# TORTS—MINORS—INDIVIDUAL UNDER THE AGE OF CRIMINAL RESPONSIBILITY NOT CIVILLY RESPONSIBLE FOR HIS WILFUL TORTS

In *Hatch v. O'Neill*[1] the Supreme Court of Georgia construed the provisions of section 105-1806 of the Georgia Code to mean that an individual under the age of criminal responsibility is not civilly responsible for his wilful torts.[2] Michael O'Neill, nine years old at the time, was alleged to have deliberately fired a rock-loaded slingshot at Andrew P. Hatch from about a yard away. The missile struck Hatch in the right eye, causing permanent blindness. A complaint was filed in Chatham Superior Court; the defendant moved for summary judgment on the ground that he was below the minimum age specified for liability in section 105-1806. The trial judge granted the motion, and plaintiff appealed directly to the Supreme Court of Georgia on grounds[3] which included the contention that section 105-1806 does not provide a minor immunity for his wilful torts, even though he is under thirteen years of age, the minimum age for criminal responsibility. This court rejected his arguments and affirmed the judgment of the trial court.

Minors[4] have long been held liable for their torts, although there are few cases dealing with the primary negligence or wilful torts of minors. In the early case of *Burns v. Hill*,[5] where the Supreme Court of Georgia discussed the effect of the conveyance of a property interest by minors, the court recognized the responsibility of a minor for his torts: "Undoubtedly an infant may be a *tort feasor*—may commit a fraud for which he can be made answerable *civiliter*."[6] This seems to have been the rule under the English as well as the American common law.[7] And, from the inception of the first Georgia Code in 1863, this state has provided for infant tort liability by statute: "Infancy is no defense to an action for a tort, provided the defen-

1. 231 Ga. 446, 202 S.E.2d 44 (1973).

2. GA. CODE ANN. §105-1806 (Rev. 1968): "Infancy is no defense to an action for a tort, provided the defendant has arrived at those years of discretion and accountability prescribed by this Code for criminal offenses." GA. CODE ANN. §26-701 (Rev. 1972) defines the minimum age of responsibility for criminal offenses: "A person shall not be considered or found guilty of a crime unless he has attained the age of 13 years at the time of the act, omission, or negligence constituting the crime."

3. The appellants also contended that the statute was violative of due process in that it deprived the plaintiff of a valuable property right solely on the basis of an arbitrary age standard. They further contended that the Code section, being in derogation of the common law, should be strictly construed. 231 Ga. at 447, 202 S.E.2d at 45.

4. Throughout this note, the words minor and infant will be used interchangeably to mean one below the age of legal capacity.

5. 19 Ga. 22 (1855).

6. *Id.* at 24.

7. *See* T. COOLEY, A TREATISE ON THE LAW OF TORTS 95 n.19 (1930) for some representative English and American decisions holding infants responsible for their torts.

dant has arrived at those years of discretion and accountability prescribed by this Code for criminal offenses."[8]

Most tort cases involving the standard of care demanded of infants have dealt with situations where the infant was alleged to have been contributorily negligent. In *Western & Atlantic R.R. v. Young*,[9] the Supreme Court of Georgia, in one of the many cases involving minors injured by trains, discussed the standard of care required of an infant for its own safety: "Due care according to age and capacity is all the law exacts of a child of tender years. Ordinary care, which is that of every prudent man, is not the standard for a child."[10] This rule has been codified in section 105-204 in essentially the same language.[11]

In Georgia, minors, if below the age of thirteen, are held to two completely different standards. If the minor is a plaintiff, he must exercise care which is reasonable for one of his age and experience or he can be found contributorily negligent. If he is a defendant, he is not held to any standard whatsoever. This disparity does not exist in most jurisdictions.[12] In *Charbonneau v. MacRury*,[13] a case representing the majority view, the court held:

> The rule of reasonable conduct is constant but the reasonably ascertainable defects of the actor, whether adult or minor, are circumstances to be considered in its application. In neither case does the law make any distinction between the conduct of an actor when charged with actionable fault and when charged with contributory negligence.[14]

Apparently, Georgia is somewhat unique in its distinction between liability for primary negligence and for contributory negligence among infants under thirteen.[15] Thus, the courts of Georgia reached the second half of this

8. GA. CODE §2996 (1863). This section has been carried down to the present in identical language codified in GA. CODE ANN. §105-1806 (Rev. 1968).

9. 83 Ga. 512, 10 S.E. 197 (1889).

10. *Id.* at 512, 10 S.E. at 197.

11. GA. CODE ANN. §105-204 (Rev. 1968): "Due care in a child of tender years is such care as its capacity, mental and physical, fits it for exercising in the actual circumstances of the occasion and situation under investigation."

12. *See* Charbonneau v. MacRury, 84 N.H. 501, 153 A. 457 (1931); Briese v. Maechtle, 146 Wis. 89, 130 N.W. 893 (1911); Hoyt v. Rosenburg, 80 Cal. App.2d 500, 182 P.2d 234 (1947).

13. 84 N.H. 501, 153 A. 457 (1931).

14. *Id.* at ___, 153 A. at 464.

15. *See* Stone, *Liability for Damage Caused by Minors: A Comparative Study*, 5 ALA. L. REV. 1, 26 (1953):

> As a general rule, the fact of minority is no defense to an action in tort. This result is generally reached in the decisions, but occasionally, as in California, it is reached by legislation. Georgia appears to be an exception to the general rule. There the Code provides that infancy is no defense to an action of tort, provided the defendant has arrived at those years of discretion and accountability prescribed in this Code for criminal offenses so that apparently an infant under the age of ten could plead infancy as a defense.

This prediction was borne out in *Hatch* some twenty years later.

century with few decisions on the standard for primary negligence of infants. What law there was was confused and not always logical in the distinctions made.[16]

The age at which responsibility for a tort attaches has not always been constant throughout Georgia's history. Although the first Georgia Code made the criteria for such responsibility the same as that for criminal responsibility,[17] this was not the standard at the common law,[18] and the criminal responsibility standard itself has varied.[19] The criminal responsibility standard, simply stated, was a conclusive presumption of incapacity under the age of ten, a conclusive presumption of capacity for minors fourteen and over, and a rebuttable presumption of incapacity between the age of ten and fourteen.[20] Today, the minimum age of criminal responsibility has been set at thirteen.[21]

The fact that liability for tortious conduct has been so closely tied to responsibility for criminal conduct is particularly significant for it shows how the law in Georgia has developed in relation to the two major philosophies of tort law: the damage-oriented and the fault-oriented philosophies.[22] The fault principle emphasizes moral blame and the belief that liability should not attach to those who are incapable of fault due to their immaturity and inability to comprehend the consequences of their acts.[23] This is the older basis for tort liability;[24] it appeals to the sense of justice

16. 231 Ga. at 448, 202 S.E.2d at 45.

17. *See* note 8 *supra*.

18. In McRae v. State, 163 Ga. 336, 337, 136 S.E. 268, 269 (1926), the court discussed the classes of infants:

> At common law infancy is usually regarded as being divided into three distinct periods as to which distinct presumption for capacity or incapacity prevails. An infant under the age of seven (in Georgia changed by statute to ten years) is presumed to have no capacity to commit a crime, and such presumption is conclusive and unrebuttable. After fourteen years of age he is presumed to be capable of committing crime, and is responsible in the same manner as an adult. Between the ages of ten and fourteen there is a presumption in favor of his incapacity to form a criminal intent.

19. Two sections in the 1863 Code established the age of criminal responsibility. Section 4190 provides:

> A person shall be considered of sound mind who is neither an idiot, a lunatic, or afflicted by insanity; or who hath arrived at the age of fourteen years, or before that age, if such person knows the distinction between good and evil.

Section 4191 provides:

> An infant under the age of ten years, whose tender age renders it improbable that he or she should be impressed with a proper sense of moral obligation, or be possessed of sufficient capacity deliberately to have committed the offense, shall not be considered or found guilty of any crime or misdemeanor.

20. *See* Ford v. State, 100 Ga. 63, 25 S.E. 845 (1896).

21. GA. CODE ANN. §26-701 (Rev. 1972).

22. For a good discussion of the distinction, see Stone, *supra* note 15, at 5.

23. *See* Bohlen, *Liability in Tort of Infants and Insane Persons*, 23 MICH. L. REV. 9, 32 (1925), for a vigorous defense of the fault-oriented concept.

24. 231 Ga. at 451, 202 S.E.2d at 47 (dissenting opinion).

and recognizes that imposing liability on a minor who is incapable of understanding the consequences wields no deterrence.[25]

Under the damage-oriented view, torts are inevitable losses which will occur in any organized society. These losses are not particularly excessive in terms of society as a whole, but they can be staggering to the individual involved.[26] Therefore, this view emphasizes the need to compensate the victim and distribute the loss across a large sector of society.[27]

The amorphous nature of the law is apparent in *Faith v. Massengill*,[28] a relatively recent decision directly in conflict with the principal case. In that case, the factual situation[29] was very similar to that in *Hatch*; however, it involved negligence and not an intentional tort. As recently as 1961, it was held that:

> In the absence of any authority in this jurisdiction with reference to the question of the primary negligence of a child of tender years and being unable to ascertain any sound or legally justifiable reasons for applying a different standard with respect to primary negligence than that applied to contributory negligence, we do not think that it can be said that a child of eight years of age is as a matter of law incapable of being guilty of primary negligence.[30]

Apparently, because of the lack of precedent and clarity in this area, it was possible for the court to choose which of two divergent paths it wanted to follow: the damage-oriented philosophy or the fault-oriented philosophy.

However, ten years later, the court completely reversed itself in *Brady v. Lewless*,[31] which specifically overruled *Faith*. *Brady*, which involved a twelve year old defendant, held: "The defendant not having attained the age of 13 at the time the alleged tort took place, he was immune from suit."[32] An almost inevitable concomitant of this reversal in policy was a return to the old double standard of primary negligence vis-a-vis contributory negligence: "[T]he rule is completely different as applied to minor plaintiffs and defendants."[33] The dissent[34] there advocated the premise,

25. James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948).

26. *Id.* at 549-50.

27. W. PROSSER, LAW OF TORTS 996 (4th ed. 1971):

> The law of torts, however, has been more concerned with the compensation of the injured party than with the moral guilt of the wrongdoer, and has refused to hold that an infant is immune from tort liability.

*See also* Sauers v. Sack, 34 Ga. App. 748, 131 S.E. 98 (1925).

28. 104 Ga. App. 348, 121 S.E.2d 657 (1961).

29. Here, the eight year old defendant negligently fired a "BB" gun in the direction of the plaintiff. The pellet ricocheted off of the sidewalk, striking the plaintiff in the eye. *Id.* at 350, 121 S.E.2d at 658.

30. *Id.* at 353, 121 S.E.2d at 660.

31. 124 Ga. App. 858, 186 S.E.2d 310 (1971).

32. *Id.* at 859, 186 S.E.2d at 310.

33. *Id.*

34. Written by Presiding Judge Jordan.

adopted by the appellants in *Hatch*, that section 105-1806 means that the defense of infancy is unavailable to infants thirteen and over, but that it does not necessarily mean that infants under thirteen are conclusively presumed entitled to immunity.[35]

In construing section 105-1806 to mean that an infant under the age of criminal responsibility is immune from a suit in tort, the Supreme Court of Georgia admitted the dearth of case law on the subject.[36] The court relied primarily on *Central R.R. v. Brinson*,[37] which did not even involve a suit against an infant defendant, but was a case where the infant was the plaintiff. The court also drew support from *Brady*, which held that a minor under thirteen was immune from tort responsibility.[38] The opinion in *Brady* is remarkable for the paucity of case and statutory justification cited; and it is totally devoid of any policy arguments. However, the Supreme Court of Georgia approved of this decision in *Hatch* without elaborating on why it believed *Brady* to be the better reasoned case.

The court dismissed the appellants' argument in *Hatch* that section 105-1806 should be construed in conjunction with section 105-204. It stated that the standard set out in section 105-204 applies to the question of contributory negligence. However, as Justice Ingram pointed out in his dissenting opinion, the majority made no attempt to resolve the anomaly that an infant defendant under the age of criminal responsibility is immune, while a similar infant plaintiff must meet the standards specified in section 105-204.[39]

The appellants' final argument, that providing an infant immunity is a violation of due process in that it deprives the plaintiff of a valuable property right, was easily disposed of on the basis of it being a proper subject for legislative regulation.

*Hatch* eliminated any controversy as to whether or not defendants under the age of criminal responsibility are totally immune for their torts. It gave the Supreme Court of Georgia the opportunity to make a choice between two tort philosophies. Unfortunately, this court decided to endorse the concept that liability for injury is to be imposed only upon those guilty of fault.[40] However, tort philosophy has evolved from a fault concept which concentrated on the perpetrator of a tort, to a damage-oriented view which is more concerned with compensating an innocent victim.[41] In ignoring the modern trend to damage-oriented tort law, Georgia has established a privi-

35. 124 Ga. App. at 860, 186 S.E.2d at 311.

36. 231 Ga. at 448, 202 S.E.2d at 45.

37. 70 Ga. 207 (1883).

38. 124 Ga. App. at 859, 186 S.E.2d at 310.

39. 231 Ga. at 449, 202 S.E.2d at 46.

40. *See* Bohlen, *supra* note 23.

41. While in 1925 a recognized authority could comfortably state that "modern law has to a very great extent abandoned the concept of liability without fault," recent developments in areas such as workmen's compensation and products liability make this statement questionable. Bohlen, *supra* note 23, at 33.

leged class of tortfeasors who may act without fear of economic repercussions. And, more importantly, the victim of the tort is left without a remedy.

Liability insurance could provide a solution to the problem of the infant tortfeasor. Although such insurance was unknown at the time the fault-oriented philosophy developed, it is widespread today.[42] Insurance protects both the tortfeasor and the victim from catastrophic loss by trading a small, determinable cost for protection from such risks. By minimizing the impact on any one individual, the cost to society as a whole is less. This is readily discernible in light of well-recognized principles of economics and marginal utility.[43] Obviously, it is better for many individuals to give up a small part of their income, than for economic ruin to befall the few.[44] Such insurance is a very real and viable alternative, perhaps in the form of comprehensive homeowners insurance. Certainly insurance is one reasonable alternative to which the Georgia Supreme Court could have looked rather than summarily deciding that the victim of an infant tortfeasor is without remedy.

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42. McNeely, *Illegality as a Factor in Insurance*, 41 COL. L. REV. 26 (1941).
43. R. LEFTWICH, THE PRICE SYSTEM AND RESOURCE ALLOCATION 56 (4th ed. 1970).
44. *See* James, *supra* note 25.