# TORTS AND CHILDREN

## I INTRODUCTION

THE LAW of torts, unlike the law of contracts, does not draw a sharp line of demarcation between minors and adults. Again, unlike criminal law or any other law, there are no similar rules of exemption from liability for torts committed by children. However, the age of a child does have a bearing in those cases where mental element in tort or reasonable care (*e.g.*, negligence cases) is material.

In relation to wrongs committed against children, similarly a greater degree of care may be expected than adults.

The law of torts is a judge-made law, but there is not much case law involving children, particularly there is a total absence of case law in India. Accordingly, a few illustrative cases from England have been used here. It is proposed to study the subject under the following heads: (*a*) the capacity of a child to sue for damages; (*b*) the tortious liability of a child; (*c*) the right, duty and liability of a parent in respect of his child; (*d*) the duty of an occupier of dangerous lands and structures in respect of children.

## II CAPACITY TO SUE

As to the capacity of a person to sue for damages in tort, the age is irrelevant. The law recognizes the right of every individual to the safety of his person and property, but as a matter of procedural requirement, a person below the age of majority has to sue by his next friend.

As to pre-natal injuries, the law of torts, in general, is uncertain. There have been one or two foreign instances of granting damages for such

injuries.[1] However, in India, no such case has so far come before the courts, and it is generally opined that a child cannot maintain an action for injuries sustained while in the womb.[2]

Under the Fatal Accidents Act, 1855, a child has a right to sue for the loss occasioned by the death of his parent, as a result of an actionable wrong, within the meaning of the Act. As a matter of procedure the suit has to be filed by executor, administrator or representative of the deceased. However, the law is specific that the damages, thereof, shall be for the benefit of child, in addition to that of wife, husband and parent.

Complicated legal problems have arisen, when injuries suffered by a child were partly attributable to his contributory negligence. Negligence means want of ordinary care, *i.e.*, "that degree of care which may reasonably be expected of a person in the plaintiff situation".[3] However, the special position of a child, arising from immature judgment, has been duly recognised by courts in this regard. This could be illustrated by a few cases. In *Lynch* v. *Nurdin*,[3a] the defendant left his house and cart unattended in a busy street. The plaintiff, a boy under 7 years of age, climbed on the cart, and another boy led the horse on. The plaintiff fell and broke his leg. In a suit for damages, the defendant contended that the plaintiff was guilty of contributory negligence. Lord Denman dismissed this argument on the ground that the degree of care, which might be expected of a young child of plaintiff's age, would be very small.

The above rule was applied in *Yachuk* v. *Oliver Blais Ltd.*[4] In this case, the defendant sold some gasoline to a boy of 9 years, who falsely represented that his mother wanted it for her car. In fact, the boy used it in his play and got himself burnt. The court held that the defendant was solely responsible for the injury notwithstanding the misrepresentation by the plaintiff.

A slightly different note was struck, however, in an Indian case, namely, *M. and S.M. Railway Co. Ltd.* v. *Jayammal*.[5] In this case, a girl of 7 years was knocked down by an engine, while she was crossing the railway line after passing through a wicket gate. It was held that the proximate cause of the accident was the negligence of the girl in not looking out for a passing engine, and a girl of her age ought to have been capable of appreciating the danger.

1. Winfield, *Tort* 722 (8th ed. 1967); Salmond, *The Law of Torts* 622 (14th ed. 1965).
2. Ratanlal, *The Law of Torts* 23 (1973).
3. Per Lord Denman in *Lynch* v. *Nurdin*, (1841) 1 Q. B. 29 at 36.
3a. *Ibid.*
4. (1949) 1 All E.R. 150 (P.C.).
5. (1924) 48 Mad. 417.

It is clear from the above illustrations that there cannot be a uniform standard applicable to the capacity of children to sue. The question to be asked in every case is whether a child of plantiff's age could have appreciated the danger involved in the particular situation.

## III TORTIOUS LIABILITY OF A CHILD

As to tortious liability of children, they are liable as adult persons except where liability depends on some special mental element like malice or fraud, or where reasonable conduct is involved. Salmond states there are no rules of exemptions such as exist in other branches of law, *e.g.*, criminal law. He observes :

> Thus a child of any age may be sued for trespass or conversion, and will be held liable in damages just as if he were an adult. The youth of the defendant is not however in all cases wholly irrelevant. For it may be evidence of the absence of the particular mental state which is an essential element in the kind of tort in question. Thus, if an action is based on malice or on some special intent, the fact that the defendant is extremely young is relevant as tending to disprove the existence of any such malice or intent. Similarly, it would seem that in order to make a child liable for negligence, it must be proved that he failed to show the amount of care reasonably to be expected from a child of that age. It is not enough that an adult would have been guilty of negligence had he acted in the same way in the same circumstances. This, indeed, seems never to have been decided, but it would seem implied in the decisions on the contributory negligence of children. In general the principle appears to be that a minor who is incapable of forming a culpable intention or of realising the probable consequences of his conduct is relieved from liability in those cases in which fault is essential to liability, but that wherever a liability is imposed irrespective of fault he is fully liable as a normal adult.[6]

In *Walmsley* v. *Humenick*,[7] the plaintiff aged 5½ years, was struck in the eye by the defendant of the same age, in the course of play. The court held that the defendant was not liable since he "had not reached that stage of mental development where it could be said that he should be found legally responsible for his negligent acts". On the other hand, in *Gorely* v. *Codd*,[8] a boy of 16½ years old was held liable for negligence, when he accidently shot the plaintiff with an air-rifle in the course of larking about.

6. *The Law of Torts*, *supra* note 1 at 617.
7. (1954) 2 D.L.R. 232.
8. (1967) 1 W.L.R. 19.

Most of the cases, wherein children have been involved, fall on the borderline of contracts and torts. Subject to certain exceptions, a child is not liable on contracts. Suppose he commits a tort, which simultaneously appears to be a breach of contract which is not binding on him, the question arises as to whether he can be sued on torts. The rule is that the courts "would not permit the plaintiff to sue in tort for what was in truth a breach of contract'.[9] Salmond says that a distinction is made "between acts which were merely wrongful modes of performing the contract and acts which were outside the contract altogether."[10] The point is illustrated by *Burnard* v. *Haggis*[11] where a minor hired a mare for riding on the express stipulation that she was not to be used for jumping or larking. He lent the mare to a friend, who injured it by making it to jump over a fence. The minor was held liable for trespass because using the mare for a purpose, expressly forbidden by the contract, amounted to using it without authorization. It would depend upon the facts of each case whether it was a case of merely wrongful performance of the contract or wrong outside the contract. However, a void contract cannot be enforced in a roundabout manner by framing an action in tort. Thus, Salmond says that "if a minor purchases goods, and retains them in his possession while refusing to pay for them, he cannot be sued in detinue."[12] A minor is also not liable in tort or contract for "procuring a contract by means of fraudulent representations either as to his age or as to any other matter."[13] However, the minor is under an equitable obligation (and possibly under section 73 of the Contract Act, 1872 also) to restore any property procured by fraudulent representation as to his age. The position with respect to contracts in respect of this matter has been considered in the previous chapter. Commenting on the unsatisfactory position in this regard, Winfield comments :

> But it has unfortunately condoned some pretty pieces of rascality on the part of minors who have procured money or goods by lying about their age, and who have escaped civil liability. Quite possibly they were amenable to the criminal law, but that is somewhat clumsy and unprofitable for the defrauded party to set in motion. Something like the Roman law *subscriptio censoria*, which branded the profligate or the dishonest, seems to be needed here.[14]

9. Salmond, *supra* note 1 at 618.
10. *Id.* at 618-19.
11. (1863) 14 C.B. (N.S.) 45.
12. *Supra* note 1 at 619.
13. *Ibid.*
14. *Id.* at 724.

## IV PARENT AND CHILD

### (*i*) Liability of a parent for the tort of his child

Generally, a parent or guardian is not liable for the tort of his child. However, there are two exceptions to this rule. "First, where the child is employed by his parent and commits a tort in the course of his employment, the parent is vicariously responsible just as he would be for the tort of any other servant of his. Secondly, the parent will be liable if the child's tort were due to the parent's negligent control of the child in respect of the act that caused the injury or if the parent expressly authorised the commission of the tort, or possibly if the parent ratified the child's act."[15]

### (*ii*) Right of a parent in respect of his child and vice versa

The relationship between parent and child, from the point of view of torts, is merely a species of general relationship between master and servant. When a tort is committed againt a child, the parent is entitled to damages only insofar as it wrongfully deprives him of the child's services. Thus, in any action for damages, he must prove (*a*) that the relationship of master and servant existed between them; (*b*) that the act is a tort against the child; and (*c*) that he is thereby deprived of his child's services.[16]

It has been generally admitted that the fact a parent has no right *qua* parent in respect of his child has inducted into this area of law an element of artificiality as well as harshness.[17] Courts have, however, tried to mitigate them interpreting these requirements liberally. Thus, very little evidence is necessary as to the existence of relationship of master and servant. If the child is below the age of majority, the mere fact that he lives with his parents is enough to imply the fact of service. However, if the child is of full age, there must be the proof of actual service, though it may be slight.[18]

There is some confusion as to the exact legal position when a minor is employed by a third person. In *Terry* v. *Hutchinson*,[19] a minor daughter, on her way back home after the termination of her employment, was seduced by the defendant. The father was awarded damages on the ground that so long as the father had the right to her services, he could recover damages, notwithstanding that he had not actually exercised his right. However, in *Hedges* v. *Tagg*,[20] when a daughter, on vacation, was seduced by the

15. *Id.* at 724-25.
16. Salmond, *id.* at 502.
17. *Id.* at 506.
18. See *id.*, at 503-506.
19. (1868) L.R. 3 Q.B. 599.
20. (1872) L.R. 7 Ex. 283.

defendant, the father was held not entitled to damages, because by virtue of the contract of service only her master and not her father was entitled to her services, notwithstanding the fact that during the vacation she used to assist her parents.

It may be noted that in all these cases, seduction *per se* is not actionable. It must result in actual loss of services. To prove such a loss, illness due to mental agitation after seduction is sufficient; pregnancy or childbirth is not necessary. Damages may include, apart from the loss of services, related medical expenses.

In grave cases such as seduction, to grant damages for such insignificant consideration as loss of services, totally ignoring parent-child relationship, sounds sadistic. Even according to the American law, which is more liberal in this regard, a parent can recover damages for emotional distress, only if other conditions relating to service are fulfilled.[21] It is submitted that the time has come to accord explicit recognition to the vital interest of everybody in family relationship, which has been so far very imperfectly and inadequately served by the law of torts. Thus, in a case like seduction, a parent should have the right to recover damages notwithstanding the considerations relating to the service. Salmond observes:

> In all such cases, indeed, the action, though in form and in law based on the loss of service, is in substance and in fact based on the injury to the honour and feelings of the parent or other relative of the person seduced....It is greatly to be desired, therefore, that the law should be put on a more rational basis, and that the real cause of action should receive legal recognition instead of being made available by means of a device which is little better than a legal fiction.[22]

As far as the converse position is concerned, the child does not have any action for any loss which he may have suffered from interference with his relationship with his parents, apart from that provided by the Fatal Accidents Act, 1855. The provisions of the statute seem to be adequate where the death of the parent has occurred. Under section 2 of the Act a suit for the benefit of wife, husband, parent and child can be brought in the case of the death of the person concerned by the wrongful act, neglect or default of another person against the latter. Damages can be claimed under two heads — damages to the beneficiaries due to the loss of bread winning capacity of the deceased and pecuniary loss to the estate of the deceased. No damages are payable for mental distress or shock. However, no remedy under the Act is available where the loss is occasioned due to any physical injury short of death (*e.g.*,

21. American Law Institute, III *Restatement of the Law of Torts* 699-707 (1938).
22. *Supra* note 1 at 506.

maiming for life). The reason for the rule seems to be that the injured person could himself sue in such a case for such items as loss of earnings, pain and suffering, loss of amenities of life, *etc.* But these heads may not cover the loss of service by a parent (a mother who has been maimed) to the child for bringing him up. The law seems to be deficient here.

*(iii)* **Authority of parents and of school-master over pupils**

According to Winfield, parents and other persons in similar positions "have control, usually but not necessarily, of disciplinary character, over those committed to their charge. The nature of control varies according to the relationship and, provided that is exercised reasonably and moderately, acts done in pursuance of it are not tortious."[23] A father may beat or imprison a child by way of punishment so long as he acts reasonably. Parental authority ceases when the child attains the age of majority.

The control of a school-master over his pupil is delegated to him by the parent. This includes implied assent of parent to any reasonable rule or custom of the school relating to discipline, whether the parent knew it or not, unless there is a specific understanding that a particular rule should not apply to a particular student. Further, a school-master's authority is not limited to school premises. In *The King* v. *Newport* (*Salop*) *Justices*,[24] corporal punishment was inflicted on a student for smoking outside the school after the school hours, in violation of a rule absolutely prohibiting smoking. The court upheld the punishment on the ground that the parent, while admitting him into the school, had impliedly acceded to that rule.

## V DANGEROUS LANDS AND STRUCTURES

In the case of dangerous lands and structures, the liability is owed by the occupier, *i.e.*, person who is in actual possession of the site for the time being, whether he is the actual owner or not. Children, like adults, may be invitees, licensees or trespassers and the occupier's liability varies as the person in question belongs to one or other of these categories. In the case of an invitee ( *i.e.*, a person who is present on the premises of the defendant at his invitation, whether express or implied, for their mutual benefit) the liability of the occupier is the greatest, *i.e.*, he is liable not only for the damages of which he knew but also for those which he ought to have known, unless he has used reasonable care. The common law liability of occupiers towards

23. *Supra* note 1 at 736.
24. (1929) 2 K.B. 416.

visitors has been modified under the English Occupiers' Liability Act, 1957, which imposes a duty to take such care as in all the circumstances of the case is reasonable to see that the invitee will be reasonably safe in using the premises for the purposes for which he is invited to be there. Under the statute he must be prepared for children to be less careful than adults. So far as the general liability of the occupier towards the invitee is concerned there seems to be hardly any difference between the common law duty and statutory duty and the position may be taken to be the same in India, though there is no such statute as the Occupiers' Liability Act in India.

The duty of the occupier under the common law is less towards a licensee (that is, a person who is on the premises with the permission, express or implied, of the occupier, but for his own benefit). A mere licensee has to take the premises as they are and the occupier is under no obligation to make them safe for the licensee except that the occupier is under an obligation to give warning to the licensee of the existence of any concealed danger existing on the premises and known to the occupier (in other words, the occupier should not lead a licensee into a trap) and that the occupier or his servants should not do any positive negligent act by which the licensee suffers the harm. Under the Occupiers' Liability Act the distinction between an "invitee" and a "licensee" has been done away with. Both are treated as visitors and the obligation towards them by the occupier is the same as mentioned above as in the case of an invitee. Thus, under the statute the liability of the occupier towards a "licensee" is greater than under the common law. In India it is the common law principle which will be applicable.

In the case of a trespasser the occupier owes no duty "other than that of not inflicting damage intentionally or recklessly on a trespasser known to be present."[25] There is no difference in this regard between an adult or a child, except that the concept of "recklessness" may impose a higher duty of care in the case of children than adults. The rigours of the law relating to a trespasser, however, have been lessened by the courts liberally holding child trespassers as "licensees" through the doctrine of implied consent, *e.g.*, where the occupier habitually and knowingly acquiesces in the trespasses of children. Further, where children are "licensees" the words "traps" and "allurements" (which it is the licensee's duty to avoid) may have a different meaning in the case of children and impose a higher duty on the occupier to take care than adults. It is not necessary to discuss the niceties of the case law except to say that the decisions reflect conflicting values—a child must trespass on its own risk and it is for the parents to look after the

25. Salmond, *supra* note 1 at 401.

children rather than the occupier, otherwise an onerous duty will be imposed on him, but on the other hand a child who lacks the power of comprehension and is not as physically strong as an adult ought to be guarded by the occupier on whose premises or land he has been allowed or tempted to enter.[26]

As in England, licensees (whether adults or children) need the same degree of protection as invitees and it seems necessary to enact law on the lines of the Occupiers' Liability Act.

## VI CONCLUSION

The law of torts in India, as in the United Kingdom, has continued to be essentially a judge-made law. This has imparted into the law certain flexibility which has rendered it responsive to changing needs. As far as children are concerned, their interests have been, by and large, protected. No doubt, the award of damages for pre-natal injuries has not yet attained wide currency, but the difficulties here are medical and not legal, *i.e.*, to establish proximate relationship between accident and damage. With the advancement of medical science in this direction, the problem may be tackled within the present legal framework itself.

An area, which calls for reappraisal, is the borderline cases of tort and contract. Under the existing law, a child, who fraudulently misrepresents himself as an adult and induces the other party to enter into an agreement with him, escapes from tortious liability. This condones fraudulent activities of children. The way should be found out to put an end to this undesirable effect of a technical interpretation. As seen in the previous chapter, a minor who on fraudulent representation has induced the other party to enter into a contract may be asked by the court to restore back the property or the money received, yet he is not liable for damages for any injury to the property or for the use of property, *etc.*

The most unsatisfactory area of the law of torts, from children's point of view, is the relationship between parents and children. Treating this as a species of master-servant relationship smacks of its feudal origin. No doubt, the courts have mitigated its consequences by interpreting the requirements of service liberally. It is submitted, nevertheless that it is opportune to put the law on a rational basis.

Further, though the Fatal Accidents Act recognises the right of a child to claim damages on account of the death of a parent, yet no damages can be claimed for any physical incapacity, short of death, which may

26. See *id.* at 406-13.

deprive the child of the benefit of the services of the parent. Here the courts should recognise this new category of damages. To avoid multiplicity of suits, the damages on this account should be awarded to the parent at his/her instance.

Finally, we should have an Act on the lines of the English Occupiers' Liability Act doing away with the common law distinction between invitees and licensees.