

Note

The transferred intent doctrine is well accepted whenever it is discussed. Is it sound? Why not say that, as to Davis, White was merely negligent or reckless?

WALKER v. KELLY

Circuit Court of Connecticut, 1973.
6 Conn.Cir. 715, 314 A.2d 785.

DEARINGTON, JUDGE.

The plaintiff, on behalf of himself and his minor son, Michael Walker, hereinafter referred to as Michael, brought this action against the defendants, parents of Sharon Kelly, their minor daughter. The plaintiff alleges that Sharon wilfully and maliciously assaulted Michael, causing a laceration over his right eye. The defendants in their answer deny the alleged assault and in a special defense allege that Sharon was five years of age and incapable of acting deliberately, wilfully and maliciously.

The action was brought under § 52-572 of the General Statutes, the pertinent part of which provided that the parents of any unemancipated minor who wilfully or maliciously caused injury to any person shall be liable with such minor for such injury to an amount not exceeding \$750 if such minor would have been liable if he had been an adult.²

The finding, which the plaintiff did not move to correct, recites as follows: Michael and Sharon lived on the same street. Michael was eight years of age and Sharon was five. At the time, Michael was riding his bicycle on the street and Sharon was on the street with other children. On more than one occasion Michael rode his bicycle close to Sharon, and it appeared to her and other children that Michael was trying to run her over. One of the older children, Robert Blinn, twelve years old, told Sharon to throw a rock at Michael's bicycle. Sharon threw a rock, intending to hit Michael's bicycle, which at that time was moving fifteen or twenty feet away on the opposite side of the street. The rock struck Michael on the forehead, causing a laceration that required medical treatment.

The court concluded that (1) Sharon did not intend to strike Michael; (2) Sharon was too young and immature to appreciate the risk involved in throwing a rock at Michael's bicycle; (3) Michael's injury was not inflicted wilfully or maliciously.

The plaintiff has assigned error as follows: (1) The court erred in failing to find that Sharon intended to strike Michael; (2) a child of five years of age may be held responsible for acts of violence; (3) Sharon's testimony indicated that she acted wilfully and maliciously. . . .

2. The amount has since been raised to \$5,000.—eds.

It appears from the certified transcript of the evidence that Sharon testified on direct examination when asked to relate what happened: "A.—Well, I was trying to go over to Lisa Blinn's house and Michael was trying to run me over with the bike and so I picked up a rock and I threw it. I meant to hit him in the fingers but by mistake, I hit him in the head. Q.—Before you threw the rock, Sharon, do you remember Bobby Blinn saying anything? A.—He said that aim . . . 'Throw the rock, but aim for the fingers.' Q.—Did you mean to hit Michael with the rock at all? A.—No." Thus, we have conflicting testimony from the witness. No further interrogation on this subject was pursued either on direct examination or cross-examination. . . .

Where there is conflicting evidence in the testimony of a witness, it is a function of the trier to accept the testimony which is believed. "[T]he trier is the final judge of the credibility of witnesses and of the weight to be accorded their testimony. . . ." It cannot be said that the court erred in its finding in that it accepted part of the testimony of Sharon and rejected other portions where the evidence was conflicting. The trial court is in a far better position than an appellate court to evaluate the testimony—from observation of a witness, from the surrounding circumstances, and from a consideration of the entire evidence. Especially is this so where, as here, the witness is of tender years. The court's conclusion that Sharon did not intend to strike Michael was warranted on the facts found.

. . . [T]he statute provides that the injury, if damages are recoverable, must result from a wilful or malicious act. Ordinarily, tort liability attaches regardless of age where the nature of the act is such that children of a like age would realize its injurious consequences. "However, where a tort requires a particular state of mind, and an infant because of his age or mental capacity, is incapable of forming such state of mind, he cannot be found guilty of the tort. Accordingly, although an infant of quite tender years may be held liable where the only intention necessary to the commission of a tort is the intention to perform the physical act in question . . . such an infant cannot be held liable where malice is the gist of the tort and he is too young to formulate the necessary malicious intention. . . ." The statutory requirement is that the act must be done "wilfully or maliciously" if recovery is to be successful. "A wilful or malicious injury is one caused by design. Willfulness and malice alike import intent. . . . [Its] characteristic element is the design to injure, either actually entertained or to be implied from the conduct and circumstances." . . . It is evident from the finding that the court considered the surrounding circumstances and the ages of those involved and that it concluded that Sharon did not wilfully or maliciously intend to injure Michael. Since this conclusion is logically supported by the finding, it must stand.

There is no error.

JACOBS, JUDGE (concurring).

I join the opinion of the court based on the finding that Sharon, a five-year-old child, did not intend to strike Michael and that Michael's injury was not inflicted wilfully or maliciously. . . .

There is, however, a statement in the record before us which reads as follows: "To find the defendants' child liable for such an act would be to impose upon a child of five years a standard of conduct and maturity of judgment not reasonably to be expected of children of such tender age." This statement, which appears in the trial court's memorandum of decision, is an incorrect statement of the law and one which we cannot and should not overlook. . . .

Notes

1. Suppose (a) Sharon had been an adult; or (b) Sharon had intended to hit the bike but not the boy. Under the first supposition would she have been wilful? Under the second would she have had *Garratt v. Dailey* intent?

2. Does the court here interpret the statutory term "wilfully" to mean something more than an intent of the kind required in common law battery?

Parental Liability

3. *Respondent superior*. There is a very general rule that certain employers are liable for the torts of their employees committed in the scope of employment. For example the telephone company is liable if its driver, on the way to connect a telephone, negligently runs into a car owned by the plaintiff. This liability of the "master" for torts of the "servant" is called vicarious liability or *respondent superior* liability, and it is limited to cases in which the employee is in a general way engaged in the job. Vicarious liability is explored further in Chapter 20 but it can be taken here as a very general rule.

4. *Parents' vicarious liability*. Parents are not generally vicariously liable for acts of the child, unless, of course, the parent is an employer using the child as a "servant," as where the parent operates a store and the child is making deliveries as part of the enterprise.

5. *Parents' fault*. In the absence of statute, then, parents' liability for the acts of the child must be founded not on vicarious liability but on the parents' own fault. Suppose parents tell a child, "Throw a rock at that boy." If the child threw it and injured the boy would the parent be liable? If so, why? Suppose a parent merely refused to exercise control over a child who constantly committed acts of violence against others?

6. *Statutes*. A number of states impose liability upon parents for certain limited acts of their children, often acts that are wilful, or acts that are directed against certain persons. These statutes vary slightly in their exact content, but most often they limit the parents' liability to a relatively small sum such as \$750 or \$500. California, however, permits parental liability up to \$10,000 for wilful misconduct of a minor and up to \$30,000 under some circumstances when the minor causes injury by discharge of a firearm. WEST'S ANN. CAL. CIV. CODE §§ 1714.1, 1714.3. How suitable is it to hold parents liable for acts of the child?