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# Agency--Automobile Tort Liability of the Minor Principal

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gress and before the public in such a manner as to take them out of the least-favored-of-all tax category. As Harriet F. Pilpel has said, "Unless authors decide to and can make Congress respond to their tax problem, at least to the extent as inventors have [or at least to a reasonable degree], they would be well advised to turn their pens into plow shares and to patent the latter at once."<sup>60</sup>

*Linza B. Inabnit*

## AGENCY—AUTOMOBILE TORT LIABILITY OF THE MINOR PRINCIPAL

Generally speaking, if two or more persons engage in a common or joint enterprise, or other agency relationship, in which they use and occupy a motor vehicle driven by one of their number, but in the management of which all have equal authority and rights, each assumes responsibility for the conduct of the one who is doing the driving and each occupant is chargeable with the driver's negligence.<sup>1</sup> This generality is an overstatement, however, for many courts say that it does not apply to the minor.<sup>2</sup>

The scope of this paper is to examine the reasons which induced courts to make a distinction between the infant and adult in this area of the law and to examine the trend of recent court decisions. It is assumed, for the purposes of this note, that a minor is engaged in a common or joint enterprise or other agency relationship, with the driver of a car which is involved in an accident, that the agent driver was negligent, and that the minor is either suing or being sued for injuries received as a result of the accident.

Early courts held that the infant's contracts were voidable in most situations, but when they were confronted with an attempt by a minor to appoint another to act for him in the business world they held the relationship void.<sup>3</sup> In support of this position it has been reasoned that if the acts done by the agent for the minor are voidable at the minor's pleasure, then the power of attorney is not operative according to its terms; whereas if the acts of the agent

<sup>60</sup> Pilpel, "Developments in Tax Law Affecting Copyrights in 1954, 33 Taxes 271, 276 (1955).

<sup>1</sup> 2 Harper & James, Torts § 2613 (1956); Cf. Bushnell v. Bushnell, 103 Conn. 583, 131 Atl. 432 (1925).

<sup>2</sup> Palmer v. Miller, 380 Ill. 256, 43 N.E. 2d 973 (1942); Hodge v. Feiner, 388 Mo. 268, 90 S.W. 2d 90 (1935).

<sup>3</sup> Ibid.

are binding upon the minor, then he has done by another what he could not do himself.<sup>4</sup>

The result of this reasoning was carried over into the automobile tort liability field to prevent the imputation of negligence to the minor principal. However, the reasons which were perhaps valid in the contract field have no validity in the tort field. While the minor lacks legal capacity to make a binding contract, which perhaps should not be circumvented by the use of an agent, the minor who commits a tort cannot avoid responsibility for the tort as he could avoid a contract.

This defense of minority, by which some would have a court bar recovery where it is justly due, does not apply where the minor commits a tort himself, but only applies where a person acting under the authority and control of the minor commits a tort.<sup>5</sup> As a general rule the infant is liable for his own torts provided he possessed the mental and physical capacity requisite to the commission of the tort.<sup>6</sup>

The protection given the minor *principal* in the tort field is partly based on the premise that agency is a contractual relationship. This is not necessarily true. Since no consideration is needed for the establishment of an agency relationship, it is not essential to find a contract. Legal writers on the subject take the position that agency is a consensual relationship requiring only that the principal have the power to give legally operative consent.<sup>7</sup> However, case authority to support this proposition is definitely lacking.

While seeking to hold a minor principal liable may have been of little importance in the early days of our history, today the growth of insurance and the improved financial position of infants have placed them on a par with adults. To meet the obvious injustice resulting from the immunity of minors, courts have utilized two methods for not barring the imputation of negligence merely on the ground that the principal is a minor. One method that the courts have used is to say that, although under agency principles a minor cannot appoint an agent and thereby subject himself to liability, these principles do not apply where the driver is acting in the immediate presence and subject to the direction of the minor who has the right

<sup>4</sup> Gregory, "Infant's Responsibility For His Agent's Tort," 5 Wis. L. Rev. 453 (1930); Mechem, Agency § 141 (2d ed. 1914).

<sup>5</sup> Palmer v. Miller, 380 Ill. 256, 43 N.E. 2d 973, 975 (1942); Hodge v. Feiner, 338 Mo. 268, 90 S.W. 2d 90, 91 (1935).

<sup>6</sup> 2 Harper & James, Torts § 2612 (1956); Cf. Brown v. Wood, 293 Mich. 148, 291 N.W. 255, 256 (1940).

<sup>7</sup> Mechem, Outlines of Agency § 419 (4th ed. 1952); Restatement (second), Agency § 20(b) (1958); Seavy, "The Rationale of Agency," 29 Yale L. J. 859, 863 (1920).

to control his operation of the car.<sup>8</sup> This view treats the driver of the car as the "alter ego" or "long arms" of the minor principal. By such a view, the negligence of the driver is the negligence of the minor principal.<sup>9</sup> This permits the courts to talk in terms of "primary negligence" for which a minor can be liable in any jurisdiction.

It should be noted that the above cases utilizing this method involved situations in which the minor principal furnished the car in which he was riding. This "ownership" might have given him a *greater* right to control the driver than he would have in the ordinary joint venture relationship, and may have been as essential factor in the court's conclusion. Therefore, while this approach has merit its applicability may be restricted because a higher "degree of control," resulting from "ownership," may be required than exists in the ordinary joint venture relationship.<sup>10</sup>

A second method used by the courts has been to find "vicarious liability" by holding the appointment of the agent by the minor merely voidable, and imputing the negligence of the agent committed within the scope of the agency to the minor where there has not been a prior avoidance of the agency relationship.

The more recent and apparently better considered cases place an infant's appointment of an agent, and the acts of the agent thereunder, in the same class as the other acts of an infant, and consider them merely voidable and not absolutely void.<sup>11</sup> The modern doctrine is to the effect that, except for a narrowly limited class of contracts which are valid and binding upon him, an infant's contracts are voidable, *but not void*.<sup>12</sup>

The use of this method requires the view that a subsequent disaffirmance of the agency relationship does not avoid the relationship *ab initio*,<sup>13</sup> but only takes effect from the time of the disaffirmance. The courts have adopted such a view.<sup>14</sup>

This extension of the law has permitted the courts to impute

<sup>8</sup> *Wilson v. Moudy*, 22 Tenn. App. 356, 123 S.W. 2d 828 (1938); *Wilson v. Mullen*, 11 Tenn. App. 319 (1930).

<sup>9</sup> *Frye v. Baskin*, 241 Mo. App. 319, 231 S.W. 2d 630 (1950); *Haynie v. Jones*, 233 Mo. App. 948, 127 S.W. 2d 105 (1939); *Feagles v. Sullivan* 32 Pa. D. & C. 47 (1938); *Wilson v. Moudy*, 22 Tenn. App. 356, 123 S.W. 2d 828 (1938); *Wilson v. Mullen*, 11 Tenn. App. 319 (1930).

<sup>10</sup> See *Feagles v. Sullivan*, 32 Pa. D. & C. 47 (1938).

<sup>11</sup> *Ahlstedt v. Smith*, 130 Neb. 372, 264 N.W. 889 (1936); *Scott v. Schisler*, 107 N. J. L. 397, 153 Atl. 395 (1931).

<sup>12</sup> *Casey v. Kastel*, 237 N.Y. 305, 142 N.E. 671 (1924).

<sup>13</sup> The view has been taken that the infant should, at his request, be excused from liability for torts committed by his servant or agent. Such a view permits a subsequent disaffirmance of the agency relationship, by the infant, to avoid the relationship *ab initio*. See *Ferson*, *Principles of Agency* § 49 (1954).

<sup>14</sup> *Scott v. Shisler*, 107 N.J.L. 397, 153 Atl. 395 (1931); Cf. *Casey v. Kastel*, 237 N.Y. 305, 142 N.E. 671 (1924).

negligence to the minor as a principal, standing on equal footing with adult principals, where the agent commits a tort.<sup>15</sup> Thus, the courts have denied recovery to a minor principal, injured while a passenger in an automobile, by imputing the negligence of the driver to him. The policy behind this determination to find liability has been aptly stated:

A minor may own an automobile; and if he is of sufficient age and judgment he not only has the legal ability to control its use and operation, but he is legally chargeable with that responsibility.<sup>16</sup>

Whether the question of contributory negligence of the minor principal as a plaintiff or the question of his negligence as a defendant is being considered, the same test should be applied. The relationship between him and the driver is the same in either situation.<sup>17</sup>

Attempts, however, have been made to distinguish between imputed negligence and imputed contributory negligence.<sup>18</sup> One court said that negligence would not be imputed to the minor principal where he was being sued, and distinguished a similar case as being one where contributory negligence was imputed.<sup>19</sup> Perhaps the justification for this distinction is the attitude of the court that the minor should be protected from being put heavily in debt before he reaches adulthood, but should not be allowed to capitalize upon his minority at the expense of a defendant who would otherwise have a valid defense.

While at first glance one might feel that there is considerable merit in such an argument it does not hold up in the world of today. Most states have automobile liability statutes<sup>20</sup> requiring, as a practical matter, that liability insurance be carried on all cars.<sup>21</sup> While the purpose of such a statute is mainly to prevent an injured plaintiff from meeting with an insolvent defendant, the statute also protects a defendant from having his resources wiped out and being put into debt. When a judgment is recovered against a minor principal for injuries received in an automobile accident, it will be paid in almost every instance by an insurance company. The only monetary effect

<sup>15</sup> *Waggoner v. Simmons*, 117 S.W. 2d 553 (Tex. Civ. App. 1938).

<sup>16</sup> *Parks v. Pere Marquette Ry.*, 315 Mich. 38, 23 N.W. 2d 196, 198 (1946).

<sup>17</sup> *Eagles v. Sullivan*, 32 Pa. D. & C. 47, 50 (1938).

<sup>18</sup> See *Haynie v. Jones*, 233 Mo. App. 948, 127 S.W. 2d 105 (1939); *Hodge v. Feiner*, 338 Mo. 268, 90 S.W. 2d 90 (1935).

<sup>19</sup> See *Hodge v. Feiner*, 338 Mo. 268, 90 S.W. 2d 90 (1935).

<sup>20</sup> *Vorys, "A Short Survey of Laws Designed to Exclude the Financially Irresponsible Driver From the Highway,"* 15 Ohio St. L. J. 101, 102 (1954).

<sup>21</sup> Generally the statutes require the deposit of security by one involved in an accident which becomes unnecessary if the driver or owner is covered by liability insurance above certain minimum levels. Practically speaking, this "requires" liability insurance. For an example of a financial responsibility law, see Ky. Rev. Stat. ch. 187 (1959).

the judgment will have on the minor is perhaps in slightly higher insurance rates.

A good example of cases holding that a minor principal may be held liable as a defendant is *Scott v. Schisler*,<sup>22</sup> wherein a minor had borrowed his father's car for the purpose of attending a football game. While on the way home, a companion whom the defendant had allowed to drive negligently caused an accident which resulted in injuries to the plaintiff. The court said:

The creation of an agent by an infant is not void *ab initio*, but voidable at his option. . . . So long as the infant sees fit to continue the existence of the agency, he is answerable for the negligence of his representative in the performance of the duty which the agency carries with it.<sup>23</sup>

In addition to the two methods listed above, there is the possibility that the question of age of the principal will not be raised or considered by the court. Thus, in denying recovery to a minor principal's administrator in *Atchison, T. & S. F. Ry. v. McNulty*<sup>24</sup> the court unhesitatingly imputed the agent driver's negligence to the minor principal riding in the car. The question of minority was not discussed but the fact was revealed in the course of the opinion.

A further possibility is exemplified by *Lind v. Eddy*<sup>25</sup> wherein a minor owner was held liable under a statute making an automobile owner liable for damages caused by the negligence of one using it with his consent. Liability was based on the statute itself and did not arise from the relation of principal and agent.

While Kentucky apparently has not had occasion to decide whether or not a minor principal would be liable for the negligence of an agent causing an automobile accident, some insight as to how it would hold might be gained by a review of related Kentucky law.

Generally in Kentucky a contract executed by a minor is not binding upon him, but is voidable at his option.<sup>26</sup> Although this would permit the court to say that an infant's appointment of an agent is merely voidable and not void, the court has adopted the opposite view.<sup>27</sup> However, since most of the growth toward holding the minor principal liable has been since Kentucky last ruled on the point, such case authority should be given little weight. The Ken-

<sup>22</sup> 107 N. J. L. 397, 153 Atl. 395 (1931).

<sup>23</sup> Id. 153 Atl. 395, 396.

<sup>24</sup> 285 Fed. 97 (8th Cir. 1923).

<sup>25</sup> 232 Iowa 1328, 6 N.W. 2d 427 (1942); accord, *Ridley v. Young*, 64 Cal. App. 2d 503, 149 P. 2d 76 (1944).

<sup>26</sup> *Wright v. Stanley Motor Co.*, 249 Ky. 20, 60 S.W. 2d 144 (1933).

<sup>27</sup> *Semple v. Morrison*, 23 Ky. (7 T.B. Mon.) 298 (1828); *Pyle v. Cravens*, 14 Ky. (4 Litt.) 17 (1823).

tucky Court of Appeals *might* now be induced to follow the "vicarious liability" approach described above in the second method.

Very close to the "primary negligence" approach described above in the first method is *Thixton v. Palmer*.<sup>28</sup> In holding a parent liable under the "family purpose doctrine" the court said that negligence of a friend whom the son had permitted to drive while he rode in the back seat would be negligence of the son. The case supports the proposition that the negligence of one driving a car under the control of a minor is the negligence of that minor, but it should be remembered that such finding did not make the minor liable for damages. It only permitted the court to hold the minor's parent liable under the "family purpose doctrine." However, the case indicates that the court might find the "primary liability" approach an easy one to accept in holding the minor liable, since Kentucky follows the general rule that a minor is liable for his own torts.<sup>29</sup>

There is also the possibility in Kentucky that the question of age of the minor principal will not be considered by the court unless raised on behalf of the minor. Kentucky has said that for the defense of infancy to be available, it must be pleaded.<sup>30</sup>

### Conclusions

The purpose of permitting a minor to avoid a contract is to protect the minor, as justice would demand. When the results reached in the contract situation are blindly applied to the tort situation in which the minor is legally capable of acting but has another act for him, an obvious injustice is committed. In the first situation we are *protecting* the infant, while in the latter we would be *shielding* him from responsibility which he would face had he acted rather than his servant or agent.

It is submitted that the early courts misapplied the contractual concept to the minor principal-agent field where a tort was involved through an automobile accident. The growth in this area of the law and the trend appear to be towards the imputation of negligence to the minor principal.

The vicarious liability approach discussed above appears to be the broadest of the methods used by the courts in their efforts to find a rational basis on which to base the liability of the minor. It would cover situations which would not come under the first method unless the "alter ego" idea were stretched beyond reason.

<sup>28</sup> 210 Ky. 838, 276 S.W. 971 (1925). Cf. Annot., 44 A.L.R. 1382 (1926).

<sup>29</sup> *Stephens v. Stephens*, 172 Ky. 780, 189 S.W. 1143 (1916) (Dictum).

<sup>30</sup> *Mullins v. Watkins*, 146 Ky. 773, 143 S.W. 370 (1912). This case was decided under a statute which was superseded by the Kentucky Rules of Civil Procedure. Therefore, the value of the case today may be open to doubt.

The second method also appears to be more logically reasoned in that it is based upon sound agency principles, whereas the first method is based upon fiction.

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### INDICTMENT AND INFORMATION— KENTUCKY CONSTITUTIONAL LIMITS AND PROPOSED CHANGES IN THE USE OF THE INFORMATION

At the present time Kentucky, by statute, allows the use of the information in circuit courts for the prosecution of certain misdemeanors, and for all offenses within the jurisdiction of courts inferior to the circuit court.<sup>1</sup> The purpose of this paper is to ascertain the extent to which the information may be used in Kentucky and to examine its possible future uses.

#### *Analysis of Constitution*

The Kentucky Constitution § 12 provides:

No person, for an indictable offense, shall be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, or by leave of court for oppression or misdemeanor in office.

Since the exceptions within this section are extremely limited, no particular importance is attached to them in the development of this paper.

This provision, on its face, would appear to prohibit the use of the information in *all* cases in which the indictment *may* be used, and since the present use of the information<sup>2</sup> overlaps the permitted uses of the indictment,<sup>3</sup> it would appear that the present use of the information is partly unconstitutional. However, such a literal interpretation has not been adopted by the Kentucky Court of Appeals. The court has wisely limited the application of the constitutional provision which otherwise would have tied the hands of a prosecut-

<sup>1</sup> Ky. Rev. Stat. § 455.080 (1959) provides in part:

In circuit court, persons charged with misdemeanors for which the highest penalty that may be imposed is a fine of one hundred dollars and imprisonment for fifty days may be prosecuted . . . by information filed by the Commonwealth's attorney or county attorney in the circuit court. In courts inferior to circuit courts, any offense within the jurisdiction of the court may be prosecuted on [an] . . . information filed before the judge or justice.

<sup>2</sup> Ky. Rev. Stat. § 455.080 (1959).

<sup>3</sup> Ky. Crim. Code § 9 (1959). The indictment *or* information may be used in the circuit courts for offenses having punishments of not more than one hundred dollars and imprisonment for fifty days.