

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

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The risky business of raising children

One of the single biggest fears a parent shoulders is the fear that their child will make a bad decision and gravely injure him or herself or another. When that unfortunate event occurs, the courts may be called upon to determine whether the parents should be required to share the blame for their child's error in judgment and respond to a damage claim.

Take comfort in the knowledge that generally a parent is not responsible for the tortious conduct of their child. As is the case with everything in the law, however, exceptions abound. Parents are not responsible for the torts of their adult children but may be responsible for the torts of their minor children under the following circumstances:

1. Where there is a master/servant relationship such as an employment situation between the parent and the child;
2. Where the child acts within the scope of authority accorded by the parent;
3. Where the parent has knowledge of the child's vicious propensities and has the ability to act to prevent such behavior; or
4. Where the parent entrusts the child with a dangerous instrumentality.

(*Miltz v. Ohel*, 627 NYS 2d 891.)

It is this last category of conduct with which the courts most often wrestle. An instrumentality can be dangerous by itself or "likely to be put to dangerous use because of the known propensities of the child," *Miltz*, supra.

A simple toy can be considered a dangerous instrumentality, therefore, if the parent is aware their child is using it in a dangerous manner and chooses not to intervene. Water balloons, it is likely, would be harmless, in the view of the courts, unless the parent becomes aware that their child is dropping them off of the overpass upon passing cars below. One court declined to find, however, that a tennis ball is a dangerous instrument even when being thrown by children in the family's darkened basement, *Schwartz v. Licht*, 570 NYS 2d 83.

Similarly, if a child is highly trained in the use of a device, the

parents may be insulated from liability. In *Klimek v. Ghent*, 521 NYS 2d 558, a jury found a 13 year old's grandparents free from fault when they entrusted him with a tractor pulling a hay wagon. The jury concluded he was an experienced driver and, therefore, the tractor was not a dangerous instrument in his hands.

Most reported cases involve the use of motorized vehicles such as boats, ATVs, dirt bikes and scooters. If that use causes injury, it is not uncommon for the courts to enforce a claim against the parents. These devices, the courts often note, are easily misused in the hands of a minor.

Parents, as a result, should be very cautious when turning over the keys to the four-wheeler. In one landmark case, it was decided that a parent bore responsibility for his child's death when he purchased a motorcycle for his 16-year-old son who was blind in one eye and had impaired vision in the other, *Nolechek v. Guesale*, 413 N.Y.S. 2d 340.

One line of cases that may be disconcerting to parents concerns the use of air rifles, BB guns and paintball guns. Pellet gun and BB gun cases are fairly quickly dispatched. If one fails to secure a BB gun, store it safely or train a child to use it properly, the courts won't hesitate to impose fault upon the parents, *Masone v. Gianotti*, 388 N.Y.S 2d 322.

But are paintball guns and air rifles dangerous? The courts reply in the affirmative. Under New York Penal Law § 265.05, it is "unlawful for any person under the age of 16 to possess any air gun, spring gun or other ... upon in which the propelling force is spring or air ..." Guns powered by carbon dioxide cartridges are considered air guns, *In re Cesar P*, 656 NYS 2d 684.

In *Cesar P.*, the parents purchased a paintball gun for their son, thereby violating a criminal statute, exposing themselves to civil liability for his negligence in the use of the gun. In *Merle v. Baderman*, 756 NYS 2d 737, however, it was stated that if the parents did not own nor buy their child the gun and one of their child's friends actually shot the paintball that caused the plain-

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Daily Record
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tiff's injuries, they could not be held responsible.

Before you lock up the toy box, though, take heart. The courts do closely weigh the evidence in light of the constant vigilance necessary to prevent every childhood bump and bruise.

"A child can be injured by an ice skate, a roller skate, a bicycle, a baseball bat, a croquet mallet and many other items which are commonly used by children. ... That an injury may be inflicted by a toy does not make it a dangerous instrument,"

Rader v. Milton Bradley, 309 NYS 2d 393.

One might be well-advised, in light of this discussion, however, to make sure those homeowners' premiums are paid and the limits of coverage are a clear reflection of the number of risky little offspring living in the household.

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