

## **ACCIDENTS IN THE HOME**

### **THE LIABILITY OF PARENTS & OTHER FAMILY MEMBERS**

#### **1. Parenthood – A Duty or a Duty of Care?**

- 1.1 No-one can doubt that parenthood (or any other familial relationship) gives rise to wide ranging social duties towards children. A duty to house, to feed, to keep safe from harm.
- 1.2 Similarly, there can be no doubt that certain functions that are incidental to parenthood will also give rise to a legal duty of care to those children. The most obvious of these is of course driving a motor vehicle in which those children are passengers.
- 1.3 Nor can there be any doubt that harm that is caused to a child by the tortious act of a parent or other family member can give rise to legal liability. The most obvious of these would be deliberate assault but equally, negligently scalding a child by personally dropping boiling liquid on them is an example.
- 1.4 However in each of these situations the defendant's status of parent or family member is irrelevant to the duty owed. The duty of a parent driver is the same as the duty of any other driver (at least so far as the quality of their driving is concerned); the assaulter is liable for their assaults whether parent or not.
- 1.5 This does not assist with the more interesting question whether the mere status of parent or family member might also create a legal duty of care. To what extent can the parent's social duty to protect their child from harm translate into duty of care in the legal sense?
- 1.6 To what extent can a parent's moral/social responsibility for the behaviour of their children be translated into a legal duty of care?
- 1.7 Ultimately each of these questions asks what level of supervision is a parent required to provide as a matter of law.

## 2. Liability for the Actions of Children

- 2.1 In ***Carmarthenshire County Council v Lewis***<sup>1</sup> the House of Lords considered the liability of a school from which a 4-year-old child strayed onto a road causing a lorry driver to swerve into a telegraph pole with fatal consequences.
- 2.2 In ***Carmarthenshire v Lewis*** Lord Reid made it clear that *There is no absolute duty [to prevent a child from wandering into the road]; 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.* What rendered the school liable in that case was their inability to explain how such a young child got onto the road without there being some negligence on the school's part. The age of the child was absolutely central to the finding that the school owed a duty at *all* to prevent him from walking into the road:

per Lord Goddard at 560 ...*By "young" children I mean those of such tender years that they may be presumed to be unable to take any care for their own safety and whom a prudent parent would not allow to go into a street unaccompanied...* and per Lord Keith at 570 ...*In what I have said and in what I am about to say I wish to make it clear that I am dealing with the case of a child so young that it cannot safely be allowed on a busy street by itself. With a child of an age to be allowed to find its own way to school, or to traverse the streets alone, different considerations arise. There can normally be no duty to prevent such a child from getting onto a street, and in the case of a traffic accident in which it is involved the question of responsibility for the accident will be considered in general with reference to the conduct of the child itself and of the other person involved in the accident...*

- 2.3 This can be contrasted with those cases in which a child has been given a firearm<sup>2</sup> in which parents have been held liable for the negligent handling of those firearms by children as old as 15, the obvious rationale being that firearms improperly used are so dangerous that a parent should not trust their child with one unless they have given

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<sup>1</sup> [1955] A.C. 549

<sup>2</sup> *Bebee v Sales* (1916) 32 T.L.R 413, *Court v Wyatt*, *The Times*, June 25 1960, *Newton v Edgerley* [1959] 1 W.L.R 1031

proper guidance and instruction in the use of that firearm and the child can be relied upon to follow that instruction and guidance.

- 2.4 It is important to recognise that in none of these cases is the parent being held vicariously liable for the actions of the child. Such a liability can only exist where the child is in fact the parent's servant or agent. The liability is founded on the parent's responsibility for the supervision of the children.

### 3. Parental Liability for Injury to Children

- 3.1 Unsurprisingly there are very few reported cases in which a parent's liability for injury sustained by their child has been asserted. Quite apart from the practical difficulties of such a claim, except in respect of an insured activity or place such a claim involves an inevitable circularity that is unlikely, ultimately to benefit the child.
- 3.2 However an extension of the principles set out in the cases described above was inevitable in respect of road traffic claims: a third party driver colliding with a wandering child was bound to seek a total or partial defence by blaming the parents for a failure to adequately supervise.
- 3.3 In *McCallion v Dodd*<sup>3</sup> the New Zealand Supreme Court was asked to consider the liability of a father who, leading his family (which included the 4 year-old Claimant) along a dark road at night led them with his back to the oncoming traffic rather than facing the oncoming traffic.
- 3.4 The Supreme Court took the view that there was an actionable duty as between the child and the father on the facts of the case but did not consider that the mere fact of parenthood gave rise to such a duty.

*...a father who in fact has the charge of a child of the age of four-and-a-half years on a highway at night has a duty of care to such a child, the breach of which will give rise to an action by the child against the father for negligence. I do not think that this duty arises from the relationship of father and child, but from the fact that, be he the father, a more distant relation, or a stranger, he has at the relevant time assumed or accepted the care and charge of the child. Any person who has done this has, in my opinion, accepted a duty of care, the breach of which will be actionable in tort<sup>4</sup>*

<sup>3</sup> [1966] N.Z.L.R. 710

<sup>4</sup> Per Turner J @ 724

*...I doubt if any duty of care such as is set up in this case can be founded purely on the relationship of father and child; if it were so a father in one part of the country could be sued for the breach of such a duty as regards the child in another<sup>5</sup>*

*I have no doubt at all that a child can sue his father for recognised torts, for example assault, for libel and for failure of the duty which a motorist owes to a passenger in his car. But I do not accept that there is any general actionable duty of care which springs basically out of the father-child relationship...when a parent leads a child of tender years on to a highway, the fact that he is a parent is very material in determining whether he has undertaken a duty to supervise and control the child's conduct; but the true basis of that duty lies in the assumption by the parent of the responsibility on the occasion. That assumption of responsibility is the foundation of the liability. The relationship of parent and child is evidence of that assumption and of course cannot be separated from the other facts, but, as I have already sought to say, the relationship is not the true foundation of the liability<sup>6</sup>*

- 3.5 In **Hahn v Conley**<sup>7</sup> a grandparent allowed his 3 year-old grandchild to cross a country road unsupervised and she was struck by a car. In the Australian High Court Barwick CJ concluded that *...the moral duties of conscientious parenthood do not as such provide the child with any cause of action when they are not, or badly, performed or neglected...whilst in particular situations and because of their nature or elements, there will be a duty on the person into whose care the child has been placed and accepted to take reasonable care to protect the child against foreseeable danger, there is no general duty of care in that respect imposed by the law upon a parent simply because of the blood relationship though he accepted that parents like strangers may become liable to the child if the child is led into danger by their actions.*<sup>8</sup>

#### 4. The Extension into the Home

- 4.1 When it comes to accidents in the home reported cases are even rarer, for obvious reasons. However a Judicial distaste for such claims is evident.

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<sup>5</sup> Per Turner J @ 725

<sup>6</sup> Per McCarthy J @ 729

<sup>7</sup> [1971] 126 C.L.R 276

<sup>8</sup> In light of *McCallion v Dodd*

4.2 In **Surtees v The Royal Borough of Kingston upon Thames**<sup>9</sup> a 2-year-old child in foster care suffered severe burns to her foot when it was immersed in hot water. Stocker LJ stated the duty owed by the parent to be *...to take such care as in all the circumstances was reasonable to ensure that the plaintiff was not exposed to unnecessary risk of injury, the standard of care being that of a careful parent in the prevailing circumstances*<sup>10</sup>

4.3 However it is emphasised that that duty of care should not be unreasonably elevated. Whether a child should be protected from a particular situation of hazard remains a test of reasonable foreseeability but:

*...such a test must be decided in relation to the person to whom it is to be applied. This accident happened in domestic circumstances in a home which, at the time, there were at least three small children in addition to the plaintiff. I do not doubt there are almost infinite circumstances in which a child if left alone can cause injury to itself. I am also sure that common sense indicates that in such domestic circumstances, though many accidents can in general terms be foreseeable, it was in this context that the test of reasonable foreseeability by Mrs Hughes was to be judged, though such a comment may be more relevant to the discharge of a duty...it is also relevant to whether a risk of a particular kind of injury is a reasonably foreseeable one...*<sup>11</sup>

4.4 Again the reasons for restricting the duty of care owed by parents and other family members are obvious:

*...the court should be wary in its approach to holding parents in breach of a duty of care owed to their children...There are very real public policy considerations to be taken into account if the conflicts inherent in legal proceedings are to be brought into family relationships. Moreover, the responsibilities of a parent looking after one or more children in addition to the myriad other duties which fall on the parent at home far exceed those of other members of society...The mother is looking after a fast moving toddler at the same time as cooking the meal, doing the housework, answering the telephone, looking after the other children and doing all the other things that the average mother has to cope with simultaneously or in quick succession in the normal household. We should be slow to characterise as negligent the care which ordinary*

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<sup>9</sup> [1991] PIQR P101

<sup>10</sup> @ 111

<sup>11</sup> Per Stocker LJ @ 112

*loving and careful mothers are able to give to individual children, given the rough and tumble of home life...*<sup>12</sup>

- 4.5 These principles have been considered again in the well known case of **Harris v Perry**<sup>13</sup>. The facts are well known. Parents hired two inflatables, a bouncy castle and a bungee run for their triplets' 10<sup>th</sup> birthday party. Before the party started they allowed other children including the 11-year-old claimant and a 15-year-old to use the bouncy castle. The mother was supervising but turned her back to the bouncy castle whilst she assisted a child on the bungee run. During that period three children did somersaults. The claimant did the second somersault and before he had got up the 15-year-old did a somersault striking the Claimant's forehead with his foot. He suffered a depressed skull fracture and a sub-dural haematoma in the left frontal-parietal lobe with severe, permanent cognitive, behavioural and social consequences.
- 4.6 In this most recent and serious of cases the Court of Appeal strongly restated the principles suggested in **Surtees**.

*It is impossible to preclude all risk that, when playing together, children may injure themselves or each other, and minor injuries must be commonplace. It is quite impractical for parents to keep children under constant surveillance or even supervision and it would not be in the public interest for the law to impose a duty upon them to do so. Some circumstances or activities may, however, involve an unacceptable risk to children unless they are subject to supervision, or even constant surveillance...*

*...in the context of this case, the issue was what positive steps would a reasonable parent take for the safety of a child of the claimant's age playing on a bouncy castle.*

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<sup>12</sup> The Vice Chancellor @ 123-4

<sup>13</sup> [2009] 1 WLR 19

*The answer to this question must depend critically on the risks that the reasonable parent ought to foresee would be involved in the use of the castle...a reasonable parent could foresee that if children indulged in boisterous behaviour on a bouncy castle, there would be a risk that, sooner or later, one child might collide with another and cause that child some physical injury of a type that can be an incident of some contact sports. We do not consider that it was reasonably foreseeable that such an injury would be likely to be serious. Let alone as severe as the injury sustained by the Claimant...the standard of care that was called for on the part of the Defendant was that appropriate to protect children against foreseeable risk of physical harm that fell short of serious injury...<sup>14</sup>*

## 5. Conclusion

5.1 From the Case Law the following principles can be drawn:

- The mere fact of parenthood or familial relationship does not give rise to a free standing duty of care.
- Nevertheless a duty of care to properly supervise children can arise and can be actionable by both third parties and the child themselves.
- Not just the extent but also the very existence of that duty is fact sensitive.
- The duty is restricted by generous interpretations of both foreseeability of injury and also reasonableness of action and those cases which are successful will either involve
  - Very young children; or
  - Activities that carry a very significant risk of injury.

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<sup>14</sup> Per Lord Phillips @ 30-31

5.2 The parent who knowingly leaves a toddler to play with a carving knife unsupervised will be liable to both the self-harming toddler and the victim of its attack but child who is injured in the course of ordinary family life is unlikely to find a remedy in law.

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