children Act 1941, section 29(2) (no. 12).

224 Section 131 of the Children Act 1908 (8 Edw. 7, c. 67).

225 The questions are inspired by an interesting discussion of equivalent provisions in the Northern Ireland legislation by J.B. Mc.C[artney], Responsibility of Parents for Children and Young Persons, 15 N.I.L.Q. 298, at 300 (1964).

FOOTNOTES TO CHAPTER 2

1 Pp. 5-6.

2 The proposal is considered primarily because the standard of negligence has sometimes been expressed in these terms in some common law jurisdictions and it might be considered that this standard should apply to contributory negligence.

3 Cf. Charbonneau v MacRury, 153 A. 457, at 463 (N.H. Sup. Ct., per Snow, J., 1931).

4 Cf. pp. 52ff.

5 See Salmond & Heuston, 208, Fleming, 106-197. Cf. Duffy v Fahy, [1960] Ir. Jur. Rep. 69 (Sup. Ct.), where Lavery, J. stated (obiter) (at 75):

> "If a case should arise where a claim is made that a higher or lower standard of care is to be applied in the case of .... any person suffering from a defect .... such case will have to be considered and should not be prejudged now."

6 Glasgow Corporation v Muir, [1943] A.C. 448, at 457 (H.L. (Sc.), per Lord Macmillan).

7 See Singer & Singer, 371-373, Garrison & Kingston, 165-166, Smart & Smart, 401, 530-531, Carmichael, vol. 1, 109-110.

8 The merits and defects of this argument are considered in our discussion of the fourth possible solution.

9 Since reference is made here to the child's (as opposed to an adult's) experience the theoretical possibility exists that the standard applicable to a particularly gifted and experienced child - a child prodigy who has toured the world, for example - might be higher than that applicable to "the reasonable man". We think that, for practical purposes, this possibility may safely be ignored and that it would complicate, rather than ease,

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matters for the legislation to provide that the standard of care applicable to children is that "of the reasonable adult person or of the child in question, having regard to the child's age, intelligence and experience, whichever standard is lower".

10 Lack of experience of particular risks appears to be a potent factor in accidents involving child pedestrians. In an Irish study of accident statistics for 1968, it was stated that "[t]he breakdown of the actions of pedestrian casualties for the peak group, viz. 5 to 9 years, shows that of the 566 casualties, 466 pedestrians, or 82 per cent, were injured when crossing the carriageway and only 1 per cent were playing on the carriageway. This suggests that in childhood the lack of experience in assessing the risks of making a crossing is a very real hazard": F. Simons, Warrants for the Installation of Pedestrian Crossing Facilities, 9 (An Foras Forbartha, 1970).

11 Cf. pp. 5-7.

12 Namely, first, whether the child was of such an age as to be capable of contributory negligence and, if so, secondly, whether, having regard to his age and mental development he was in fact guilty of contributory negligence.

13 Dorais v Paquin, 98 N.H. 149, 304 A. 2d 369 (1973) (emphasis added). See further Prosser & Keeton, 181..

14 See pp. 13-14.

15 Cf. Terry, Negligence, 29 Harv. L. Rev. 40, at 47 (1915).

16 Cf. James, Accident Liability Reconsidered: The Impact of Liability Insurance, 57 Yale. L. J. 549, at 554ff. (1948).

17 Cf. Purtle v Shelton, 474 S.W. 2d 123 (Ark. Sup. Ct., 1971).

18 Cf. Neumann v Shlansky, 58 Misc. 2d 128, 294 N.Y.S. 2d 628 (Westchester Cy. Ct., 1968), aff'd., 34 A.D. 2d 1016,

312 N.Y.S. 2d 947 (1970), aff'd., 318 N.Y.S. 2d 925 (1971), Goss v Allen, 70 N.J. 442, 360 A. 2d 388 (Sup. Ct., 1975), rev'g, 134 N.J. Sup. 99, 338 A. 2d 820 (App. Div., 1975).

19 Cf. pp. 14-24.

20 Cf. Ryan v Hickson, 7 O.R. (2d) 352, 55 D.L.R. (3d) 196 (High Ct., Goodman, J., 1974).

21 Cf. pp. 26-27.

22 Cf. pp. 24-26.

23 Cf. Linden, 33-34.

24 Cf. Ryan v Hickson, 7 O.R. (2d) 352, at 358, 55 D.L.R. (3d) 196, at 202 (High Ct., Goodman, J., 1974).

25 Linden, 39.

26 Linden, 39. See also Taurunga Electric Power Board v Karora, [1939] N.Z.L.R. 1040, at 1044 (C.A.), where Myers, C.J. stated that to apply the subjective standard to a 17-year-old cyclist "would constitute an added terror to the difficulties and dangers of modern traffic conditions".

27 107 N.W. 2d 859, at 863 (Minn. Sup. Ct., 1961).

28 Pp. 15-16.

29 107 N.J. 407, 224 A. 2d 63.

30 The issue of whether a motorist should reasonably anticipate being involved in a collision has been discussed in decisions where persons who fail to wear available seat belts have been charged with contributory negligence. The position commanding general support is that he should. In Yuan v Farstad, 66 D.L.R. (2d) 195, (B.C. Sup. Ct., 1967), Munroe, J. stated:

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> "Can a person reasonably anticipate that when driving his car in a city he may be involved in a collision? The answer to that question, I think, must be in the affirmative".

See also, McCann, The Seat Belt Defence in Canada, 42 Sask. L. Rev. 75, at 80-81 (1977).

31 In the passage from Dellwo v Pearson, quoted, supra, it is stated that "[a] person observing children at play with toys, throwing balls, operating tricycles or velocipedes, or engaged in other childhood activities may anticipate conduct that does not reach an adult standard of care or prudence". Yet the decisions are legion in which such persons failed to anticipate such conduct. It is only in these cases that the issue of the child's negligence will arise. Where the victim's failure to anticipate the injury in such cases was reasonable, it is difficult to see how his position differs from that of a driver who is injured by a minor motorist.

32 Linden, 34.

33 92 Wash. 2d 410, 598 P.2d 392 (1979). Cf. Dellwo v Pearson, 259 Minn. 452, 457-458, 107 N.W. 2d 859, 863 (1961):

> "Certainly in the circumstances of modern life, where vehicles moved by powerful motors and readily available and frequently operated by mature individuals, we should be skeptical of a rule that would allow motor vehicles to be operated to the hazard of the public with less than the normal minimum degree of care and competence."

34 Why should a 15-year-old causing havoc in a schoolyard by riding his bicycle at 25 m.p.h. be treated by a more indulgent standard than a 15-year-old (licensed), motorcyclist driving at 15 m.p.h. on the road? Cf. Comment, Capacity of Minors to be Chargeable With Negligence and Their Standard of Care, 57 Neb. L. Rev. 763, at 770 (1978). If the answer is that he should not, and that both should be held to an adult standard of care, the concept of "inherently dangerous" activity would go very much further than the "adult activities" doctrine as currently understood by the courts.

35 Cf. McMahon & Binchy, 295-296.

36 In Robinson v Lindsay, 92 Wash. 2d at 410, 598 P. 2d 392, Utter, C.J. argued that the "inherently dangerous" activity rule:

> "protects the need of children to be children but at the same time discourages immature individuals from engaging in inherently dangerous activities."

Whether Utter, C.J. was serious about the deterrent function of the rule is not clear; but it is doubtful whether this argument has any substantial force. Cf. Comment, A Proposal for a Modified Standard of Care for the Infant Engaged in a Adult Activity, 42 Ind. L. J. 405, at 410-411 (1967):

> "If a child who engages in an adult activity cannot comprehend prospectively the hazards he creates, it certainly cannot be assumed that the application of a more stringent standard of care will deter him from imprudence. Therefore, the prime purpose for imposing a more exacting standard for measuring child conduct is to assure that fewer injuries will go uncompensated rather than to deter minors from creating hazards."

In accord: Comment, Torts - Contributory Negligence - Minor Motor Vehicle Operator Held to Adult Standard of Care, Daniels v Evans, 47 B.U.L. Rev. 450, at 454-455 (1967); Note, Motor Vehicles - Negligence - Standard of Care for Minors - Adult Standard of Care Applied to Seventeen-Year-Old Defendant Motorist - Reiszel v Fontana, 35 Alb. L. Rev. 606, at 611 (1971). Contra, Note, Negligence - Application of Adult Standard to Minor, 33 Tenn. L. Rev. 533, at 536 (1966).

Scepticism as to the deterrent effect of tort liability or "random human frailties like inattentiveness .... on the road" has recently been expressed by Fleming, Is There a Future for Tort?, 44 La. L. Rev. 1193, at 1198 (1984). More generally, see Brown, Deterrence and Accident Compensation Schemes, 17 W. Ontario L. Rev. 111, at 140-143 (1979); Cramton, Driver Behaviour and Legal Sanctions: A Study of Deterrence, 67 Mich. L. Rev. 421 (1969).

37 For consideration of the policy issues, see Karr v McNeil, 92 Ohio App. 458, 110 N.E. 2d 714 (1952); Nelson v Arrowhead Freight Lines, 99 Utah 129, 104 P.2d 225 (1940); Wilson v Shumate, 296 S.W. 2d 72 (Mo. Sup. Ct. 1956); Daniels v Evans, 107 N.H. 407, 224 A. 2d 63 (1966); Baxter v Fugett, 425 P.2d 462 (Okla. 1967); Powell v Hartford Accident & Indemnity Co., 398 S.W. 2d

727 (Tenn. Sup. Ct., 1966), Simmons v Holm, 229 Ore. 373, 367 P.2d 368 (1961). For academic analysis, see O'Neill, Torts: Standard of Care Applied to Minors in Operation of Dangerous Instrumentalities, 3 Tulsa L. J. 186, at 192 (1966), Morris, Relation of Criminal Statute to Tort Liability, 46 Harv. L. Rev. 453, at 469 (1933), Comment, Recommended: An Objective Standard of Care for Minors in Nebraska, 46 Neb. L. Rev. 699, at 706-707 (1967).

[38] Unless, of course, the plaintiff was a child.

[39] Carroll v Clare Co. Co.., [1975] I.R. 221, at 227 (Sup. Ct., per Kenny, J.).

[40] For an excellent analysis, see Osborough The Regime of Protection for Road Accident Claimants, 5 Ir. Jur. (n.s.) 217 (1970).

[41] See Osborough, supra.

FOOTNOTES TO CHAPTER 3

[1] See, however, fn. 4, infra.

[2] Cf. McMahon & Binchy, 26.

[3] The doctrine of res ipsa loquitur is an example. See Salmond, 238-241 (17th ed., by R. Heuston, 1977). In the United States, the doctrine has been extended further in relation to medical operations: see Ybarra v Spangard, 25 Cal. 2d 486, 154 P. 2d 687 (Sup. Ct., 1944), criticially analyzed by Seavey, Comment: Res Ipsa Loquitur: Tabula in Naufragio, 63 Harv. L. Rev. 643 (1950). See also section 11(3) of the Civil Liability Act, 1961 (No. 41), which relieves the plaintiff of proof of causal responsibility where two or more persons are at fault and one or more of them is or are responsible for damage which the other or others is or are free from responsibilty. In such a case, those at fault will be deemed concurrent wrongdoers. The same principle is supported (in arguably somewhat more restricted circumstances) by the Canadian decision of Cook v Lewis, [1952] 1 D.L.R. 1 (Sup. Ct. Can.) and the Californian decision of Summers v Tice 33 Cal. 2d 80, 199 P. 2d 1 (Sup. Ct., 1948).

[4] Cf. Posner, A Theory of Negligence, 1 J. Legal Studies 29, at 43 (1972):

> "Perhaps the reason for treating employers and parents differently is that employers in fact have greater control over the behaviour of their employees on the job than do parents over their children. The employer can select his employees, discharge them, and prescribe rewards and punishments to which rational beings will respond. Children tend to be ungovernable; natural parents do not choose their children; children cannot be fired for having been careless. A rule of strict parental liability would have little regulatory effect ...."

See also the Scottish Law Commission's Consultative Memorandum No. 65, Legal Capacity and Responsibility of Minors and Pupils, para. 6.11 (1985):

> "The analogy with the vicarious liability of an employer is inappropriate. Its underlying philosophy, which is, broadly speaking, to transfer the burden of

> inevitable losses on those best able to bear them, is inappropriate in this context. A parent may have few resources to meet any claim arising out of his child's wrongdoing and to compel him to insure against all damage caused by his child seem excessive. Moreover, the imposition of liability on parents without proof of fault would create other anomalies - for example, where the child is in local authority care or in the care of a relative or appointed guardian or in the actual care and control of a school. There seems to us to be a strong argument in favour of extending such liability to any person in loco parentis who has care and control of the child."

[5] E.g. deceit, certain aspects of defamation, malicious prosecution and conspiracy.

[6] Travaux du Premier Colloque International de Droit Comparé, tome II, pp. 43-44 (1963).

[7] Cf. Moynihan v Moynihan, [1975] I.R. 192 (Sup. Ct.).

[8] Cf. Turner v Bucher, 308 So. 2d 270 (La. Sup. Ct., 1975), Mayhall, 21 Loyola L. Rev. 1019 (1975). In the United States statutes in fifty jurisdictions directed against juvenile delinquency have imposed liability on parents for injury intentionally inflicted by their children on person or property. Some of these statutes provide for no monetary maximum but most specify a maximum amount, ranging from two hundred to fifteen hundred dollars: see Prescott & Kundin, Toward a Model Parental Liability Act, 20 Calif. W. L. Rev. 187 (1984).

[9] ".... [W]hile the parent cannot be held to the degree of liability of one harbouring a vicious dog after notice of its viciousness, or a wild animal, we think parents should be held responsible and liable for a dnagerous habit of a child of which they have knowledge and take no steps to correct, or restrain": Norton v Payne, 281 P. 991, at 992 (Sup. Ct., Holcomb, J., 1929). See also Alexander, Tort Liability of Children and Their Parents, ch. 14 of D. Mendes da Costa ed., vol. 2, at 846:

> "I suppose a parent could be held strictly liable for damage caused by his child by analogy to dangerous animals. As a parent I find the analogy not inapt."

In Smith v Leurs, 70 Comm. L. R. 256, at 260 (High Ct.

Austr. 1945), Starke, J. observed that "[y]oung boys, despite their mischievous tendencies, cannot be classed as wild animals". Professor Fleming has responded, however, that "a child afflicted with vicious propensities resembles, if not a wild beast, at least a fierce dog; and the parent's scienter should, by analogy, commit him - though not perhaps to strict liability, for he cannot simply 'put the creature away' - certainly to a duty of the closest surveillance and discipline": Fleming, 644. (In view of the fact that secton 3 of the Animals Act 1985 imposes strict liability on the owner of a dog where the dog attacks a person, Fleming's position might require modification in the Irish context.)

10 Cf. A.G. v Corke, [1933] Ch. 89 (Bennett, J., 1932) criticised in 49 L. Q. Rev. 158 (1933) and by Kennedy, 11 Can. Bar Rev. 693 (1933); and by McMullin, J., in Matheson v Northcote College, [1975] 2 N.Z.L.R. 106, at 117-118. See also the discussion by Weinrib, The Dorset Yacht Case: Causation, Care and Criminals, 4 Ottawa L. Rev. 389, at 401-402 (1971). Cf. McDonald v Feely, unreported, High Ct., Barrington, J., 30 June 1980 (4431P-1980), at p. 8, Ellis v Dun Laoghaire Corporation, unreported, Circuit Ct., Judge Ryan, 29 January 1982, Irish Times, 30 January 1982, and McMahon & Binchy, 504.

11 Cf. Travaux du Premier Colloque International de Droit Compare, Tome II, p. 43 (1963):

> "That th[e civil law] approach is to be preferred seemed to be supported by the observation that one reason why there are relatively few actions against parents in the common law jurisdictions is that many parents feel a moral obligation to pay for damage done by their children without regard to their legal liability."

12 Cf. Article 1384 of the Civil Code, and see Dalcq, 28 Rev. Crit. de Jur. Belge 248 (1974).

13 See Carbonnier, vol. 4, 350-353, 357-360, Starck, 237-260, Marty, 55-57, Planiol & Ripert, vol. 2, part 2, p. 508, para. 910, Larroumet, Responsabilité de Fait d' Autrui, Dalloz, at paras. 132-134, 152ff. (1974) and Article 1384, para. 4 of the Civil Code.

14 See Cohn, para. 320, Waller, Visiting the Sins of the Children: The Liability of Parents for Injuries Caused

by Their Children, 4 Melbourne U. L. Rev. 17, at 32-33 (1963), Opuku, Delictual Liability in German Law, 21 Int. & Comp. L. Q. 230, at 239 (1972), and Article 832 of the Civil Code.

15 See Pogliani, 129ff., Cappelletti, Merryman & Perillo, 222ff., Miccio, 802ff., and Articles 2047-2048 of the Civil Code.

16 See Resumés d'arrets: responsabilité du chef de la famille, 135 J. des Trib. dr fed. 620 (1977), and articles 333 of the Civil Code.

17 As to the law in the U.S.S.R., see Gsovski, vol. 1, 531-532, Guins, 301, Berman, 333-334, Sverdlov, Family Law, ch. 9 of Romashkin, at 381. As to Polish law, see Szpunar, The Law of Tort in the Polish Civil Code, 16 Int. & Comp. L. Q. 86, at 88 (1967).

18 Article 2321 of the Civil Code of Chile, translated by Stone, Liability for Damages Caused by Minors: A Comparative Study, 5 Ala. L. Rev. 1, at 24 (1952). To similar effect in Article 2348 of Panama's Civil Code, of 1904.

19 Vicarious liability goes some way towards making employers liable for damage caused by their employees, but it does not extend to cases where the employees, in causing damage, have not committed a tort.

20 In civil law systems, it is generally necessary that the child should be living with his or her parent or parents: see, e.g., the French Civil Code, Article 1384, the Italian Civil Code, Article 2048, the Spanish Civil Code, Article 1903, the Louisiana Civil Code, Articles 2317 and 2318, the Puerto Rico Civil Code, section 5142, the Argentine Civil Code, Article 1114, the Bolivian Civil Code, Article 968, the Chilean Civil Code, Article 2320, the Colombian Civil Code, Article 2347, the Mexican Civil Code, Article 1919, the Nicaraguan Civil Code, Article 2511, the Uruaguayan Civil Code, Article 1324, the Venexuelan Civil Code, Article 1190. Tunc, The Twentieth Century Development and Function of the Law of Torts in France, 14 Int. & Comp. L.Q. 1089, at 1093 (1965) states that whilst the condition "may sometimes give rise to difficulties, and borderline cases may arise .... [, it] is certainly reasonable".

[21] This is the approach favoured in most civil law jurisdictions. It might be argued that liability should not extend in any case beyond where the minor has reached some specific age lower than eighteen, such as thirteen or fifteen, for example. Cf. the Scottish Law Commission's Consultative Memorandum No. 65, para. 6.9 (1985).

[22] Cf. Tunc, supra, at 1094 (favouring statute which would impose strict liability on father "up to the time when the child is sixteen or seventeen").

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