VISITING THE SINS OF THE CHILDREN

The Liability of Parents for Injuries Caused by Their Children

By PETER L. WALLER*

When questions of imposing liability on infants to compensate for injuries arise, there is little of that tenderness which is sometimes shown to the young defendant by, say, the criminal law or the law of contract. Generally, the common law has postulated that children are liable personally for their torts, and Lord Kenyon's exclamation that

> . . . if an infant commit an assault, or utter slander, God forbid that he should not be answerable for it in a Court of Justice. . . [1]

largely expresses the present position.[2] Plaintiffs seeking compensation from infant defendants may often view these rules of liability with something less than great enthusiasm, and with reason. Their situation has been starkly summed up in both judicial and academic comment. In *Smith v. Leurs and Others*[3] (of which more later), Mayo J. said, when the case was before him at first instance:

> The plaintiff is entitled *for what it is worth*,[4] to judgment against the infant defendant for damages.

Similarly, Mr C. A. Morrison, in *A Century of Family Law*,[5] wrote:

> Though actions in tort brought on behalf of an infant have been on the increase there are a number of reasons for the infrequent appearance of the child as a defendant. His liability in tort has been accepted since the seventeenth century, but usually he is not worth powder and shot.[6]

The financial circumstances[7] of most infant defendants encourages,

* LL.B. (Melb.), B.C.L. (Oxon.); Senior Lecturer in Law in the University of Melbourne.

[1] *Jennings v. Rundall* (1799) 8 T.R. 335, 337.

[2] For a classic discussion, see F. H. Bohlen, 'Liability in Tort of Infants and Insane Persons' (1924) 23 *Michigan Law Review* 9: reprinted in his *Studies in the Law of Torts* (1926) 543. See also J. G. Fleming, *The Law of Torts* (2nd ed. 1961) 24 (intentional torts), and 123 (negligence).

[3] [1944] S.A.S.R. 213, 217. [4] Author's italics.

[5] Graveson and Crane, eds. (1957). See also Lewis, ed., *Winfield on Tort* (6th ed. 1954) 115. [6] Morrison, *op. cit.* 109.

[7] The recovery of damages awarded against an infant defendant at a later date when he is in rosier financial circumstances, is of course a possibility. However, any *action* on the judgment must be brought within a strictly specified period: England: 12 years, Limitation Act 1939 2 & 3 Geo. VI c. 21 s. 2 (4); Victoria: 15 years, Limitation of Actions Act 1958, s. 5 (4); New South Wales: 20 years, Real Property Limitation Act 1833, s. 40; Queensland: 12 years, Limitation Act 1960, s. 9 (4); South Australia: 15 years, Limitation of Actions Act 1950-1959, s. 34; Tasmania: 12 years, Limitation of Actions Act 1875, s. 8; Western Australia: 12 years, Limitation Act 1935, s. 32.

Execution may be levied on a judgment, without leave, at any time within six years of the date of the order; after that time leave must be sought: see, *e.g.*, Rules of the Supreme Court, O. XLII, rr. 22 & 23 (a) (Vic.). The Court of Appeal held in *Lamb & Sons v. Rider* [1948] 2 All E.R. 402, that action on the judgment

then, the search for other persons who may be made to compensate for injuries inflicted by such infants, persons of recognized financial standing. The defendant towards whom our society naturally looks is the parent with whom the infant tortfeasor resides, and who is recognized as having rights and duties in respect of such child in the context of custody applications, prosecutions and actions for assaults by way of chastisement and especially in actions for the loss of the child's services.[8] The purpose of this article is to examine the success of these attempts to impose liability on the parents in cases where it is the child who has inflicted the injury, firstly in the common law jurisdictions, and secondly in some foreign legal systems. Finally, there will be an examination of some of the matters of policy which arise in the decision of this question, and the suggestion of a rule which might appropriately be adopted *de lege ferenda* in Victoria.

I COMMON LAW JURISDICTIONS

There has been a persistent rejection of any attempt to make a parent vicariously liable for the torts of his child on the simple basis of the relationship between them. The dictum of Willes J. in *Moon v. Towers*[9] that

> 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. . .

is generally regarded as a classic statement of common law doctrine.[10] Twenty-five years after *Moon v. Towers,* Higinbotham J., speaking for the Full Court of the Supreme Court of Victoria, approved the proposition enunciated in that case and said:

> The relationship existing between the defendant and the actual wrongdoers must be excluded from consideration in dealing with this question. A father is not legally responsible for his son's trespass, unless the relation of principal and agent exists between them . . . .[11]

More recently, members of the High Court reiterated the same proposition in *Smith v. Leurs and Others.*[12] Dixon J. made specific

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and execution of it are quite distinct procedures, and that the Limitation Act 1939 (Eng.) did not govern execution. However, 'it has been assumed . . . that when the right to enforce the judgment by action is barred leave to levy execution will be refused. The explanation appears to be that the Court . . . acts by analogy with the 1939 Act.': M. Franks, *Limitation of Actions* (1959) 113.

[8] See Fleming, *op. cit.* 106 ff. (chastisement), 617 ff. (loss of services).

[9] (1860) 8 C.B. N.S. 611, 615.

[10] See Fleming, *op. cit.* 649, where reference is made to this judgment in support of the proposition. See also Street, *The Law of Torts* (2nd ed. 1959) 491; the rule is bluntly stated in Bromley, *Family Law* (1957) 318, and Johnson, *Family Law* (1958) 262.

[11] *Mauduoit v. Ross* (1884) 10 V.L.R. (L.) 264, 266.

[12] (1945) 70 C.L.R. 256, on appeal from the Supreme Court of South Australia. See Latham C. J. at 259; Starke J. at 260; McTiernan J. at 264.

reference to the statement by Willes J., and admitted that the English rule was not in accord with popular notions which persisted because of what he called 'early law' ideas. The learned judge noted also the contrast between the French rule (in article 1384 of the *Code Civil*) and the common law.[13]

The same rule prevails in other common law jurisdictions.[14] Dean Prosser submits that the situation is similar throughout the United States (except in Louisiana) and, alone of those authorities already considered, attempts a justification:

> Since the relation of parent and child involved no such fusion of legal identity as in the case of husband and wife, the common law, unlike that of the civil law countries, never has made the parent vicariously liable as such for the conduct of the child.[15]

Moreover, for all the recognized distinction between the common law and civil law rules, the South African courts have favoured the common law rule.[16]

Despite these constant rejections of a vicarious liability rule, the courts in common law countries have in fact imposed liability on parents in some cases where the damage to the plaintiff has been caused by their children. In every instance the courts have been careful to formulate their rulings in terms which do not conflict with the rejection of the vicarious liability rule. It is possible to discern three separate formulations in these parental liability cases, and each one will be considered in turn.[17]

(a) *Where the parent has directed or encouraged the child or ratified the acts.*

It seems clear that if the parent has directed, or consented to, or ratified, the child's acts which caused the damage, the plaintiff will be able to recover damages from the parent as an independent tortfeasor: *qui facit per alium facit per se.*[18] In *Moon v. Towers*[19] itself, this was the basis of the plaintiff's claim:

> T employed his son F, aged about 17, as treasurer of the Victoria Theatre, at which the plaintiff M was also employed as 'property-man'. On the occasion in question T became suspicious of M's accounts presented for payment and dismissed him. Thereupon F, on

[13] *Ibid.* 261.

[14] For New Zealand, see Inglis, *Family Law* (1960) 494-495: citing *Moon v. Towers* (*supra* note 7) as authority. For Canada, most recently, see *Hatfield v. Pearson* (1957) 6 D.L.R. 2d 593, 600, *per* Sheppard J. A., again citing *Moon v. Towers.*

[15] *Handbook of the Law of Torts* (2nd ed. 1955) 680. See also Harper and Fleming James Jr, *The Law of Torts* (1956) i, 660.

[16] See McKerron, *The Law of Delict* (5th ed. 1959) 78; Spiro, *Law of Parent and Child* (2nd ed. 1959) 120. The Scottish position is the same: see *Lindsay v. Robertson* [1933] S.L.T. 121.

[17] See Harper and James, *op. cit.* i, 661 ff.

[18] See Fleming, *op. cit.* 326. The matter is dealt with on a general basis in Heuston, ed., *Salmond on Torts* (13th ed. 1961) 106-107.

[19] (1860) 8 C.B. N.S. 611.

> his own initiative, had M arrested by the police and charged with obtaining money by false pretences; but M was not committed for trial. In an action against T for damages for false imprisonment, M argued that T had by his conduct ratified and sanctioned all his son F had done.

The court decided that there was no evidence of ratification, as the father had in fact told the boy he would have nothing more to do with the matter. However, the court clearly stated that had there been either previous authority or subsequent ratification by the father, he would have been liable. William J. indeed said that:

> Where an act is done by . . . 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.[20]

Again in *Mauduoit v. Ross*,[21] the question was whether the defendant had authorized or ratified the acts of his sons, who had driven eight head of the plaintiff's cattle from his paddock; the cattle were subsequently abandoned and became lost. There was no evidence that the defendant had authorized his sons to drive off the cattle, but when the case was heard at first instance the County Court Judge found that he had subsequently ratified their acts. The Full Court of the Supreme Court of Victoria upheld the defendant's appeal. Higinbotham J. said:

> . . . in the present case all the elements of a legal ratification are absent. The defendant derived no profit or advantage from the wrongful act of his sons. . . . [He] never expressed approval of his sons' act. On the contrary, he intimated his opinion in a conversation with the plaintiff some time afterward that his sons' conduct had been wrong, and furnished just ground of complaint. . . .[22]

The same doctrine is accepted in the United States.[23] It is worth emphasizing that the liability of the parent here depends, and is clearly said to depend, not on the relationship with the child but on the authorization or ratification of an agent's act, the parent being cast as principal. Harper and James contend that while these situations of a parent directing or authorizing his child are 'closely akin' to cases wherein a parent has been held liable as principal, in fact the courts have treated them 'as special cases of liability governed by their own peculiar principles'.[24] There is support for this view in some of the cases cited by the authors, but it is suggested that in cases where it is a parent who is sued as an authorizer or ratifier of tortious

[20] *Ibid.* 615. [21] (1884) 10 V.L.R. (L.) 264.
[22] *Ibid.* 267. See also *Gray and Another v. Fisher* [1922] S.A.S.R. 246, where the Court also held there was no evidence of authority by the child incendiarist's mother. [23] Prosser, *op. cit.* 681; Harper and James, *op. cit.* i, 664. [24] *Ibid.*

conduct, the extent of the peculiarity is that the court may say there is a presumption of fact that he *knew* what his children were about either during or shortly after the acts in question. In *Hower v. Ulrich,*[25] one of the cases cited by Harper and James, the plaintiff brought an action for trespass *de bonis asportatis* against the defendant; it was proved that the defendant's children had put the plaintiff's corn in their father's bin. The Court clearly held that there was a presumption that the defendant knew what his children did, and that if he knew or came to know of their acts he was liable as ratifying them and accepting the benefits thereof. Yet it can be said that such an approach by these American courts indicates a desire to circumvent, to an extent, the blunt common law rule which has been stated previously.

(b) *Where the parent employed the child as his servant.*

It seems to be a well-accepted rule that a parent who employs his child is liable for the torts of his child *qua* servant.[26] There is no difficulty in conceiving cases where the family relationship is quite unimportant and where the characterization of the parent as master and the child as servant is quite genuine. However, attempts have been made to persuade courts to accept this characterization in cases where there is very little beyond a family relationship in fact. Most of these attempts have been in cases of motor-car accidents, where a car owned by the parent but driven by the child causes physical or property damage to the plaintiff. Quite plainly, the search is for a financially responsible defendant; more especially, for a properly insured defendant.

An illustrative case of this kind is *Hewitt v. Bonvin and Another,*[27] where the Court of Appeal refused to make the characterization. In that case:

> B was the owner of the motor car driven by his son J, aged 18; H was a passenger therein. J had been given permission by his mother

[25] (1893) 27 A. 37 (Supreme Court of Pennsylvania). See also *Harrington v. Hall* (1906) 63 A. 875 (Supreme Court of Delaware): In an action for trespass for the shooting of the plaintiff's foxhound by the defendant's son, the jury were charged that if they found that the defendant had given his son general or special directions about shooting dogs, then he was liable.

In *Stewart v. Swartz* (1914) 106 N.E. 719 (Appellate Court of Indiana), plaintiff was injured when he tripped over a rope stretched across the road by defendant's children; defendant knew that the rope had been so stretched for several days. Held, defendant must have impliedly consented to, or acquiesced in the act, and was liable.

[26] See Fleming, *op. cit.* 649; *Salmond on Torts, op. cit.* 74; *Winfield on Torts, op. cit.* 117; Prosser, *op. cit.* 681; Harper and James, *op. cit.* i, 660 ff.; Bromley, *op. cit.* 318; Johnson, *op. cit.* 262. The position is the same in South Africa: see Spiro, *op. cit.* 121.

[27] [1940] 1 K.B. 188. For an Ulster version of this case, see *Gibson v. O'Keeney* [1928] N.I. 66. See also *Wood v. Freyne* [1930] Gaz. L.R. 149 (Supreme Court of New Zealand).

> to drive on the occasion in question, and he wanted to use the car to drive H and two girl-friends to the country. Neither parent knew the girls, nor was it their concern that they be driven to the country. There was an accident in which H was killed. In an action by his administrator, Lewis J. gave judgment against the father, holding that the son was driving as his servant.[28]

The Court of Appeal upheld the father's appeal and decided that the son was not driving for his father's purposes as his servant, and so the father was not liable under the doctrine of *respondeat superior*. In argument, counsel for the plaintiff-respondent said:

> The car was a family car although driven usually by the father. If an accident happens when a car is driven by a member of the owner's family, the driver is usually regarded as driving the car as the agent of the father.[29]

The argument was met by Mackinnon L. J. saying that the son's acts were for his own benefit, and there was nothing done by way of work for the employer-father. Apparently the result would have been different had the father asked the son to drive Hewitt and the girls, or even had they been the father's own guests whom he might be regarded as wanting to be driven to their homes.[30] The courts seem readier now, in England and Australia, to make owners of cars vicariously liable for damage caused by other persons driving the cars, so long as there is the merest scintilla of interest in the affair.[31] In the recent case of *Soblusky v. Egan*,[32] the High Court of Australia clearly lent its authority to this approach. The appellant defendant was dozing in the corner of his car, which was being driven by one Lewis with his consent; the car ran off the road and injured Egan. The Court unanimously held that Soblusky was properly held liable, since

> The principle of the cases cited [*i.e.* earlier English decisions] is simply that the management of the vehicle is done by the hands of another and is in fact and law subject to direction and control.[33]

This approach is buttressed by the readiness of judges now to let the jury entertain the question of the owner's liability once it is proved

[28] Judgment was also given against the son.

[29] [1940] 1 K.B. 188, 190.

[30] *Ibid.* 196, *per* du Parcq L.J.: 'if the girls . . . had been the guests of the appellant, or if it had been established that Madame Bonvin had allowed her son to take the car because she felt that she and her husband were under some social or moral duty to convey them to their home, I should have thought that the finding [of Lewis J.] ought not to be disturbed'.

[31] See *Ormrod v. Crosville Motor Services* [1953] 1 W.L.R. 1120, where it appears that the prospect of spending a joint holiday with the driver at the end of a very long trip made by him alone rendered the owner liable for injuries to the plaintiff caused by the driver. There is an excellent though brief discussion in Fleming, *op. cit.* 343 ff. Professor Fleming thinks that *Hewitt v. Bonvin supra*, is properly regarded as being outside the limits of this new approach: see 345.

[32] (1960) 103 C.L.R. 215. [33] *Ibid.* 231.

that he is the owner of the car.[34] Proof of ownership produces an inference that the driver was acting on behalf of the owner and driving in the course of his employment.[35]

In the United States, many of the State Supreme Courts have adopted a doctrine in the terms submitted by the plaintiff's counsel in *Hewitt v. Bonvin*.[36] The 'family-car' or 'family-purpose' doctrine is said by Prosser, writing in 1955, to be accepted in about half of the American Courts, including such populous States as Minnesota, but it is rejected in both New York and New Jersey.[37] The doctrine is thus enunciated by Harper and James:[38]

> when an automobile is provided and maintained for the pleasure and enjoyment of its owner's family, its use for that purpose, with the owner's express or implied consent, puts the owner and driver in the position of master and servant. And since the pleasure of each member of the family is a component part of the family pleasure, the pursuit of the child's own pleasure, for instance, is regarded as within the scope of the child's agency for the father in the use of the family car.[39]

The reasoning advanced in support of this doctrine by those courts which have adopted it has sometimes been put in terms which indicate that the true aim is to provide a financially responsible defendant in a situation where the actual tortfeasor has no money and no possibility of obtaining any. In *King v. Smythe*,[40] the Supreme Court of Tennessee said that a judgment against an infant child, living as a member of the defendant's family, 'would be an empty form'; the dictates of justice were more important than the refinements of the then-established notions of vicarious liability. It is this formulation of liability in terms of a supposed master-servant relationship which has brought down the wrath of those courts which decry the 'family-car' doctrine as a modern fiction to be abhorred.[41] They point

[34] *E.g.*, *Wiseman v. Harse* (1948) 65 W.N. (N.S.W.) 159.

[35] The effect of compulsory third-party insurance legislation, compelling owners to insure against any damage caused in effect by their cars, no matter by whom driven, may be thought to weaken the impetus towards developing a doctrine of vicarious liability of owners. It must be remembered, however, that such legislation usually only compels insurance against liability for death or physical injury: *e.g.*, Motor Car Act 1958 (Vic.), s. 40. See Fleming, *op. cit.* 344.

[36] [1940] 1 K.B. 188.

[37] Prosser, *op. cit.* 369 ff. Harper and James, *op. cit.* ii, 1419 ff. It should be noted, however, that New York and several other States provide by statute that a car owner is liable for the negligence of persons who drive his car with his consent. See *Anheuser-Busch v. Starley* (1946) 170 P. 2d 448 (Supreme Court of California) for a general consideration of a representative Statute; and Prosser, *op. cit.* 371.

[38] *Op. cit.* ii, 1420. The leading study is Lattin, 'Vicarious Liability and the Family Automobile' (1928) 26 *Michigan Law Review* 846.

[39] A very similar statement of the doctrine is found in *Norton v. Hall* (1921) 232 S.W. 934, 935 (Supreme Court of Arkansas). For the qualifications and extensions of the doctrine, see Harper and James, *op. cit.* ii, 1421 ff.; Prosser, *op. cit.* 370 ff.

[40] (1918) 204 S.W. 296.

[41] See the harsh strictures in *Watkins v. Clark* (1918) 176 P. 131, *per* Burch J. (Supreme Court of Kansas); and *Arkin v. Page* (1919) 123 N.E. 30, 32 (Supreme Court of Illinois). However, in some instances the doctrine has been used in such

out that the doctrine has been rejected in respect of chattels, other than motor cars, bought by the father which his children use, and further that the doctrine remains restricted to motor cars even in those States which accept it. These criticisms cannot be met on the same grounds upon which they are offered; it is ludicrous to attempt to force the normal 'family-car' situation into the master-servant mould. At the same time, it can surely be argued with real cogency that the solution which the 'family-car' doctrine achieves is a good one, and that it has been evolved to meet a situation which might be regarded as causing real injustice to persons injured on the roads by children driving their parents' cars. The policy of this rule will be considered further in the last part of this article.

(c) *Breach of Parent's Own Duty to Control Child.*

There are numerous cases where liability has been imposed on a parent whose child has caused some injury, on the basis of the parent's own breach of duty to take care for the plaintiff's safety. The rule postulated here is that a parent may owe a personal duty to control his child's activities, and should he carelessly fail to do so, he will be liable in negligence. This duty to control children is traditionally described as one instance of the duty to control others which may arise from a particular relationship, and the duty has been imposed equally upon school-teachers and schools' boards in the case of their pupils,[42] and upon the board of a mental hospital in respect of its inmates.[43]

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a way as to overcome the public policy rule (established in most American jurisdictions) that a parent cannot sue his child, or be sued by him, in tort. In *Silverman v. Silverman* (1958) 145 A. 2d 826 (Supreme Court of Errors of Connecticut) plaintiff was injured whilst riding in her husband's car driven by her son, aged eighteen. By Connecticut law a wife may sue her husband in tort; she cannot sue her son because of the public policy rule mentioned above. The Court held the plaintiff could here recover from her husband who was liable for damage caused by his son driving the family car with his general consent. The 'family-car' rule was re-indorsed in wide terms. It may be noted that in Connecticut there has been a statutory rule since 1931 that 'where the owner of a car bears a designated relationship to the operator' there is 'a rebuttable presumption that [the] car is being operated as a family car': (1958) 145 A. 2d 826, 828. See a note in (1959) 10 *Mercer Law Review* 339.

[42] The most recent of the school cases is the important decision of the House of Lords in *Carmarthenshire County Council v. Lewis* [1955] A.C. 549. The appellants, who managed and controlled a nursery school, were held liable for injuries to the respondent's deceased husband, a truck driver, which he received in swerving to avoid a very young pupil who ran out of the school. The House of Lords concluded that the appellants were clearly under a duty to prevent pupils at their school straying on to the road, and they had been negligent in the circumstances. It is suggested that the American position is similar: see *McLeod v. Grant County School District No. 128* (1953) 255 P. 2d 360 (Supreme Court of Washington) where the respondents were regarded as owing a duty to a pupil at their school who was raped by a fellow-pupil during a recess. See also Prosser, *op. cit.* 189, citing *Cashen v. Riney* (1931) 40 S.W. 2d 339. See also *Rich v. London County Council* [1953] 2 All E.R. 376; *Clark v. Monmouthshire County Council* (1954) 188 J.P. 244; and *Prince v. Gregory* [1953] 1 W.L.R. 177.

[43] *Holgate v. Lancashire Mental Hospital Board* [1937] 4 All E.R. 19 (Liver-

The leading Australian case in which this aspect of a parent's liability was investigated is *Smith v. Leurs and Others*:[44]

> B, aged 13, the adopted son of L (who was treated at all times as if he was a natural child) fired a stone from his shanghai whilst playing with a companion S; S's sight was very seriously affected. There was evidence at the trial that L knew B had a shanghai, and that he had warned B of the dangers of using it; further, that L's wife had told B only to use the shanghai against the house-wall. S sued both B, in assault, and his parents, in negligence.

At the trial before Mayo J., in the Supreme Court of South Australia, both the boy and his parents were held liable. The parents appealed to the Full Court, which reversed the decision.[45] The plaintiff appealed to the High Court of Australia, which upheld the decision of the Full Court.

All the judges in the High Court agreed that a parent who has control of a child (a notion which was mentioned but not adumbrated by any of the Court) owes a duty to others, so that

> it is incumbent upon a parent who maintains control over a young child to take reasonable care so to exercise that control as to avoid conduct on his part exposing the person or property of others to unreasonable danger. Parental control, where it exists, must be exercised with due care to prevent the child inflicting intentional damage on others or causing damage by conduct involving unreasonable risk of injury. . . .[46]

With equal unanimity, the Court decided that the parents were here not guilty of negligence. The facts which weighed heavily with the Court in reaching this conclusion were the admonitions and instructions given to the boy, and also the general ways of boys with shanghais.[47] The general principles to be used are best put by Dixon J.:

> If the important consideration be, as no doubt it is, how the community regards these risks, whether as nothing but unavoidable or reasonable incidents of vigorous boyhood, or as something reprehensible that a parent or guardian may and ought to stop, then we are thrown back to a great extent on our conceptions of what is reasonable and proper, practical and usual. . . . The whole matter appears to me in the end to come down to weighing the risks to others which the boy's possession of a shanghai involves against the difficulties and disadvantages of an attempt on the part of parents to eliminate those as well as other foreseeable risks to strangers from the conduct of their sons by

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pool Assizes). There are several American decisions to the same effect: see especially *Scolavino v. State* (1947) 74 N.E. 2d 174 (Court of Appeals of New York), and Harper and James, *op. cit.* ii, 1058.

[44] (1945) 70 C.L.R. 256. [45] [1944] S.A.S.R. 213.

[46] (1945) 70 C.L.R. 256, 262, *per* Dixon J.

[47] (1945) 70 C.L.R. 256, 259, *per* Latham C.J.; 261, *per* Starke J.; 265, *per* McTiernan J.

seeking to restrict their forms of amusement and activity to those regarded as perfectly safe and harmless.[48]

Although there was no wide canvas of analogous or hypothetical situations, there was a readiness on the part of the High Court to say that there might well be cases where warnings would not be enough and confiscation of the child's plaything necessary in order to escape a finding of negligence.[49] In *Gray v. Fisher*,[50] Gordon J. speculated that a parent who allowed a ten-year-old child to have lucifer matches during the summer might be *eo ipso* guilty of negligence.[51] A Canadian judge has made a like statement.[52]

The age of the child, his known disposition,[53] and the character of the activity in question—all factors mentioned or alluded to in *Smith v. Leurs*—are matters which courts have considered in determining whether or not a parent has satisfied the test of reasonable control posited by Dixon J. It is interesting to examine the consequences in a group of cases all concerning injuries caused by children using guns, an activity in which they are ever-increasingly encouraged to engage, it appears. In the well-known case of *Dixon v. Bell*,[54] the defendant was held liable in case in respect of injuries caused by his thirteen-year-old maidservant firing a gun in play, the court saying he ought to have rendered the gun quite safe and innocuous before entrusting it to the girl; without any doubt the same result would have been reached had it been defendant's child who caused the injury. One hundred years later, the Divisional Court decided in effect that it was negligent of a father to allow his fifteen-year-old son to use an air-gun,[55] after a complaint had been made to the father that the boy had broken a window with the gun. Lush J. went further and indicated that the father might properly be held liable even in the absence of any warning.[56] In *Donaldson v. McNiven*,[57] the Court of Appeal concluded that a father was properly held not liable in negligence in another air-gun shooting case.

[48] *Ibid.* 263-264. See Fleming, *op. cit.* 649. Sir Owen Dixon's comments on the shanghai are well worth reading.

[49] *Ibid.* 259, 265.

[50] [1922] S.A.S.R. 246.

[51] The case was decided on the question of the parents' authorization: see note 20 *supra*.

[52] *Thisbodeau v. Cheff* (1911) 24 O.L.R. 214, *per* Boyd C.

[53] But see *Corby v. Foster* (1913) 13 D.L.R. 664, 674, where Riddell J., delivering the judgment of the Supreme Court of Ontario, said: 'The rule about dogs (*i.e.* the *scienter* rule) has never applied to boys.'

[54] (1816) 5 M. & S. 198.

[55] *Bebee v. Sales* (1916) 32 T.L.R. 413. The boy shot out another boy's eye.

[56] *Ibid.* In *Heberley v. Lash* [1922] N.Z.L.R. 609, a case almost identical with this one, Hosking J. held the father liable in negligence even in the absence of any previous intimation of misuse of the gun by his son.

[57] [1952] 1 All E.R. 1213 (Liverpool Assizes) affirmed by the Court of Appeal: [1952] 2 All E.R. 691. There are *dicta* in both judgments that the boy who fired would have been held liable in tort.

> The father had extracted a promise from the son, aged thirteen, that he would never fire the gun outside the cellar of their home; in breach of his promise the boy fired the gun in an alley-way and put out the eye of a five year-old child.

Lord Goddard C. J. said that there was no obligation on the father to continually watch the boy, and so there had been no carelessness in supervision; his conduct was, in Birkett L. J.'s words, which echo those in *Smith v. Leurs,*[58] that 'of a reasonable and prudent father'.[59] The most recent instance in this tale of violence is *Newton v. Edgerley,*[60] a decision of Lord Parker C. J.

> N received wounds in the leg when a shotgun carried by E's son S, aged twelve, was fired by a third boy whilst the three of them were walking through a wood. E had approved S's purchase of the gun, and had instructed him in its use, though not in its handling when others were present. S had been forbidden to take the gun off his parents' farm, or to use it on the farm when others were about; he had disobeyed the order on the occasion in question.

Lord Parker decided that the defendant had been guilty of negligence in these circumstances. He said:

> . . . I take the view that in the exercise of reasonable care this father either ought to have prevented the son from having this gun at all or, if the son did have the gun, he ought to have realised that the boy would sooner or later go out with others and, accordingly, have given him very careful instructions as to the use of the weapon if others were present.[61]

The learned judge distinguished *Donaldson v. McNiven*[62] with the observation that 'each case must depend on its exact facts'; the age of the boy and the nature of the weapon in each case seemed decisive.[63] It is difficult to see these as real distinctions of fact in the two cases. Of course, it is correct to say that much depends on the judge's view of the witnesses and the manner in which the case was conducted, and this is emphasized in all the cases in this group, but it might be thought that Lord Parker's finding indicates that a more stringent view will be taken of parental responsibility, at least in cases concerning firearms. It may be suggested that a parent who

[58] (1945) 70 C.L.R. 256.

[59] [1952] 2 All E.R. 691, 692. *Cf. Burfitt v. A. & E. Kille.* [1939] 2 K.B. 743, where a shopkeeper who sold a young boy a 'safety-pistol' was held liable to another child injured when the pistol was fired at him. However, this case was clearly decided on the basis of the now criticized doctrine imposing strict liability on those who distribute chattels described as 'dangerous *per se*': see Fleming, *op. cit.* 480.

[60] [1959] 1 W.L.R. 1031 (Manchester Assizes).

[61] *Ibid.* 1033, 1034.

[62] [1952] 2 All E.R. 691 (C.A.).

[63] See the American cases considered in the annotation to *Condel v. Savo* (1945) 155 A.L.R. 81, 87 ff. There is a lengthy examination of a wide range of Canadian and other Commonwealth cases, by Sheppard J.A., in *Hatfield v. Pearson* (1956) 6 D.L.R. 2d 593. For an analogous school authority case: *Ricketts v. Erith Borough Council* [1943] 2 All E.R. 629 (schoolboys with bow and arrows).

does not *take away* a gun which his child acquires for himself is negligent, in the light of the remark made by Lord Parker in the extract from his judgment set out above. This accords with the view already taken in a number of American cases of a similar sort.[64] Further, it may be that the parent will be regarded as in breach of his duty to a person injured if he did not take away the gun even where he had no previous warning of dangerous use of it by his child.

There are a number of American cases where, despite the expressed judicial reluctance to equate boys with dogs,[65] parents have been held liable for neglecting to control their children known to have vicious dispositions. In *Condel v. Savo*,[66] the defendants were held liable in the following circumstances:

> J, the young son of S, was allowed by S to go outside to play on the evening in question. He attacked C, a young boy, and threw him down a steep embankment; C fractured his leg. There was evidence that many complaints had been made about J to his parents, and that the parents had resented 'any resistance or admonition made by any adult person' in encounters with J.

Hughes J., delivering the opinion of the court, said that whilst 'mere knowledge' of a child's vicious disposition will not make them liable, failure to exercise control over a child known to be vicious, as Julius Savo was known, will. It is apparent from this decision that a parent must apply real restraint and seriously admonish such a child in order to escape liability in negligence.[67] The same decision has been reached more recently in California, where parents were held liable for injuries caused to their baby-sitter by their four-year-old son, who violently attacked her and knocked her to the floor.[68] The District Court of Appeal held that the parents' negligence consisted of not restraining their child, known to have a habit of violently attacking people, or at least warning the plaintiff. *Bieker v. Owens*,[69] decided by the Supreme Court of Arkansas in 1961, is to the same effect, and in strong language. There the defendant's son, driving his father's

[64] See the view of Harper and James, *op. cit.* i, 663: citing *Johnson v. Glidden* (1896) 76 N.W. 933 (Supreme Court of South Dakota). See also *Hopkins v. Droppers* (1924) 198 N.W. 738 (Supreme Court of Wisconsin).

[65] See the remark of Riddell J. in *Corby v. Foster* (1913) 13 D.L.R. 664. In *Smith v. Leurs* (1945) 70 C.L.R. 256, 260, Starke J. said, more circumspectly: 'Young boys, despite their mischievous tendencies, cannot be classed as wild animals.' The analogy appears to be to domestic animals known to be vicious, *i.e.* the *scienter* action in respect of dogs who have had their first bite.

[66] (1944) 39 A. 2d 51 (Supreme Court of Pennsylvania). See also *Streifel v. Strotz* (1957) 11 D.L.R. 2d 667.

[67] See similar opinions, endorsed in the instant case, in *Norten v. Payne* (1929) 281 P. 991 (Supreme Court of Washington); and *Ryley v. Lafferty* (1930) 45 F. 2d 641 (District Court of Idaho); and see (1962) 64 *West Virginia Law Review* 355, 358.

[68] *Ellis v. D'Angelo* (1953) 253 P. 2d 675; and see *Zuckerburg v. Munzer* (1950) 100 N.Y.S. 2d 910.

[69] (1961) 350 S.W. 2d 522.

car, forced the plaintiff's car to stop, then dragged the plaintiff from it and brutally beat him. The defendant knew his son had attacked and injured small children on a number of occasions. Bohlinger J. said:

> Where the parent (1) has the opportunity and ability to control a minor, and (2) has knowledge of the tendency or proclivity of the minor to commit acts which could normally be expected to cause injury to others, and (3) after having such opportunity, ability and knowledge has failed to exercise reasonable means of controlling the minor or appreciably reduce the likelihood of injury to others because of the minor's acts, the parent should be made to respond to those who have been injured by such acts of the minor.[70]

Though there do not seem to be any Australian or English cases the facts of which resemble any of the American cases considered, there are hints in some of the English gun cases, and in *Smith v. Leurs*,[71] that Australian and English courts might well come to similar conclusions to those reached in the American 'vicious child' cases. One wonders what the careful parent must do—warnings, both to the child and to people coming into contact with him, certainly, curfews probably, but beyond that? It is here that any analogy between any normal (in the sense of non-defective) child and the savage dog becomes unhelpful; for who would suggest putting a muzzle and a leash on a boy? Not even the most enthusiastic home disciplinarian, it is thought. It is worth recalling at this point that the standard which must be observed is that of the reasonable, prudent parent. To compel parents to search their sons for shanghais 'whenever they left home would involve setting up an impracticable and unreasonably high standard of parental duty'.[72] And though a mother may be liable if her child runs onto the street and causes a motorist who swerves to avoid him to injure himself, that finding will probably not be made just because the mother left the child unattended for a few moments. Considering such a situation by the way, in his judgment in *Carmarthenshire County Council v. Lewis*, Lord Reid said:

> 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.[73]

In fact, at common law, parents are not expected to meet 'an obligation to control their children almost impossible of performance'.[74]

[70] *Ibid.* 526. In a concurring opinion, Harris C.J. passionately declared: 'I feel that this is one of the most important decisions that has been handed down by this court, and truly "strikes a blow" for home discipline.' *Ibid.*

[71] (1945) 70 C.L.R. 256, 259, *per* Latham C.J.; 265, *per* McTiernan J. See also *Gray v. Fisher* [1922] S.A.S.R. 246.

[72] *Ibid.* 259, *per* Latham C.J.

[73] [1955] A.C. 549, 566. See also Lord Goddard C.J., at 561.

[74] *Smith v. Leurs* (1945) 70 C.L.R. 256, 261, *per* Starke J.

II A COMPARATIVE GLANCE

It has already been mentioned that there appears to be a significant difference between the common law and civil law rules about a parent's responsibility to compensate those injured by his infant children. In *Smith v. Leurs*,[75] Dixon J. said:

> The not uncommon error that a parent is responsible for the harm done by his young child is perhaps to be accounted for by the persistence of the notions of early law. But the French *Code Civil* adopted or preserved the rule; *"Le père, et la mère après le décès du mari, sont responsables du dommage causé par leur enfants mineurs habitant avec eux"* (Article 1384).

It may be of some value, in assessing the common law rules considered above, to look then at the French and several other codes which postulate a rule of parental responsibility in general terms.[76] Such a view may even suggest that the 'common error' mentioned by Sir Owen Dixon represents instead a criticism of the common law rules.

If one looks to 'early law', one finds, curiously enough that the Jewish legal system, as it had developed at the time when the final edition of the *Mishnah* was compiled, in about 200 A.D., imposed no liability upon a parent for damage caused by his minor child (that is a boy under the age of thirteen and a girl under the age of twelve).[77] The rule is reiterated by Maimonides, in the twelfth century,[78] and in the most famous mediaeval code, the *Shulhan Aruch*.[79] It is only in *responsa* of the nineteenth century that one begins to discern notions about a *Beth Din* imposing penal sanctions upon parents to compel them to control children who have revealed a propensity to do harm; but the aim appears to be prevention of future harms and there is still no allusion to compensation by the parents of those to whom damage is caused. The Mishnaic policy would still appear to prevail: that an encounter between a child and an adult is unfortunate for the adult because if the child is injured, the adult is liable, but if the adult is injured, the child is

[75] (1945) 70 C.L.R. 256, 261.

[76] See the survey by Professor F. F. Stone, 'Liability for Damage Caused by Minors: A Comparative Study' (1952) 5 *Alabama Law Review* 1.

[77] See Tractate, *Baba Kamma* 87a: there is no liability incurred by the child who causes the damage and hence no obligation imposed on the parent to compensate. And see Fishman, 'The Capacity of the Minor in Jewish Law' in Weinon and Israelstam (eds) *Ye Are My Witness* (1936) 200, 206.

[78] *Mishnah Torah*, Book XI, *Hilchot Chovel u'mazeh*, C. 4.20. This part of the *Mishnah Torah* has been translated by Hyman Klein as *The Code of Maimonedes: The Book of Torts* (Yale Judaica Series, 1954); the passage in question is at 176.

[79] Written by Joseph Karo about 1550. It forms the basis of modern rabbinic law.

not.[80] That loss lies where it falls.[81] In the Roman legal system, at least in classical times, the *paterfamilias* was liable to compensate those injured by children in *patria potestatis,* the plaintiff proceeding by way of an *actio noxalis* against the father. The *paterfamilias* had the choice however, of handing the offending child over to the plaintiff and indeed surrender seems to have been the primary obligation.[82] This liability was 'balanced' by the rule that the child in power usually acquired property and rights generally, not for himself but for the *paterfamilias.* In the post-classical period, and certainly when Justinian caused the *Corpus Juris* to be published, noxal actions in respect of children were no longer possible, such actions persisting only in respect of slaves.[83] The suggested reason given in the Institutes is the harshness of demanding surrender:

> For who would endure to hand over to another a child, particularly a daughter, and to suffer, perhaps, in the person of his son more than the son himself?[84]

Professor Stone subscribes to the more practical view that this change took place contemporaneously with the development of the rule allowing a minor to possess and control his own special fund or *peculium.*[85] If this is so, it suggests that the real reason of the Roman rule was to provide a pocket from which the injured person could draw his damages. If one accepts the strong links which so many distinguished civilians have said bind Roman law and the modern legal systems of say, France and Germany, this short view of the Roman law may prove useful when considering their rules regarding parental liability which appear to reproduce a version of the classical Roman law. It is to those systems to which attention is now directed, and then the Louisiana Civil Code provision will be considered.

(a) *France*

Article 1384 of the *Code Civil* provides that:

> The father, and the mother after the father's death, are responsible for the damage caused by their minor children residing with them.[86]

The emphasis of the decided cases is on the fact of actual residence with the parents, because this underscores the notion put strongly by Professor Esmein that the law presumes the damage would never

[80] See note 77 *supra.* It may be noted that there have been rabbinic statements that a child who causes damage is under a *moral* obligation to compensate upon reaching adulthood, but there is no legal liability.

[81] I am indebted to Rabbi S. Gutnick, B.A., for assistance in finding and evaluating these materials.

[82] See W. W. Buckland, *A Textbook of Roman Law* (2nd ed. 1932) 104, 603.

[83] See *Institutes* 4.8.7; R. W. Lee, *The Elements of Roman Law* (4th ed. 1956) 403 ff.

[84] *Loc. cit.*

[85] Stone, *op. cit.* 8.

[86] For the French text, see p. 30 *supra.* All translations from this code and the German Civil Code (*vide infra*), are the author's.

have been caused but for some failure on the part of the parents in educating the child and in supervising his activities. And coupled with this is the simple fact that the child has usually no financial resources, and an action against him would thus leave the victim '*sans recours utile*'.[87] Professor Esmein's view of the principle underlying the rule receives additional support from the proviso to article 1384 which provides that:

> The aforesaid responsibility is imposed unless the father and mother can prove that they could not prevent the act which gives rise to that responsibility.

The commentators speak of a 'presumption of fault' on the parents' part arising from the fact of parenthood which brings the obligations to educate as well as to rear and the child's residence with the parents which gives the physical opportunity for control and training. If the parent can rebut the presumption, he escapes liability. The tenor of the cases discussed by Professor Esmein (though he speaks of the Court of Cassation giving the judges a wide scope within which to determine responsibility) indicates that mere absence by a parent from the scene would not excuse, since the parent must take precautions so that supervision will continue in his absence.[88] However a parent is not at fault only because he allows his child, properly brought up and educated (which can only mean one who has given no previous demonstrations of dangerous behaviour) to engage in ordinary childhood activities, like riding a bicycle alone. In such a case, if an accident occurs, the parent will not be liable.[89] But in common law terms it might be said that the burden of proving non-negligence in respect of the duty of controlling the child is placed on the parent; the plaintiff is in the comparatively happy tactical position of not being compelled to prove that the parent acted unlike the 'reasonable, prudent father' of the cases considered in Part I above.

(b) *Germany*

Article 832 of the German Civil Code of 1900, the *Burgerliches Gesetzbuch,* provides that:

> (1) Whoever by law is under a duty of supervising another person, who, because of a minority or because of his mental or physical state requires supervision, is bound to make good the damage which such a person unlawfully causes to a third person. The duty to make good the damage does not arise if he has fulfilled his duty

[87] Planiol et Ripert, *Traite Pratique de Droit Civil Francais: Tome vi, Obligations* (by Paul Esmein) (1952) 257.
[88] *Ibid.* 890. And see Amos and Walton, *Introduction to French Law* (2nd ed. 1963; Lawson, Anton and Brown eds.) 227-228.
[89] *Ibid.* 891. See also Stone *op. cit.* 13.

of supervision or if such damage would have arisen despite proper supervision.

(2) The same responsibility is imposed on a person who, by contract, undertakes the supervision of another.

As under the *Code Civil* a parent may escape liability if he can prove that he has not been negligent in his supervision or that the damage would have occurred despite supervision.[90] In construing this section, the Federal German Supreme Court has worked out a pattern not unlike that evolved in the common law cases on a parent's negligence, remembering always that here the question is one of the *parent* proving *no* negligence. That Court has said that much depends on the personal qualities of the child concerned, and on the circumstances of the incident. Thus if a child is given or allowed to use dangerous things like guns or motor vehicles, instruction in their use must be given, and usually admonishment about common dangers as well.[91] A parent will probably not escape liability unless he can prove he gave specific instructions and warnings to his child in respect of a weapon available about the house; a general warning not to use, say, shotguns, would not be sufficient.[92]

(c) *Louisiana*

Article 2318 of the Civil Code of 1825, as revised in 1870, provides that:

> The father or, after his decease, the mother, are responsible for the damage occasioned by their minor or unemancipated children residing with, or placed by them under the care of other persons, reserving to them recourse against these persons.

The Louisiana rule is thus wider than that of the *Code Civil,* on which it is largely based,[93] in that a parent may be liable even if the child is not living at home with parents. In such a case however the parent may sue separately the guardian entrusted with the care of the child and in the end the same situation probably obtains. The basis of the rule was first put by Fenner J. in *Mullins v. Blaise,*[94] where he said that there was no necessity of proving that the child who caused the damage was personally liable in tort in order to fix the father with liability:

[90] See *Manual of German Law* (1950) i, 105: 'In . . . [this case] (*i.e.* of children) there is a reversal of the burden of proof: the person exercising supervision is responsible, except if he has exercised all due care in supervising or if the damage would have arisen notwithstanding the exercise of due supervision.'

[91] See *Reichsgerichtsrate — Kommentar zum Burgerliches Gesetzbuch* (10th ed. 1953) ii, 796. Also K. Larenz, *Lehrbuch des Schuldrechts* (2nd ed. 1957) ii, 351.

[92] *Ibid.* I am indebted to my friend and colleague, Dr J. Leyser, Reader in International and Comparative Law in the University of Melbourne, for assistance in assessing the provisions of the French and German Codes considered above.

[93] See Stone, *op. cit.* 18. [94] (1885) 37 La. Ann. 92; 155 A.L.R. 96.

> The law itself imputes the fault to the father. It presumes that it resulted from lack of sufficient care, watchfulness and discipline on his part, in the exercise of the paternal authority. This is the very reason and foundation of the rule.[95]

When one notices that the Louisiana Code has no provision, like the *Code Civil,* enabling a parent to escape liability by proving that he exercised proper supervision and could not have prevented the child causing the injury, and couples this with the view put by Fenner J., it appears that the Louisiana parent is under more stringent legal pressure to watch and control his children than parents in any jurisdiction yet considered. However, the Supreme Court of Louisiana has modified this position in more recent decisions on article 2318 and related provisions in the Code.

In *Toca v. Rojas,*[96] the plaintiff's son had his eye taken out by a hook on the defendant's son's fishline; it was alleged that the line had been negligently handled by the boy. The Supreme Court found that there was no evidence of negligence in the handling of the pole, and refused to hold Rojas liable. Thompson J. said:

> It is unquestionably the law that in order to hold a defendant liable for damages for personal injuries arising *ex delicto,* there must appear some actual or legal fault. . . . The rule applies with equal force when the father is sought to be held liable for the act of his minor child. While the law imputes the fault of the minor to the father, there must of necessity be some fault, actual or legal, in the act of the minor which caused the damage, before the father can be held liable in damages. Fathers and mothers are only made answerable for the offences and quasi-offences [*i.e.* torts] committed by their children (Civil Code 237) from which it follows that, if the act of the minor which caused the damage did not in law constitute an offence or quasi-offence, there can be no paternal responsibility.[97]

What the Court did was, in fact, to read the Code as a whole, an obviously sensible method of interpretation, and construe the phrase 'damage occasioned by their minor . . . children' in article 2318 in the light of article 237, quoted almost verbatim in the extract from the judgment above. Subsequently this view was reiterated in the important case of *Johnson v. Butterworth,*[98] where the defendant's daughter, aged three, bit her nurse, the plaintiff. However the Court added that a parent would be liable, not only if his child could be regarded as at fault, so liable in tort, but also if the parent had himself been guilty of negligence or imprudence; this is in accord with what was said in *Toca v. Rojas,*[99] that there must be some legal fault in someone. In *Phillips v. D'Amico,*[1] decided in 1945, the same rule was enunciated in a case where the defendant's son shot out the

[95] *Ibid.* 93. [96] (1922) 93 So. 108. [97] *Ibid.* 111. [98] (1934) 157 So. 121.
[99] (1922) 93 So. 108. And see Stone, *op. cit.* 20. [1] 21 So. 2d 748.

eye of the plaintiff's son with an air-gun; the court found for the plaintiff on the basis that the defendant's son was negligent in handling the gun as he did.

It must still be emphasized that in Louisiana, once it is proven that the child is liable in tort, the parent cannot escape the liability imposed by article 2318 by proof that it was impossible for him to prevent the damage. In this view, parental liability is indeed strict. The decision in the recent case of *Jackson v. Ratliff*,[2] decided in 1956, emphasizes this strictness but also points up the importance of a plaintiff demonstrating that the child who caused the injury is residing with them (the parents), or placed by them under the care of other persons.

In that case, the plaintiff brought an action against the father of an eighteen-year-old boy who had allegedly attacked her with intent to rape her. At the time of the attack, the boy was living with his grandmother, who had legal custody of the boy pursuant to a divorce between his parents. The Court of Appeal held that a court order awarding custody away from the father deprives him of paternal authority, and he is then no longer responsible for his child's torts.[3] The case thus indicates clearly that the basis of liability under article 2318 is a tort committed by the child (or the parent), coupled with the *possibility* of the parent exercising the duty of paternal supervision. Breach of that duty is supposed before liability under article 2318 will be ascribed. One may sum up the Louisiana position by saying that a parent is liable *vicariously* for his children's *torts*, so long as he is in a position to exercise his parental duty to supervise and control. The father cannot rebut the presumption that his child's tort was committed because of some failure to supervise on his part.

III SOME CONCLUSIONS AND A SUGGESTION

The late Professor H. C. Gutteridge, in his brilliant monograph, *Comparative Law*,[4] sorrowfully recognized the antipathy towards and ignorance of foreign law exhibited by the generality of common lawyers—what Maitland once described as 'our very complete and traditionally consecrated ignorance'. It may be that since Professor Gutteridge wrote that attitude has modified, not a little because of his own distinguished endeavours towards that end. And so today, it may be possible to argue that where a problem is treated in quite different a manner by the civil law systems from that accorded it by the common law world, the common law may look with profit

[2] 84 So. 2d 103. See a note in (1956) 30 *Tulane Law Review* 504.

[3] See *Simmons v. Simmons* (1954) 71 So. 377: a son on military service is no longer under his father's authority and the father is not liable for his torts. Similarly, where the son becomes a member of the sheriff's posse: *Coats v. Roberts* (1883) 35 La. Ann. 891.

[4] (2nd ed. 1949) 23 ff.

to the civil law solution. Especially may this be so where there are no real differences in the social context in which the problem is set in both systems. Children are the same, and family structure too, in England as in France. The problem of compensating the victim of the accident caused by the youthful driver, or the child whose eye is blinded by the stone from the boy's slingshot or the pellet from his air-gun or the hook on his fishing line is complicated by the same difficulty everywhere, that though the child who causes the injury may be liable as a tortfeasor personally, such an adjudication is a hollow victory for a plaintiff who finds his defendant penniless. A feeling for justice to plaintiffs in this sort of situation leads one, at first, to look with favour on a rule which makes the parent vicariously liable for his children's torts, as the Louisiana rule largely does. If it is recalled that such liability is only imposed whilst a child is actually susceptible to real parental control, living at home and unemancipated, then it may further be argued that it is as just to make the parent liable here as it is to make the employer liable for the torts of his servant done in the course of his employment.

Despite hard rearguard actions, such as that fought by Dr Baty,[5] the vicarious liability of the employer is now an inherent feature of the common law. The doctrine has been strongly justified because it fulfils the social interest in furnishing an innocent victim with recourse against a financially responsible defendant;[6] further:

> The principle gains additional support for its admonitory value in accident prevention. In the first place, deterrent pressures are most effectively brought to bear on larger units like employers who are in a strategic position to reduce accidents by efficient organization and supervision. . . . By holding the master liable, the law furnishes an incentive to discipline servants guilty of wrongdoing. . . . [7]

Cannot the same reasons of policy be advanced, *mutatis mutandis*, in support of adoption of the Louisiana rule for parents? That there has been already some considerable nibbling at the idea is demonstrated by the approaches in some of the American cases considered in Part I (a) and (b) above, especially in the 'family-car' cases, which cast the parent and child as master and servant in order, it is suggested, to satisfy the policy judgment that a financially responsible defendant must be found. Just as it is suggested that the master's vicarious liability encourages him to discipline and watch his servants, so might it also be argued, as it was by Harris C. J. in *Bieker v. Owens*[8] that the parent will be encouraged to discipline and control his child better when the threat of vicarious liability for his child's torts hangs over his head. And discipline and control in this sense

[5] *Vicarious Liability* (1916) 154 ff. And see the reference in *Soblusky v. Egan* (1960) 103 C.L.R. 215, 229. [6] Fleming, *op. cit.* 323.
[7] *Ibid.* [8] (1961) 350 S.W. 2d 522.

may lawfully be much more stringent than in the case of an employer and his employee.

In this regard it is interesting to take note of a development which has occurred in a large number of the jurisdictions in the United States.[9] In 1951, the State of Nebraska enacted that

> The parents shall be jointly and severally liable for the wilful and intentional destruction of real and personal property occasioned by their minor or unemancipated children residing with them, or placed by them under the care of other persons.[10]

This enactment clearly imposes vicarious liability on parents in respect of certain sorts of damage caused by their children, a liability, moreover, which cannot be rebutted upon proof of due care and control of the children. It mirrors, in effect, the Louisiana Civil Code, with the qualifications as to 'wilful and intentional destruction of real and personal property'. Presumably also a parent will escape liability in cases where the child has been removed from his care by a court order, in a matrimonial or other cause.[11] Subsequently some twenty other states have adopted the Nebraska pattern, but in most cases there is a statutory maximum of three hundred dollars as the amount of damages recoverable from the parents, whatever the actual damage caused.[12] It has been suggested by a commentator on these statutes that the legislative intent is to secure limited compensation to plaintiffs and in the process the legislature has incidentally looked to the parent's duty to train and discipline his child.[13] That duty, coupled with the well-known rights to custody and to discipline, supports the imposition of this liability on the parents.

Such a reform of the common law position would have been avidly supported by the late Dean Wigmore. He vehemently advocated the view that the 'Anglo-American law' whilst recognizing the parent's right to control the child, was anomalous in refusing to recognize what he called the 'humane complements' of that right namely, the parent's duty to support the child and give him a dowry or 'start in life', the parent's duty to bequeath a *legitima portio* to the child upon death, and finally, the parent's duty to compensate third parties injured by the child tortfeasor.[14]

Thus far the argument has been directed completely in favour of

[9] A number of states by statute impose liability on the parent who signs a minor's application for a driver's licence for any negligence in driving of such minor: see Lousberg (1955) 30 *Notre Dame Lawyer* 295, 297.

[10] Nebraska Revised Statutes, 1952, § 43-801. But see note 17 *infra*.

[11] See the discussion on the Louisiana case of *Jackson v. Ratliff* (1956) 84 So. 2d 103, *supra* n.2.

[12] See C. J. Peck, 'Parental Liability for Wilful and Malicious Acts of Children' (1961) 36 *Washington Law Review* 327, and a note by J. M. Cook, (1959) 37 *Texas Law Review* 924.

[13] See Lousberg, *op. cit.*

[14] J. H. Wigmore, 'Parent's Liability for Child's Torts' (1925) 19 *Illinois Law Review* 202, 203.

securing justice, in the form of real compensation, to the person injured by a child. The common law refusal to impose vicarious liability on the parent merely because of his relation to the infant tortfeasor does have the merit, so far not considered, of maintaining the just interests of the parent. The analogy between employer and parent, between the employer's capacity to control and deter his recalcitrant or careless employee and the parent's capacity to do the same with his child collapses on several important points. The employer can secure indemnities from his employee, whose pocket in many cases is as deep as the employer's.[15] Further, the employer may and does insure against liability in respect of his servants' torts and *pass his insurance charges on to a wider segment of the community through the price of his products or services.*[16] Most important, the employer will usually be able to dismiss the servant who is 'accident prone' or who wilfully damages property or injures others. A parent's situation is so different in all these respects as to make the analogy almost impossible to sustain. And in connexion with the American statutory imposition of vicarious liability previously described, it may be argued that the actual legislative intent there is not to provide real compensation, as witness the limitation of damages to three hundred dollars (about one hundred and thirty pounds) and the reference only to property damage caused wilfully or maliciously by the child, but rather as one commentator has put it, to aid in the control of juvenile delinquency, and not very effectively at that.[17] In this connexion it is interesting to note that the State of Wisconsin repealed its parental liability statute in 1959, after a legislative life of remarkable brevity, and that these laws generally have been the subject of harsh criticism by the National Council of Juvenile Court Judges.[18]

The common law rules indeed may be commended for not imposing liability without fault of any sort on parents, save when the parent is cast as employer. The 'family-automobile' rule in some of the American jurisdictions, and its more general Australian and English counterpart which goes to the imposition of vicarious liability on car owners generally in respect of injuries caused by the car, so to speak, may be justified on the public policy argument that the problem of motor car accidents is *sui generis* and has called for special solutions.[19] In other cases, in a society where it is increasingly ex-

[15] See *Lister v. Romford Ice Co.* [1957] A.C. 555; and *Davenport v. Commissioner for Railways* (1953) 53 S.R. (N.S.W.) 552. [16] See Fleming, *op. cit.* 323.

[17] C. J. Peck, *op. cit.* It appears that Nebraska has also imposed a 300 dollar limit on recovery: see Peck, *op. cit.* 330, note 19.

[18] Peck, *op. cit.* 328.

[19] See pp. 23-24 *supra.* And on motor car accidents, see Ross Parsons, *Death and Injury on the Roads* (1955) *University of Western Australia Annual Law Review* 201, and Leon Green, *Traffic Victims: Tort Law and Insurance* (1958).

pensive and difficult to raise and educate children, it is suggested that there must be a real warrant, which does not so far appear to have been made, for imposing such strict liability. Furthermore, there are now so many occasions in the ordinary course of family life when the child is, though residing at home with his parents, actually under the control and supervision of school-teachers, leaders of Boy Scout and similar youth movements, summer camp directors and the like. It would be quite unjust in such circumstances to infer that the injuries caused by the child are conclusively presumed to have occurred because the parent did not control or guide his child living at home with him. The argument that the parent may insure against this liability, were it imposed, as does an employer, may be met with the retort that the parent cannot pass on his insurance charges,[20] and a further financial burden should not be cast upon a group in the community already heavily burdened with the expenses of providing for the health, education and welfare of their children.

However, there is one reform of the common law rules which may be advocated which is much more moderate, and which does not conflict with the notion that generally a parent should only be liable for injuries caused by his children if he has personally been at fault. It is a reform suggested by the rule in the French and German Codes.[21] The rule advocated is that in any action brought against a parent sued in respect of injuries caused by his child, once the plaintiff has adduced evidence that the defendant's child caused the injury and that the child is living as a child in his parent's home, the defendant should run the risk of not persuading the tribunal that he was not negligent in his care and control of his child in all the circumstances. Put somewhat differently, it may be stated that the defendant is presumed to be at fault as he is under the French Code. Again, as under the Continental Codes, this presumption would be rebuttable by the parent who could persuade the Court that he took the care of a 'reasonable, prudent parent'. In other words, in the ordinary negligence action against a parent, like *Smith v. Leurs*[22] or *Donaldson v. McNiven*,[23] the defendant should run the risk of not persuading the tribunal of fact, judge or jury, that he was careful in the control of the child living with him.[24] The effect would be to introduce a

[20] See the note on comprehensive home owners' policies in the United States, in Peck, *op. cit.* 330, note 18. [21] See the discussion at pp. 31-33 *supra*.

[22] (1945) 70 C.L.R. 256. [23] [1952] 2 All E.R. 691.

[24] The notion of imposing the burden of proving no negligence on a defendant, in the sense of imposing 'the risk of non-persuasion', and not merely the burden of 'passing the judge' or adducing some evidence, has recently been accepted in a new statutory context in Australia; see the Civil Aviation (Carriers' Liability) Act 1959, s. 29 (Cth), and Article 20 of the Warsaw Convention, which forms the First Schedule to this Commonwealth statute. See Fleming, *op. cit.* 283, and Edwards, 'Some Aspects of the Liabilities of Airline Operators in Australia' (1960) 34 *Australian Law Journal* 142. And see Stone, *op. cit.* 34, who advocates this rule, but without elucidating any reasons for his support.

version of the rule well-known in negligence already, *res ipsa loquitur*. This version is apparently favoured in English Courts, though Australian Courts regard *res ipsa loquitur* as casting upon a defendant merely the burden of adducing evidence of no negligence, not of the risk of not persuading the tribunal that he was not negligent.[25]

The reasons for advocating this reform may be shortly summarized. Firstly, it is suggested that the general feeling referred to by Dixon J. at the beginning of his judgment in *Smith v. Leurs*,[26] 'that a parent is responsible for the harm done by his young child', does reflect a more limited truth, namely, that in a large number of cases of injuries caused by young children, there has been a failure or omission by the parent in his control and care of the child which results in the child being in a position to do the harm. And it is suggested that this is the real thrust of Dean Wigmore's argument.[27] Granted this conclusion, is it not just as between a plaintiff and a defendant-parent to subject the parent to the burden of proving that in the instant case he was not careless, that he was the 'reasonable, prudent father'? The continental experience clearly suggests it is. Secondly, it is the parent who is acquainted most intimately with most aspects of the child tortfeasor's activities. It is more convenient and fairer to compel him to prove that he could not prevent the child doing what he did, because the child was at that time completely outside his actual control, at school or elsewhere, or that he took every reasonable step to control his child, or to instruct him in the use of vehicles or guns or toys which he gave him or allowed him to have. What will result is that, in the end, when all the evidence is in, if the tribunal is in doubt whether it is more or less probable that the defendant parent was negligent, that doubt will be resolved in the plaintiff's favour. It is strongly suggested that such a rule will work justly as between a plaintiff looking for a financially responsible defendant and a parent who could justly complain if he was made liable even where he might prove that he was completely without fault, and that he reasonably kept control of a child he had a right to control. It is not a large reform of the common law which is being proposed, but one, suggested by other legal systems, which will not subject parents to unreasonably high standards of parental duty, but which will, in uncertain cases, provide the innocent plaintiff with the possibility of real compensation.

[25] See the excellent discusion in Fleming, *op. cit.* 271 ff., 283.
[26] (1945) 70 C.L.R. 256, 261, quoted at length at pp. 25-26 *supra*.
[27] See note 14 *supra*.