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Infants - Torts - Whether, as a Matter of Law, a Cause of Action for Non-Negligent Tort May Be Maintained in Illinois against a Minor Six Years of Age

J. F. Quetsch

INFANTS—TORTS—WHETHER, AS A MATTER OF LAW, A CAUSE OF ACTION FOR A NON-NEGLIGENT TORT MAY BE MAINTAINED IN ILLINOIS AGAINST A MINOR SIX YEARS OF AGE—A question of interest not only to the profession but as well to the conscientious parents of infant children recently arose in the Illinois case of *Seaburg* v. *Williams*.[1] Therein, a property owner sued an infant six years of age for damages resulting from the burning of the plaintiff's garage. In one of the four counts of the complaint, it was alleged that the infant tortiously and wrongfully set the fire.[2] On the defendant's motion, the trial judge dismissed the entire complaint for failure to state a cause of action. With respect to the particular count in question, the apparent reason therefor was that a minor of such tender years lacked the mental capacity to commit an intentional tort. A judgment for the defendant was followed by an appeal to the Appellate Court for the Second District of Illinois. That tribunal concluded that, as a matter of law, it could not be said that a child of six lacked the mental capacity to commit an intentional tort and, consequently, reversed and remanded the case with respect to the aforementioned count.

Under the common law and according to the general rule in Illinois, an infant is civilly liable for his torts.[3] However, where there exists in the particular case some element which is precluded by an infant's incapacity, he cannot be held liable for such tort.[4] Thus, in the tort of slander, an infant under the age of seven is deemed not liable as he is presumed conclusively to be incapable of malice, a necessary ingredient of slander.[5] Another exception to the general rule of the tort liability of infants appears in torts involving negligence. In negligent torts, an infant under seven years of age is conclusively presumed to be incapable of such conduct as will constitute negligence, for a child of such "tender years" is deemed to lack sufficient mental development to foresee that his heedless conduct might lead to injury.[6]

[1] 16 Ill. App. (2d) 295, 148 N. E. (2d) 49 (1958), noted in 19 Ohio St. L. Rev. 769.

[2] Two of the other three counts sounded in quasi-contract, while the remaining count also charged the defendant with an intentional tort and further alleged that he was protected by insurance. The ruling of the trial court was sustained with respect to these three counts.

[3] Palmer v. Miller, 380 Ill. 256, 43 N. E. (2d) 973 (1942); Mathews v. Cowan, 59 Ill. 341 (1871); Wilson v. Garrard, 59 Ill. 51 (1871); Ridenour v. Johns, 258 Ill. App. 48 (1930).

[4] In Crutchfield v. Meyer, 414 Ill. 210, 111 N. E. (2d) 142 (1953), and in Chicago City Ry. Co. v. Touhy, 196 Ill. 410, 63 N. E. 997 (1902), it was held that an infant under seven years of age was legally incapable of contributory negligence.

[5] The court, in the instant case, referred to the fact that since, under the common law, an infant under the age of seven is not *doli capax*, he is incapable of the malice which is necessary for slander.

[6] See cases cited in note 4, ante.

The defendant in the instant case contended that, by necessary implication, the presumption of an infant's incapacity in negligence cases extends to the question of an infant's capacity for intent in cases of non-negligent torts.[7] In rejecting the defendant's contention, the appellate court emphasized the importance of placing the burden of loss in "pure" or intentional torts on the wrongdoer and compensating the innocent party for his injuries, and held that whether the defendant could and did intend to burn the plaintiff's garage was a question of fact. The reviewing court clearly limited the question of the defendant's intent simply to whether he had intended to do the act of burning the plaintiff's property. The question of intent to cause harm thereby was held to be immaterial.[8]

In the instant case, the distinction made by the court between the mentality required in negligent torts and that required in wilful torts of the trespass type does not appear to be strained. One can hardly question the logic of a presumption that infants under the age of seven are without sufficient mentality to foresee that their heedless conduct in the course of their normal play might injure others. However, though prudence and due care are not to be expected of infants of tender years, certainly it can be expected of them that they are capable of intending to do their positive acts.[9]

In view of the law's solicitous attitude toward infants,[10] the decision in the instant case might appear to be an inconsistent regression.[11] However, it seems nonetheless to have been a desirable decision. Recognition of the destructive propensities of many infants and the lax parental supervision which could conceivably be an indirect result of decisions which are unrealistically indifferent to the burdens which they place on innocent persons injured by infants calls for just such a decision as that rendered. It is not inconsistent to hold that the child who is incapable of negligence

[7] To the effect that there is a rebuttable presumption of incapacity for contributory negligence in an infant between the ages of seven and fourteen years, see Maskaliunas v. Chicago & W. I. R. Co., 318 Ill. 142, 149 N. E. 23 (1925).

[8] In an Illinois case involving the burning of a barn by a defendant who was insane at the time of the act, the court held that "intent" was not a material consideration in torts of the trespass type, but apparenly meant that intent *to do harm* was not material: McIntyre v. Sholty, 121 Ill. 660, 13 N. E. 239 (1887). The court, in the instant case, recognized that the tort liability of infants and of insane persons is generally parallel.

[9] Hutching v. Engel, 17 Wis. 230, 84 Am. Dec. 741 (1863). In that case, a boy of six was held liable for trespassing upon the plaintiff's land and destroying the flowers and shrubs thereon. It, too, holds that intent to commit harm is not material in cases sounding in trespass.

[10] Ill. Rev. Stat. 1957, Vol. 1, Ch. 38, § 591, declares that children under ten years of age cannot be convicted of crime. See also notes 5 and 7, ante, regarding presumptions operating in favor of infants.

[11] The note in 19 Ohio St. L. Rev. 769 so characterizes the decision in the instant case as it expresses disapproval of the holding therein.

is at the same time capable of intending to commit a positive act which is wrongful in itself.[12]

Although this case has not altered the rule of the non-liability of parents for the torts of their children,[13] it should, nevertheless, induce conscientious parents to make insurance provision for the protection of the estates of their children as well for compensating the innocent victims of intentional torts committed by their children.[14]

J. F. QUETSCH

SPECIFIC PERFORMANCE—MUTUALITY OF REMEDY—WHETHER A DECREE FOR SPECIFIC PERFORMANCE MAY ISSUE NOTWITHSTANDING A LACK OF MUTUALITY OF REMEDY AT THE INCEPTION OF A CONTRACT—The Supreme Court of Illinois, through the medium of the case of *Gould* v. *Stelter*,[1] was recently faced with the problem of whether a contract might be specifically enforced even though such a remedy would not have been available to both parties at its inception. Therein, the plaintiff, acting under a power of attorney, contracted to purchase a tract of land in her own name even though authorized to contract only in her principal's name. When the vendors refused to convey, the plaintiff filed a complaint for specific performance which, in the second count, sought a decree compelling the vendors to execute a deed either to the plaintiff or to her principal. The principal, nominally a defendant originally, then filed a cross-complaint seeking identical relief. The trial court, dismissed both the second count of the original complaint and the cross-complaint on the ground that mutuality of remedy did not initially exist between the principal and the defendants. In so doing, the court ignored the fact that the principal had since ratified the contract and become bound thereon. On appeal, the Supreme Court of Illinois reversed the decision and announced that the technical requirement of mutuality of remedy at the inception of a con-

[12] In the case under consideration, the court quoted from the opinion in Ellis v. D'Angelo, 116 Cal. App. (2d) 310 at 315, 253 P. (2d) 675 at 677 (1953), a case involving the legal sufficiency of a complaint charging a battery on the part of a four-year old boy, as follows: "Thus as between a battery and negligent injury an infant may have the capacity to intend the violent contact which is essential to the commission of battery when the same infant would be incapable of realizing that his heedless conduct might foreseeably lead to injury to another which is the essential capacity of mind to create liability for negligence."

[13] White v. Seitz, 342 Ill. 266, 174 N. E. 371 (1931); Paulin v. Howser, 63 Ill. 312 (1872); Dick v. Swenson, 137 Ill. App. 68 (1907). A note on the subject of parental responsibility for acts of juvenile delinquents appears in 34 CHICAGO-KENT LAW REVIEW 222.

[14] For further discussions of the tort liability of minors, see 1951 Ill. L. Forum 227 and 23 Mich. L. Rev. 9 (1924).

[1] 14 Ill. (2d) 376, 152 N. E. (2d) 869 (1958). Daily, C. J. filed a separate concurring opinion.