TORTS: APPLICATION OF ADULT STANDARD OF CARE TO MINOR MOTOR VEHICLE OPERATORS

IN a recent decision, *Dellwo v. Pearson*,[1] the Supreme Court of Minnesota refused to apply an individualized standard of care to a twelve-year old defendant whose allegedly negligent operation of a motor boat resulted in injury to the plaintiff. The trial court had applied the view of the vast majority of courts and instructed the jury that the defendant was required to exercise only the degree of care which is ordinarily exercised by children of like age, mental capacity and experience.[2] On appeal from a verdict for the defendant, the supreme court reversed, declaring[3] that to protect the public from the hazards of traffic, minors should be held to an adult standard of care[4] when operating automobiles, airplanes or motor boats.

Several reasons have been advanced in support of the majority view granting indulgence to minors in the determination of negligence.[5] Courts have recognized that immaturity limits the capacity for fault by restricting the ability of a child to perceive the probable consequences

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[1] 107 N.W.2d 859 (Minn. Sup. Ct. 1961).

[2] This standard of care is often loosely termed subjective. See, *e.g.*, 2 HARPER AND JAMES, TORTS 926 n.11 (1956); 74 U. PA. L. REV. 79, 80 (1925). On closer examination the standard of care, although individualized to the child's physical and mental development, is still objective in its application, requiring the child to act as a reasonable child with similar attributes. See Seavey, *Negligence—Subjective or Objective?*, 41 HARV. L. REV. 1 (1927); Shulman, *The Standard of Care Required of Children*, 37 YALE L.J. 618 (1928).

The qualities taken into consideration by the courts have been expressed in varying language, but those qualities most often mentioned are age, intelligence and experience. See cases collected in Annot., 67 A.L.R.2d 570, 576-578 (1959); Annot., 174 A.L.R. 1080, 1097-1098 (1948).

[3] The Minnesota Supreme Court held that the lower court erred in instructing the jury that forseeability is a test of proximate cause. 107 N.W.2d at 860. The court went on to order that on retrial the defendant be held to an adult standard of care. *Id.* at 863.

[4] The law of torts requires the exercise of a uniform standard of care by all adults. The standard is external and objective rather than relying on the judgment of a particular individual. See Seavey, *supra* note 2, at 1. In any situation an adult is required to act as the reasonable man would do in his place. This hypothetical man is a prototype of all proper qualities with only such shortcomings as the community will tolerate. See PROSSER, TORTS § 31 (2d ed. 1955); RESTATEMENT (SECOND), TORTS § 283, comment *c* at 14 (Tent. Draft No. 4, 1959).

[5] The most detailed and analytical judicial consideration of these reasons is found in Charbonneau v. MacRury, 84 N.H. 501, 153 Atl. 457 (1931).

of his acts or omissions[6] and have attempted to achieve a concurrence between legal liability and subjective fault[7] by considering the child's education, experience and intelligence.

It has also been urged that there is a special public interest in the protection of children.[8] Their basic educational process consists of exposure to an adult society, and in this manner they gradually develop the skills of adulthood. Imposition of an adult standard would subject the child to liability for acting as a child in an adult environment. Courts have protected children from this burden by the application of a less exacting standard of care.[9]

Furthermore, an individualized standard is administratively feasible, because community experience acts as a yardstick which courts can use to determine with some accuracy the care to be expected from a child of a given age.[10]

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[6] *Ibid.*

[7] Even where the individual attributes of the child are taken into account, moral culpability and legal liability do not exactly coincide. The child's age, intelligence and experience are only considered in determining the standard of care he will be required to exercise. The child will still be required to act as a reasonable child with the above mentioned qualities. Hence carelessness, if greater than average, will not relieve the child from negligence. Lutteman v. Martin, 20 Conn. Supp. 371, 135 A.2d 600 (1957); 2 HARPER AND JAMES, TORTS § 16.8 (1956); Shulman, *supra* note 2, at 624.

[8] Charbonneau v. MacRury, 84 N.H. 501, 153 Atl. 457 (1931).

[9] See, *e.g.*, Gernier v. Town of Glastonbury, 118 Conn. 477, 173 Atl. 160 (1934); Charbonneau v. MacRury, *supra* note 8; RESTATEMENT, TORTS, Special Note § 167, comment *e* at 29-31 (Tent. Draft No. 4, 1929).

[10] Charbonneau v. MacRury, *supra* note 8; RESTATEMENT (SECOND), TORTS § 283A, comment *b* at 18 (Tent. Draft. No. 4, 1959); RESTATEMENT, TORTS, Special Note § 167, comment *e* at 29-31 (Tent. Draft No. 4, 1929); 79 U. PA. L. REV. 1153, 1154 (1931).

However, the courts have generally refused to make allowances for the shortcomings of the insane and mentally deficient in the determination of negligence. *E.g.*, Bessemer Land & Improvement Co. v. Campbell, 121 Ala. 50, 25 So. 793 (1899) (excitable temperament); Worthington v. Mencer, 96 Ala. 310, 11 So. 72 (1892) (dullness); Georgia Cotton-Oil Co. v. Jackson, 112 Ga. 620, 37 S.E. 873 (1901) (stupidity); Sforza v. Green Bus Lines, 268 N.Y. Supp. 446 (1934) (insanity); *contra*, *e.g.*, Noel v. McCaig, 174 Kan. 677, 258 P.2d 234 (1953).

There are good reasons for this difference in treatment. While the capacity of a child may be ascertained with reasonable certainty, gradations of mental disease or deficiency are exceedingly difficult to distinguish. Furthermore, aside from insuring against the subnormal adult becoming a ward of the state there are no socially significant reasons why his estate should not repair the harm his conduct causes. In the case of children, however, there is a positive social interest in allowing them to develop the skills of adulthood free from the onerous burden of tort judgments. RESTATEMENT

There is, however, a growing dissatisfaction with the application of such a standard to minor motor vehicle operators. In several jurisdictions minors are required to exercise the same driving skills as adults,[11] and according to one commentator, even in some jurisdictions nominally making allowances for youthfulness, the trial courts are in fact requiring an adult standard of care of all drivers.[12]

The court in the *Dellwo* case articulates for the first time many of the practical considerations that favor holding minors to an adult standard of care when operating motor vehicles. As the court indicates, when children are playing there are certain physical limitations on the extent of injury they can cause.[13] In many instances, an adult can advert to a child's lack of care and protect himself accordingly. However, when encountering an approaching vehicle driven by a child, whose vehicle has a capacity for destruction equal to a vehicle driven by an adult, an individual does not know whether the operator is a child, nor can he protect himself even if warned.[14]

Moreover, youthful drivers, due to their inexperience and natural exuberance, have a disproportionately large number of motor vehicle accidents.[15] Hence the application of a personalized standard could

(SECOND), TORTS § 283B, comment *b* (Tent. Draft No. 4, 1959); RESTATEMENT, TORTS § 283 (Supplement, 1948).

[11] Wilson v. Shumate, 296 S.W.2d 72 (Mo. Sup. Ct. 1956) (statute); Karr v. McNeil, 92 Ohio App. 458, 110 N.E.2d 714 (1952) (statute); Biddle v. Mazzocco, 204 Ore. 547, 284 P.2d 364 (1955) (dictum); Nelson v. Arrowhead Freight Lines, 99 Utah 129, 104 P.2d 225 (1940) (rebuttable presumption of adult responsibility for minor drivers); see also Hill Transp. Co. v. Everett, 145 F.2d 746 (1st Cir. 1944) where the court refused to allow a defendant to assert his minor employee driver's incapacity.

The majority of courts, however, still apply an individualized standard of care to child drivers. See, *e.g.*, Mosconi v. Ryan, 94 Cal. App. 2d 227, 210 P.2d 259 (1949); Seeds v. Chicago Transit Authority, 346 Ill. App. 472, 105 N.E.2d 126 (1952); Harvey v. Cole, 159 Kan. 239, 153 P.2d 916 (1944); Norby v. Klukow, 249 Minn. 173, 81 N.W.2d 776 (1957); Chernotik v. Schrank, 76 S.D. 374, 79 N.W.2d 4 (1956).

[12] 2 HARPER AND JAMES, TORTS § 16.8 n.12 (1956).

[13] See generally, Annot., 173 A.L.R. 890 (1948), for a collection of cases dealing with the liability of children for play injuries.

[14] 107 N.W.2d at 863.

[15] James and Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769, 775 (1950). The court in the instant case states that children are no less prone to accidents than adults. 107 N.W.2d at 863.

During 1959, drivers under twenty years of age were involved in 13.0% of the total accidents in the United States although they comprised only 7.2% of the total drivers. A better measure would relate accidents to miles driven but such information is not available. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 51 (1960).

often preclude accident victims from recovering damages because of the very foibles that make minor drivers dangerous.

The compensation of accident victims presents a significant social problem.[16] Automobile, boating and airplane accidents cause a large number of personal injuries and deaths.[17] If the victims go uncompensated the resulting medical bills and loss of income are a hardship, not only on the individual himself, but also on charitable organizations and society at large.[18] This problem has been alleviated somewhat by legislative enactments in numerous states assuring the financial responsibility of those operating motor vehicles.[19] However, as a prerequisite to recovery, the accident victim still must establish the defendant's fault.

Any meaningful appraisal of the effects of tort liability on minors must also take into account the prevalence of liability insurance.[20] Minors are seldom sued in the absence of insurance, because they usually lack sufficient financial resources to make suit worthwhile. Most minor drivers are insured by omnibus coverage clauses for which their parents

[16] See generally COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS, REPORT (1932); Corstvet, *The Uncompensated Accident and Its Consequences*, 3 LAW & CONTEMP. PROB. 466 (1936); Grad, *Recent Developments in Automobile Accident Compensation*, 50 COLUM. L. REV. 300 (1950); James and Law, *Compensation for Auto Accident Victims: A Story of Too Little Too Late*, 26 CONN. B.J. 70 (1952).

[17] It is estimated that in 1959 motor vehicle accidents resulted in 37,800 deaths and 1,400,000 injuries disabling beyond the day of the accident. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 40 (1960). In 1957 non-commercial aviation accidents resulted in 802 deaths and 391 serious injuries. *Id.* at 76. In 1958 estimates indicate that 1,250 people were killed in water accidents, and over one half of these accidents involved motor boats. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 73, 76 (1959).

[18] See COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS, REPORT 19 (1932); 2 HARPER AND JAMES, TORTS 730 (1956); Corstvet, *supra* note 16, at 466; Grad, *supra* note 16, at 301.

In 1959 the economic loss from motor vehicle accidents was estimated at $1,600,000 in wages, $150,000,000 in medical expenses and $2,100,000 in property damage. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 4, 13 (1960).

[19] For a survey of the types and effectiveness of these measures see Braun, *The Financial Responsibility Law*, 3 LAW & CONTEMP. PROB. 505 (1936); Grad, *supra* note 16, at 305-317.

[20] See James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549, 554-556 (1948).

The cases, however, have held liability insurance is not to be considered in determining whether a child is liable for a tort. Seaburg v. Williams, 16 Ill. App. 2d 295, 148 N.E.2d 49 (1958); Garratt v. Dailey, 46 Wash. 2d 197, 279 P.2d 1091 (1955); *but cf.* Moore v. Moyle, 405 Ill. 555, 92 N.E.2d 81 (1950); Wendt v. Servite Fathers, 332 Ill. App. 618, 76 N.E.2d 342 (1947).

pay an extra premium.[21] Accordingly, any loss resulting from tort liability is rarely paid by the minors themselves, but rather distributed among the parents of minor drivers—the group which should most equitably bear the loss. Although these parents are not often held personally negligent,[22] they have provided the child with an instrumentality that can cause serious injury.

The holding in the *Dellwo* case is in one respect inconsistent. The court first states categorically that in the determination of a minor's contributory negligence an individualized standard is proper.[23] The court goes on to state, without exception, that minors operating automobiles, airplanes or motor boats are required to exercise an adult standard.[24] Thus the standard of care required of a child driver where contributory negligence is in issue is left unresolved.

Many of the above-enunciated policy reasons favoring an adult standard are not present where the child is a plaintiff. The application of such a standard decreases rather than increases the child's chance of recovery and may place the whole loss upon the child and his family rather than distributing it through insurance. In this instance the application of an individualized standard promotes rather than interferes with the compensation of accident victims. Hence, in order to

[21] James, *supra* note 20, at 555.

[22] A parent is not vicariously liable, as such, for the conduct of a child. *E.g.*, Hagerty v. Powers, 66 Cal. 368, 5 Pac. 622 (1885). Hopkins v. Droppers, 184 Wis. 400, 198 N.W. 738 (1924); *contra*, Phillips v. D'Amico, 21 So.2d 748 (La. Ct. App. 1945) (statute).

The courts, however, have gone to unusual lengths to establish an agency relationship between parent and child. Under "family purpose" doctrine the owner of an automobile who permits a member of the household to use the automobile for a family purpose is vicariously liable. These holdings are obviously based on the public policy of protecting the public from financially irresponsible motorists rather than any real agency relationship. See PROSSER, TORTS 681 (2d ed. 1955). For the divergent views of the various state courts see Annot., 132 A.L.R. 981 (1941). A recent North Carolina decision Grindstaff v. Watts, 254 N.C. 568, 119 S.E.2d 784 (1961), refused to extend the family purpose doctrine to motor boats, deeming this a policy decision properly made by the legislature.

A parent may of course be negligent himself for entrusting to a child a dangerous instrument or something the child has shown a propensity to misuse, but motor vehicles themselves are not classified as dangerous instrumentalities. Steffen v. McNaughton, 142 Wis. 49, 124 N.W. 1016 (1910); Hopkins v. Droppers, *supra*. However, parents have been held liable for entrusting motor vehicles to a child they know or should know to be incompetent. Daily v. Maxwell, 152 Mo. App. 415, 133 S.W. 351 (1911); Taylor v. Stewart, 172 N.C. 203, 90 S.E. 134 (1916); Hopkins v. Droppers, *supra;* Allen v. Bland, 168 S.W. 35 (Tex. Civ. App. 1914).

[23] 107 N.W.2d at 862-863.

[24] *Id.* at 863.

allocate the loss from motor vehicle accidents in a socially desirable manner, minor drivers should be held to an adult standard where they are defendants and to an individualized standard where they are plaintiffs.[25] In the past, courts have refused to apply such a dual standard[26] but no material obstacle appears to such an approach.

It is submitted that the above considerations—children's capacity for destruction when operating a motor vehicle, the social problem of uncompensated accident victims, the propensity of minors to have vehicular accidents, and the social utility of distributing the loss through insurance—should outweigh any desire on the part of the courts to achieve a strict concurrence between subjective fault and legal liability. Within the framework of a system of liability based on fault,[27] these

[25] See James and Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769, 794-795 (1950).

[26] The vast majority of early cases dealt with the contributory negligence of minor plaintiffs. These decisions were uniform in making allowances for the child's age, experience and intelligence. Annot., 174 A.L.R. 1080 (1948). When the question first arose there was some conflict as to whether the same standard of care should be applied to minor defendants.

The difference between these two situations was noted in the 1929 Tentative Draft of the Restatement of Torts. "There are so few cases which involve the liability of a child defendant that it has been necessary to state the standard of behaviour required of a child as it is indicated by the analogy of contributory negligence on the part of young children. There may be some doubt as to whether it is correct to regard contributory negligence and negligence as sufficiently analogous to make one a safe basis for statements in regard to the other. It may be that children should not be required to conform to a particular standard in order to relieve an admittedly negligent defendant from liability to them. It does not necessarily follow that a child should not be required to conform to a higher standard of behaviour where it is necessary for the protection of innocent members of the public." RESTATEMENT, TORTS, Special Note § 167, comment *e* at 29, 30 (Tent. Draft. No. 4, 1929); *accord*, Roberts v. Ring, 143 Minn. 151, 173 N.W. 437 (1919) (dictum); Terry, *Negligence*, 29 HARV. L. REV. 40, 47 (1915); *but see* Faith v. Massengill, 121 S.E.2d 657, 660 (Ga. Ct. App. 1961) (argument of counsel); Annot., 67 A.L.R.2d 570, 576 n.17 (1959).

The courts, however, have rejected or ignored this distinction and gone on to apply an individualized standard of care to child defendants as well as child plaintiffs. See Mosconi v. Ryan, 94 Cal. App. 2d 227, 210 P.2d 259 (1949); Hoyt v. Rosenberg, 80 Cal. App. 2d 500, 182 P.2d 234 (1947); Lutteman v. Martin, 20 Conn. Supp. 371, 135 A.2d 600 (1957); Harvey v. Cole, 159 Kan. 239, 153 P.2d 916 (1944); Charbonneau v. MacRury, 84 N.H. 501, 153 Atl. 457 (1931); Fox v. Harding, 6 Pa. D. & C.2d 785 (1955); Chernotik v. Schrank, 76 S.D. 374, 79 N.W.2d 4 (1956); Briese v. Maechtle, 146 Wis. 89, 130 N.W. 893 (1911); RESTATEMENT, TORTS § 283 comment *e* at 743 (1934); Bohlen, *Liability in Tort of Infants and Insane Persons*, in STUDIES IN THE LAW OF TORTS 543, 571 (1926); Annot., 73 A.L.R. 1277 (1931).

[27] For three decades commentators have attacked the common law principle of "no liability without fault" as inadequate to cope with the problem of automobile accidents and have argued for the adoption of various social insurance schemes similar to work-

policies can best be effected by requiring a dual standard of care. All defendants should be required to operate motor vehicles with a uniform degree of care, but minor drivers should only be held to an individualized standard of care in the determination of contributory negligence.

The latest tentative draft of the Restatement of Torts would hold both minor plaintiffs and defendants to an adult standard when engaging "in an activity which is normally undertaken only by adults and for which adult qualifications are required."[28] The problem remains to determine what are "adult activities" and "adult qualifications." The Restatement suggests legislatively-enacted licensing requirements as a criteria to circumscribe these areas.[29] However, as licenses are not now generally required for the operation of motor boats, the instant case illustrates that the proposed criteria is not satisfactory under all circumstances.

In the future, courts should adopt the approach utilized in the *Dellwo* case, determining the standard of care to be imposed by the extent of damage minors may cause when engaged in the activity in question. The courts should also consider the effect the imposition of an adult standard of care liability may have on the allocation of loss, rejecting application of the Restatement rule to minor plaintiffs because of the socially undesirable denial of compensation which might result.

man's compensation plans. *E.g.*, COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS, REPORT 200 (1932); Grad, *supra* note 16, at 305-317; James and Law, *supra* note 16, at 70; Lewis, *The Merits of the Automobile Accident Compensation Plan*, 3 LAW & CONTEMP. PROB. 583 (1936). It is not within the scope of this note to discuss the merits and demerits of the proposed alternatives. Here it is sought only to determine what standard of care should be required within the traditional framework.

[28] RESTATEMENT (SECOND), TORTS § 283A, comment *c* at 19 (Tent. Draft No. 4, 1959).

[29] *Ibid. Accord*, Wilson v. Shumate, 296 S.W.2d 72 (Mo. Sup. Ct. 1956); Karr v. McNeil, 92 Ohio App. 458, 110 N.E.2d 714 (1952); Nelson v. Arrowhead Freight Lines, 99 Utah 129, 104 P.2d 225 (1940); *contra*, Harvey v. Cole, 159 Kan. 239, 153 P.2d 916 (1944); Charbonneau v. MacRury, 84 N.H. 501, 153 Atl. 457 (1931).