Appellate Mediation—A Mediator’s Perspective

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LIABILITY OF PARENTS FOR CONDUCT OF THEIR CHILD
UNDER SECTION 33.01 OF THE TEXAS FAMILY CODE:
DEFINING THE REQUISITE STANDARDS OF
"CULPABILITY"

L. WAYNE SCOTT*

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I. INTRODUCTION

Under section 33.01 of the Texas Family Code, a party may look to

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the parents of a child for redress when a child inflicts property damage.\(^1\) This statute has survived constitutional attack in an intermediate Texas court\(^2\) and provides an expansive statutory avenue for recovering damages previously unavailable at common law from the parent for a child's acts.\(^3\) This article will analyze the extent of parental liability under both of the available statutory provisions: negligence and strict liability. The particular problems of culpability will be reviewed in depth. The analysis will concentrate on the traditional tort concepts of duty, breach, and causation as applied to this statute.

II. PARENTAL NEGLIGENCE: BACKGROUND

A. Common Law

At common law, the parent is generally not liable for the tortious acts of a minor child.\(^4\) Courts have repeatedly stressed that liability

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1. TEX. FAM. CODE ANN. § 33.01 (Vernon 1986). Liability extends also to "other person[s]... who [have] have the duty of control and reasonable discipline of a child." However, the statute fails to delineate what level of control over a child these "other persons" must possess to premise liability. Id. Under the Family Code, the duty of control and discipline is imposed upon a managing conservator, a parent, and a possessory conservator in possession of a child. See TEX. FAM. CODE ANN. § 14.02(b)(2)(Vernon Supp. 1988); see also TEX. FAM. CODE ANN. § 14.04(a)(1) (Vernon 1986). A managing conservator may be a court appointed agency, or an adult, other than a parent. See TEX. FAM. CODE ANN. § 14.01(a) (Vernon Supp. 1988). Thus, liability may be imposed outside the traditional, natural parent-child relationship. See generally Note, Has the Family Code Made Any Changes in the Liability of a Parent for His Child's Conduct?, 26 BAYLOR L. REV. 687, 690-91 (1974).

2. Buie v. Longspaugh, 598 S.W.2d 673, 676 (Tex. Civ. App.-Fort Worth 1980, writ ref'd n.r.e. (sections 33.01-.03 of Family Code did not deny equal protection or due process of law). The basis of the lawsuit, however, was malicious and willful conduct on the part of the minor. See id. at 674. The purpose of subsection (1) of section 33.01 of the Texas Family Code may therefore be different, or at least subject to, further interpretation. See also Kelly v. Williams, 346 S.W.2d 434, 437 (Tex. Civ. App.-Dallas 1961, writ ref'd n.r.e.)(held previous statute, article 5923-1, constitutional).

3. See TEXAS FAM. CODE ANN. §§ 33.01-.03 (Vernon 1986). Section 33.01 states: A parent or other person who has the duty of control and reasonable discipline of a child is liable for any property damage proximately caused by: (1) the negligent conduct of the child if the conduct is reasonably attributable to the negligent failure of the parent or other person to exercise that duty; or (2) the willful and malicious conduct of a child who is at least 12 years of age but under 18 years of age. Id. § 33.01.

4. See Parsons v. Smithey, 504 P.2d 1272, 1274 (Ariz. 1973). The Parsons court held that, at common law, parents will not be liable for their children's tortious acts, based on the mere parental relationship. See id.; see also National Dairy Prod. Corp. v. Fresch, 393 S.W.2d 48, 53 (Mo. Ct. App. 1965)(liability of parent not based on relationship but on negligence);
does not exist simply because of the parent-child relationship. However, exceptions to the general rule exist, and the parent may be held liable if:

1. the child is an agent of the parent;
2. the parent negligently intrusts a dangerous instrumentality to the child;
3. the parent ratifies the conduct of the child by acceptance or consent;
4. the parent directs the child in the commission of the tort;
5. the tort is committed in the scope of duties the parent imposes on the child.

These limited instances of parental liability at common law require

5. See, e.g., Parsons, 504 P.2d at 1274; Zeeb v. Bahnmaier, 176 P. 326, 327 (Kan. 1918); Fresch, 393 S.W.2d at 53; Hackley, 195 S.E. at 693.
6. See Hackley, 195 S.E. at 693 (principal-agent relationship will impose parental liability); Hopkins v. Droppers, 198 N.W. 738, 739 (Wis. 1924) (no presumption of agency in domestic relations).


10. See Klapproth v. Smith, 144 S.W. 688, 688 (Tex. Civ. App.—Fort Worth 1912, no writ) (to hold parent liable tort must be committed at parent's direction or within duties imposed on child by parent).
parental knowledge of the child's propensity to engage in the conduct which caused the damage in question. However, some courts have refused to find a parent liable merely because the parent knew of the child's vicious tendencies, although this knowledge is an important factor in determining liability. This knowledge element is required, even when the parent's own negligence was the proximate cause of the damage. Thus, the negligent parent who knew, or should have known that the child could or would act in such a manner as to cause damage would be held liable for failing to restrain the child.

B. The Reform Movement

In the 1930's, Louisiana began a movement towards statutory imposition of liability upon parents for the torts of their minor children. Under the Louisiana statute, the parents could be held liable, regardless of whether they had knowledge of the child's vicious tendencies. Critics of this vicarious liability pointed out that the Louisiana statute created a no-fault situation in civil law, which had been


12. See Snow v. Nelson, 450 So.2d 269, 272 (Fla. Dist. Ct. App. 1984) (Court broadens the rule of parental liability, based upon knowledge of his child's vicious tendencies to include factors such as ability and opportunity to control the child); Condel v. Savo, 39 A.2d 51, 53 (Pa. 1944)(mere knowledge not enough).

13. See, e.g., Dickens v. Barnham, 194 P. 356, 357 (Colo. 1920)(father negligent for son's shooting since father knew child could not manage rifle but rifle accessible to son); Vallency v. Rigillo, 102 A. 348, 349 (N.J. 1917)(dynamite cartridges left within easy reach of infant son but parent still had to have knowledge of child's propensities); Moore v. Crumpton, 285 S.E.2d 842, 843 (N.C. Ct. App. 1982)(parent failed to prevent son from having access to deadly weapon, but knowledge of child's propensities still required).


16. See LA. CIV. CODE ANN. art. 2318 (West 1932); see also Johnson v. Butterworth, 152 S. 166, 169 (La. Ct. App. 1934)(to hold parent liable for minor's negligence not necessary to show parent's knowledge of minor's conduct). See generally Note, Torts-Liability of a Parent
expressly rejected at common law.\textsuperscript{17} Despite this criticism, legislatures began enacting parental liability statutes.\textsuperscript{18} Several states enacted these parental liability statutes to curb juvenile delinquency.\textsuperscript{19} Apparently, some of these statutes were enacted to expand the common law, which originally left innocent victims with no way to recover for their injuries caused by a child.

Because parental liability statutes were in derogation of the common law, courts have tended to interpret them strictly.\textsuperscript{20} Some courts have reasoned that liability must be based on willful and malicious conduct, and specifically reject the notion that liability is imposed on parents for negligent control of their children.\textsuperscript{21} Other states have held that the parents must have knowledge of the child's propensity for the tortious activity in order to incur liability.\textsuperscript{22} Some of the jurisdictions requiring knowledge, sometimes described as "foreseeable-
ity,” additionally require negligence on the part of the parent in failing to exercise reasonable control over their child to prevent damage.23

In jurisdictions requiring a parent’s negligence in controlling the child, custody becomes an important issue.24 Liability has been imposed in situations where there has been merely legal custody of the child, but many states require actual custody before imposing liability.25 The reason for imposing liability only in cases where there was actual custody is based on an application of general principles of negligence.26 First, to find the parent negligent in controlling the child, a plaintiff must prove that the parent was, or should have been, aware that there was a probability that the child would commit the tort.27 If the parent did not have actual custody of the child, then he could not observe and control the child to prevent the probable damage that the child might inflict.28 Therefore, it appears that the imposition of liability on parents who were not in actual custody of the child would not deter negligent parental control. The difficulty of this view is that parents may avoid liability by not maintaining custody of a child known to have tortious propensities. This may be why other jurisdictions have held that mere absence of the child from the parent’s custody does not relieve the parent of liability.29 However, the

23. Robertson, 232 Cal. Rptr. at 637 (primary consideration in establishing element of duty under negligence concept is foreseeability of risk); National Dairy Prod. Corp. v. Fresch, 393 S.W.2d 48, 53 (Mo. Ct. App. 1965) (liability of parents based on ordinary negligence and what was reasonably foreseen).

24. See Robertson, 232 Cal. Rptr. at 641 (under common law crucial factor in determining negligence liability is parents' ability to control child).

25. See, e.g., id. at 643; In re James D., 455 A.2d 966, 972 (Md. 1983) (parent not liable when actual custody and control removed); Albert v. Ellis, 392 N.E.2d 1309, 1311 (Ohio Ct. App. 1978) (parent not relieved of liability of minor child unless child marries, reaches age of majority, or custody removed by court).

26. See Weisburt v. Flohr, 67 Cal. Rptr. 114, 120 (Cal. Dist. Ct. App. 1968) (parent's duty of care is dependent upon foreseeable dangers of child within parent's custody); see also In re James D., 455 A.2d at 972 (discussing policy of actual custody requirement); Poston v. U.S. Fidelity & Guaranty Co., 320 N.W.2d 9, 14 (Wis. Ct. App. 1982) (father not liable without legal or actual custody of son).

27. See Weisburt, 67 Cal. Rptr. at 120 (parent's duty of care dependent upon foreseeable dangers of child within parent's custody); Singer v. Marx, 301 P.2d 440, 444 (Cal. Dist. Ct. App. 1956). In both Weisburt and Singer, recovery was denied on the ground that there was no showing that the parent knew of any dangerous tendency. See Weisburt, 67 Cal. Rptr. at 122; Singer, 301 P.2d at 445.


29. See Pissio v. Graves, 453 So.2d 592, 596 (La. Ct. App. 1984) (parent liable for seventeen year old son's tort even though son moved from mother's home two months prior to
constitutionality of this position is questionable, as statutes imposing liability, regardless of custody and control, have been both upheld and struck down when attacked on due process grounds.\textsuperscript{30}

C. Texas Common Law

Like other states, Texas common law recognized parental liability for the torts of minor children only in a few limited situations.\textsuperscript{31} Generally, Texas common law only imposed liability on a parent for the tort of a child when:

1. a master/servant relationship existed between the parent and child,\textsuperscript{32}
2. the parent had directed the child in the commission of the tortious act,\textsuperscript{33} or
3. the parent had negligently permitted this child to engage in conduct likely to harm another.\textsuperscript{34}

Further, the usual exceptions to the general rule of no parental liability found in other states can be found in Texas.\textsuperscript{35}
III. THE TEXAS STATUTE

A. Section 33.01 of the Texas Family Code

According to the Texas Court of Civil Appeals in Fort Worth, section 33.01 of the Texas Family Code was enacted in order to protect and compensate property owners when their property is destroyed by minors. Under the old statute, article 5923-1 of the Texas Revised Civil Statutes of 1962, there was no parental liability due to a breach of the duty of control and reasonable discipline, as found in the introductory paragraph of section 33.01.

B. Section 33.01(1) — Negligence of Parents

Section 33.01 has no express requirement that the parent have knowledge of the dangerous propensities of the child before the parent can be held liable. However, the statute does require that both the parent and the child be negligent before liability is imposed. This requirement seems to indicate that the proof of the parent's negligence would necessitate the parents' knowledge of the child's tortious tendencies. The circumstances of a particular case may allow a fact finder to determine that there was evidence of the propensity toward the conduct in question, and that the parent should have been aware of it. The statute does contain the word "control," which may indicate a requirement for an opportunity to control the child, as well as the need for the parent to have knowledge of the child's propensities. However, it is not possible to know with certainty that the requirement of knowledge and notice will be within the court's interpretation of the statute, as no case directly based on the introductory paragraph to section 33.01 has arisen since its enactment.

The constitutionality of the Texas statute, however, has been con-

36. See Buie v. Longspaugh, 598 S.W.2d 673, 675 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.) (basis of lawsuit was minor's malicious and willful conduct).
37. TEX. REV. CIV. STAT. ANN. art. 5923-1 (Vernon 1962).
39. See TEX. FAM. CODE ANN. § 33.01 (Vernon 1986).
40. Id. § 33.01(1).
41. See id. Such a dual requirement would constitute a severe restriction on the effectiveness of the first paragraph of Section 33.01. If the dual requirement is read into the statute, consideration should be given to the elimination of the "control" language.
firmed since the enactment of the new section.\textsuperscript{42} In \textit{Buie v. Longspaugh},\textsuperscript{43} the Texas Court of Civil Appeals in Fort Worth upheld sections 33.01 through 33.03 of the Texas Family Code as constitutional, stating that these sections did not deny litigants equal protection or due process.\textsuperscript{44}

C. \textit{Section 33.01(2) — Strict Liability of Parents}

Under section 33.01(2) of the Texas Family Code, a parent is vicariously, or strictly liable, for property damage caused by the "willful and malicious conduct of a child who is at least 12 years of age but under 18 years of age."\textsuperscript{45} Prior knowledge of "willful and malicious conduct of the child" by the parent was not a condition for the application of the previous provision of the statute.\textsuperscript{46}

\begin{footnotesize}
\begin{itemize}
\item 42. See \textit{Buie v. Longspaugh}, 598 S.W.2d 673, 676 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.).
\item 43. 598 S.W.2d 673 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.).
\item 45. \textit{Tex. Fam. Code Ann.} § 33.01(2) (Vernon 1986). Again, a person other than a parent may be liable for the conduct of a child, if such "other person" has the duty of control and reasonable discipline of the child. \textit{Id.} Section 33.02 of the Family Code limits recovery under section 33.01(2) "to actual damages, not to exceed $15,000.00 per act, plus court costs and reasonable attorneys' fees." \textit{Id.} § 33.02. Section 33.02 was amended in 1981, increasing the amount recoverable under section 33.01(2) from $5,000.00 per act to $15,000.00 per act. \textit{See id.} (Historical Note).
\item 46. \textit{See id.} § 33.01(2) (Vernon 1986). Although subsection one clearly requires negligence on the part of the parent, subsection two notably omits any requisite of negligence on the part of a parent to impose liability, which would include prior knowledge. \textit{See id.} The courts and commentators are in agreement on this point. \textit{See Buie,} 598 S.W.2d at 676 (nothing in analysis of [now] section 33.01(2) implies element of knowledge or opportunity for correction as requirement for liability); \textit{accord} Kelly v. Williams, 346 S.W.2d 434, 437 (Tex. Civ. App.—Dallas 1961, writ ref'd n.r.e.)(prior knowledge of parent should not be read into previous statute article 5923-1). \textit{See generally W. KEETON, D. DOBBS, R. KEETON \\& D. OWEN, PROSSER AND KEETON ON TORTS 912-14 (5th ed. 1984) (vicarious liability for torts of family); Note, \textit{Torts, Parent and Child-Parent Liable for the Malicious and Willful Torts of Child Under Tex. Rev. Civ. Stat. Ann. Article 5923-1} (Vernon Supp. 1958), 37 Tex. L. Rev. 924, 924-928
\end{itemize}
\end{footnotesize}
To premise liability under section 33.01(2), it must be established that the actions of the child entailed willful and malicious conduct. The courts of Texas, however, have yet to define with clarity what level of culpability satisfies the "willful and malicious conduct" standard of section 33.01(2). This author concludes that the gross negligence of a child, which proximately causes an accident or damage, will suffice as willful and malicious conduct. Under this standard, if a child acts with gross negligence in undertaking an act which subsequently causes damages, the child is imputed by law to have intended the result, therefore satisfying the willful and malicious standard of section 33.01(2).

1. Meaning of "Willful and Malicious" Generally

The meaning of "willful and malicious" under the statute must be put in the context of the varying degrees of requisite mental states necessary to impose liability. These mental states range from intent to strict liability, which imposes liability even in the absence of intent. The Restatement (Second) of Torts, equates "willful and malicious" conduct with recklessness (or gross negligence), a mental state which requires something more than negligence, yet not the conscious desire implied by intent. Even in intentional torts, a finding of intent is not conditioned on the existence of a subjective intent to bring about harm, but an intent to do the act which results in harm. To impose on the phrase "willful and malicious," the requirement of specific intent to bring about the desired harm would make the required mental state under section 33.01(2) something more than intent. This would, in effect, only impose liability in cases of vandalism. If the phrase "willful and malicious" is given the meaning assigned to it by the Restatement, gross negligence, then it has the effect of broadening parental responsibility to include acts of their children which are beyond mere negligence, but not yet vandalism.

(1959)(discussing parent's liability for child's willful and malicious torts); Rogers, Chapter 33. Liability of Parents for Conduct of Child, 13 Tex. Tech L. Rev. 1127, 1127 (1982)(commentary on section 33.01(1) and (2) of the Texas Family Code); Note, Has the Family Code Made Any Change in Liability of a Parent for His Child's Conduct, 26 Baylor L. Rev. 687, 688-689 (1974)(discussing parents vicarious liability).

47. See Tex. Fam. Code Ann. § 33.01(2) (Vernon 1986).
Until 1978, courts usually interpreted the phrase "willful and malicious" consistent with the Restatement meaning of recklessness, as it related to the Bankruptcy Code. Under the Bankruptcy Code, a bankrupt was not discharged from obligations arising from a willful and malicious injury to a person or property. Consequently, there were many decisions on what constituted willful and malicious injury. Many courts followed the "reckless disregard" standard as set forth in Tinker v. Colwell. Under that standard, acting in "reckless disregard" for the safety of persons or property could be construed as a willful and malicious action, even in the absence of a specific intent to cause the damage. Moreover, to overcome this construction, the usual interpretation of "willful and malicious" was recklessness, which Congress, in 1978, specifically attached to those words in the context of the bankruptcy statute. The new congressionally mandated meaning of a willful and malicious act is a deliberate action intending the resultant damage. Absent such a clear legislative mandate, then the usual interpretation given to "willful and malicious" is that of recklessness or gross negligence.

a. Malice Defined Under Texas Law

"Malice" is a term of general, not specific, intent. Neither the

50. See, e.g., McIntyre v. Kavanaugh, 242 U.S. 138, 141-142 (1916) (disregard of duty constitutes willful and malicious act); Rosen v. Shingleur, 47 So. 2d 141, 146 (La. App. 1950) (driving while intoxicated was construed under bankruptcy law as constituting willful and malicious conduct); Cogswell v. Kells, 292 N.W. 483, 485 (Mich. 1940) (willful and malicious acts under the bankruptcy act mean something more than accidental act).

51. 11 U.S.C. § 523(a)(6) (1982). Section 523(a)(6) states that "... [a] discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt ... for willful and malicious injury by the debtor to another entity or to the property of another entity ..." Id.

52. See, e.g., McIntyre, 242 U.S. at 141-42 (disregard of duty constitutes willful and malicious act); Rosen, 47 So. 2d at 146 (driving while intoxicated was construed under bankruptcy law as constituting willful and malicious conduct); Cogswell, 292 N.W. at 485 (willful and malicious acts under the bankruptcy act mean something more than accidental act). But see, e.g., In re Vena, 46 F.2d 81, 81 (W.D. Wash. 1930) (willful and malicious acts products of intentional evil design); Prater v. King, 37 S.E.2d 155, 158 (Ga. Ct. App. 1946) (no matter how great degree of negligence still not willful and malicious); Seward v. Gatlin, 246 S.W.2d 21, 22 (Tenn. 1952) (gross negligence not enough to constitute willful and malicious behavior).

53. 193 U.S. 473 (1920).
54. See id. at 475.
56. Id.
57. J. Miller, CRIMINAL LAW § 20(b) (1934); R. Perkins, CRIMINAL LAW 766 (2d ed. 1969).
words "malicious" nor "willful" require the proof of specific intent. In *Rankin v. State*, the court held that "the words 'willful' and 'malicious' have the same legal meaning . . . as do the words 'malice aforethought' in murder cases." Malice includes all states of mind which cause a result which would exculpate or mitigate. Malice includes a willful disregard for the rights of others, which results in injury to another. In at least one case, *Cockrell v. State*, the Texas Court of Criminal Appeals sustained a murder with malice conviction on the basis of the defendant's disregard for the rights of others, evidenced by the defendant's reckless driving. Whether the *Cockrell* case was limited to its facts is not significant here. What is important is the recognition that the term "malice" changes its meaning from crime to crime, just as modern concepts of intent change from crime to crime. In the context of this civil statute, the term "malicious" seems to indicate that form of intent now covered by the concepts of intentional, knowing, and reckless conduct under the Texas Penal Code. However, the term does not appear to cover accidental conduct or ordinary negligence.

In the context of the civil liability of parents for the acts of minors, it seems that the cases requiring the concurrence of intent and injury take an extreme position. This is best illustrated by the Kansas case of *Hanks v. Booth*. In *Hanks*, several children were found to have intended to set a fire, but not to have burned down the plaintiff's barn. The Kansas Supreme Court refused to impose liability on the

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59. 139 S.W.2d 811 (Tex. Crim. App. 1940).
60. See Rankin, 139 S.W.2d at 812. But see Westbrook, *The Role of Specific Intent in Criminal Law*, 14 Baylor L. Rev. 32, 38 (1962)(criticizing *Rankin* decision). The passage of the 1972 Penal Code ended fruitful discussion on this question. However, *Rankin* represents the accepted trend not to require a specific intent, unless mandated by specific wording in a statute. See *Rankin*, 139 S.W.2d at 812.
62. J. Miller, *Criminal Law* 69 (1934); see also Ramsey v. Arrot, 64 Tex. 320, 323 (1885).
63. 135 Tex. Crim. 218, 117 S.W.2d 1105 (1938).
67. Id. at 598. The Kansas court reasoned: "...while there was evidence that the children willfully and intentionally lit matches and small piles of hay on fire, they believed the fires
minor children absent a showing that the offending act of the children and the resulting damage were malicious and willful. Cases such as *Hanks* ignore the purpose of the statute. This standard might be appropriate for determining whether the children were guilty of arson, but should not preclude the plaintiff from recovering damages for the wrongful burning of his barn from the parents of these children. Therefore, if the initiating act was intentional and malicious, or the equivalent thereof, and the damage was a foreseeable consequence of the initiating act, then statutes such as section 33.01(2) of the Family Code should be satisfied. Although there are cases to the contrary which require intent to bring about the consequences of the action, these are in the context of criminal proceedings in which a higher standard of proof is necessary in comparison to civil proceedings. Therefore, the most logical standard involves an inquiry into whether the foreseeable consequences of the malicious act were caused by the act. The issue, then, is what consequences can be considered foreseeable.

In Texas, the two elements of causation are cause-in-fact and foreseeability. The Texas Supreme Court, in *Nixon v. Mr. Property Management*, reviewed the two requirements:

Cause-in-fact denotes that the negligent act or omission was a substantial factor in bringing about the injury and without which no harm would have been incurred. . . .

. . . Foreseeability means that the actor, as a person of ordinary intelligence, would have anticipated the dangers that his negligent act created for others . . . .

Under *Nixon*, an act may be held foreseeable, regardless of whether the actor specifically anticipated how the injuries would grow out of were extinguished and the evidence fails to prove the children intended to burn down plaintiff's barn . . . .” *Id.*

68. *See Hanks*, 716 P.2d at 598.


71. 690 S.W.2d 546 (Tex. 1985).

72. *Id.* at 549-50.
the dangerous situation. Rather, if the actor "should have reasonably foreseen that the event . . . would occur," the cause-in-fact element is satisfied. To hold that section 33.01(2) requires that the child intend the consequences that result from the willful or malicious act would vitiate the act and render it virtually worthless.

b. Criminal Culpability

The result is not changed if the question of foreseeability is treated as a question of criminal culpability. The terms "willful and malicious" are imprecise, and have generally been abandoned in criminal matters. Rather, intent is now generally discussed in terms of culpable mental states, including "intentional, knowing, reckless, and criminal negligence" under the Texas Penal Code. Thus,

A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

Likewise,

A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

Further,

A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur.

Finally,

A person acts with criminal negligence, or is criminally negligent with respect to circumstances surrounding his conduct or the result of his

73. See id.
74. Id.; see also Missouri Pac. R.R. Co., 552 S.W.2d at 103.
75. The question is, really, whether the legislature intended that the statute only apply to acts of vandalism, or whether it intended the statute to apply to willful and malicious acts of children that were performed without thought about the possibility of damage. Certainly the statute should apply in the latter instance, which is this case.
76. See TEX. PENAL CODE ANN. § 6.02 (Vernon 1974)(excluding willful and malicious as culpable mental state).
77. Id.
78. TEX. PENAL CODE ANN. § 6.03 (a) (Vernon 1974).
79. Id. § 6.03 (b).
80. Id. § 6.03 (c).
conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur.\textsuperscript{81}

In the case of reckless conduct, there is a disregard of the risk, while criminal negligence involves the failure to perceive the risk.

2. “Willful and Malicious” Conduct of Children: Other Jurisdictions

Other jurisdictions have not been uniform in addressing the level of culpability required to hold parents liable for the willful and malicious conduct of their child.\textsuperscript{82} In some jurisdictions, conduct recognized as reckless or grossly negligent, will satisfy the willful and malicious requirement.\textsuperscript{83} As discussed in the New Mexico Supreme Court case of Ortega v. Montoya:\textsuperscript{84}

There is very little, if any, difference between ‘willful’ and ‘malicious’ conduct . . . and when [the statute] characterizes an act as being done ‘willfully’ or ‘maliciously’, it denotes the intentioned doing of a harmful act without just cause or excuse or an intentional act done in utter disregard for the consequences . . . and does not necessarily mean actual malice or ill will . . . .”\textsuperscript{85}

Under the reasoning of this case and others like it, a child’s specific intent to cause property damage is apparently not necessary in order to impose liability on the parent. Rather, a lesser degree of culpable conduct by the child, including reckless conduct, will suffice to confer liability upon the parent.

Another view among jurisdictions is that a finding of “willfully damaging” must be premised on findings that both the initial act, and the subsequent damage, were done intentionally.\textsuperscript{86}

\textsuperscript{81} Id. § 6.03 (d).
\textsuperscript{82} See appendix (culpability ranges from willful, malicious, strict liability, intentional, delinquents, purposefully, criminal recklessly, and unlawful).
\textsuperscript{83} See McKinney v. Cabell, 198 N.W.2d 713, 714 (Mich. Ct. App. 1974)(minor’s reckless conduct can qualify as willful or malicious destruction of property).
\textsuperscript{84} Ortega v. Montoya, 637 P.2d 841, 843 (N.M. 1981).
\textsuperscript{85} Id. at 842-43. The Ortega court relied heavily on the earlier case of Potomac Ins. Co. v. Torres, 401 P.2d 308, 309 (N.M. 1965), wherein the court noted that the child’s act in driving at high speeds in crowded business district, trying to evade police pursuit, and hitting the plaintiff’s car which was stopped at a traffic light, was more than mere negligence in trying to pass, and was clearly more than a lack of sound judgment. The child’s intentional acts were undertaken without just cause or excuse, and evidenced an utter disregard for their consequences. From this conduct, the requisite malice or willfulness was inferred. \textit{Id.} at 309.
\textsuperscript{86} See, e.g., Crum v. Groce, 556 P.2d 1223, 1224 (Colo. 1976)(to support finding of
3. The Texas Interpretation
   a. "Willful and Malicious" Defined as Gross Negligence

Texas has yet to articulate the requisite level of culpability required to satisfy the willful and malicious standard of section 33.01(2). An insight, however, may be obtained from the current Texas view on gross negligence. In *Burke Royalty v. Walls*, the Texas Supreme Court recognized that to require the plaintiff to prove gross negligence, by direct evidence of the defendant's subjective state of mind, would leave outrageous conduct unpunished. Combining the two traditional tests for gross negligence ("an entire want of care" and "reckless disregard for the rights and safety of others"), the Texas civil test is both an objective and subjective test. Thus, a plaintiff may establish a defendant's gross negligence by proving that the defendant had "actual subjective knowledge that his conduct created an extreme degree of risk." The plaintiff may also prove gross negligence by reference to an objective standard showing that in the same circumstances a reasonable person would realize that his conduct "created an extreme degree of risk to the safety of others."

The logic of the quoted cases and the posture of Texas law require the conclusion that in Texas reckless or grossly negligent conduct will satisfy the statutory requirement for willful and malicious conduct.

"maliciousness" plaintiff must show child intentionally damaged property or motivated by mischievous purpose or design to injure); Hanks v. Booth, 726 P.2d 1319, 1322 (Kan. 1986)(to state cause of action plaintiff must prove act of child and resulting damage willful and malicious); Motorists Mut. Ins. Co. v. Bill, 383 N.E.2d 880, 884 (Ohio 1978)(willfully damaging property means intentional act which occasions resulting loss coupled with intent of causing damage).

87. 616 S.W.2d 911 (Tex. 1981).
88. See id. at 922.
89. Id.
90. W. LAFAVE & A. SCOTT, CRIMINAL LAW § 3.7 (2d ed. 1986). Lafave and Scott suggest that the existence of subjective awareness of conduct, creating a higher degree of risk, is necessary to criminal recklessness, as opposed to criminal negligence. Id. § 3.7(d). However, they recognize that "subject realization of risk... must generally be inferred from... words and conduct in the light of the circumstances." Id.
91. Williams v. Steves Indus., Inc., 699 S.W.2d 570, 573 (Tex. 1985). Cases such as *Sutherland v. Roth*, 407 So. 2d 139, 140-141 (Ala. Ct. App. 1981)(willful and malicious is subjective on part of actor) and *Farm Bureau Mut. Ins. Co. v. Henley*, 628 S.W.2d 301, 302 (Ark. 1982)(parent must actually have knowledge of child's propensity) are directly to the contrary. Most of these courts, however, mix this issue with the issue of causation, and are discussed in the next section. These cases, while not discussing causation, seem to indicate that reckless or grossly negligent conduct which leads to an injury cannot be a cause in fact, unless there was an intent to cause injury.
However, there remains the problem of satisfying the causal requirement of this statutory cause of action. The problem is whether a child, who intentionally undertakes an act, but does not intend the subsequent damage, fulfills the causal element of the statute.

D. Causation

Accepting that recklessness or gross negligence will satisfy the "willful and malicious" requirement, the problem of causation must be resolved. Even if the damage by the child was entirely foreseeable, it may not have been intended. In order to determine whether causation exists, two issues must be decided: first, whether the undertaking of a potentially damaging act can be considered as the cause-in-fact of the accident or damage; and second, whether an act classified either as grossly negligent, or willful and malicious, which produces a foreseeable result, can be sufficient cause under a willful and malicious standard.

The Dallas Court of Civil Appeals, in Kelly v. Williams, 92 did not separate the issues as just stated, but seems to have resolved both, by impliedly holding that the acts related to the theft of a car could be a legally sufficient cause of the damage to the car resulting from an accident. 93 In Kelly, the child stole the plaintiff's car, and was then involved in a high speed chase with the police, which resulted in damage to the stolen car. 94 The trial court entered judgment for the plaintiff against the child's father. 95 The Court of Civil appeals affirmed, reasoning that there was "but one transaction, the damaged car proximately resulting from the initial theft." 96 Because the act of taking the car was intentional and malicious, the foreseeable results flowing from that malicious activity could also be considered malicious, and the initial act was the cause of the damage sustained by the plaintiff. 97

Other jurisdictions have reached similar results under similar fact patterns. 98 In Crum v. Groce, 99 however, the Colorado Supreme

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92. 346 S.W.2d 434 (Tex. Civ. App.—Dallas 1961, writ ref'd n.r.e.).
93. See id. at 437.
94. See id. at 435.
95. See id.
96. Id. at 437.
97. See id.
98. See, e.g., Tassinary v. Moore, 446 A.2d 13, 14-15 (Conn. Super. Ct. 1982)(conversion cause of action sufficiently stated in complaint without stating whether damage occurred inten-
Court reasoned that while the theft of a vehicle was willful and malicious, the injury was not.\textsuperscript{100} There was no evidence to support a finding that the child damaged the property intentionally, and the \textit{Crum} court chose not to see the activity as one continuous event, severing the damage to the vehicle from its theft.\textsuperscript{101} The reasoning of the \textit{Crum} decision speaks in terms of the criminal concurrence of intent and injury.\textsuperscript{102} The Texas statute in question does not require the concurrence of any specific intent and injury, unless it is implied by the use of the enigmatic term "malicious."\textsuperscript{103} This author concludes that the term malicious is insufficient to add a specific intent, beyond the intent to willfully perform an act with the awareness that the act may foreseeably cause injury to another.

\section*{IV. Conclusion}

Under section 33.01(1) of the Texas Family Code, a parent is liable for the ordinary negligence of the child if the parent is found, upon proper proof, to have knowledge of the child's tortious tendencies.

It would appear from history, from the better reasoned precedent, and from the controlling precedent in Texas,\textsuperscript{104} that section 33.01(2),...
Texas Family Code, imposes vicarious liability upon the parent of juveniles, who voluntarily undertake an act which produces an injury to another, if the minor acted in a manner that would satisfy, in a civil proceeding, the Texas Penal Code definitions of criminal recklessness or criminal negligence. While the phrases, criminal recklessness and criminal negligence, do not translate exactly into the terms of the civil law, it seems clear that gross negligence on the part of the juvenile is sufficient for parental liability under section 33.01(2), but that ordinary negligence is not.

In an age when tort liability is determined more from an insurance theory than a fault theory, section 33.01 of the Family Code will be an anachronism, unless it is construed to impose liability where fault clearly exists. The legislative limits upon parental liability for the ordinary negligence of a child, in section 33.01(1) of the Texas Family Code, while well founded in history, seem outmoded in light of the ready availability of liability insurance, and the law’s imposition of a greater level of civilization upon society as a whole. Consideration should be given to an expansion of parental liability to cover, without prior parental knowledge, conduct of a child, which would fall within the definition of criminal negligence.

The use of dusty terms such as “willful” and “malicious”, in section 33.01(2) of the Texas Family Code, should not mislead any interpreter. This statute was not written to cover only acts of vandalism, but also acts of gross negligence. However, for clarity, any future amendments should eliminate the terms “willful” and “malicious” in favor of “intentional” and “grossly negligent conduct”.

V. APPENDIX

<table>
<thead>
<tr>
<th>State</th>
<th>Cite</th>
<th>Type Liability Imposed</th>
<th>Amount</th>
<th>Date Passed</th>
</tr>
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<tbody>
<tr>
<td>Alabama</td>
<td>ALA. CODE § 6-5-380 (1987)</td>
<td>Intentional, Willful or Malicious</td>
<td>$500 + court cost</td>
<td>1965</td>
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</tbody>
</table>

liable for minor's willful and malicious conduct); see also Buie v. Longspaugh, 598 S.W.2d 673, 676 (Tex. Civ. App.—Fort Worth 1980, writ ref’d n.r.e.) (upheld constitutionality of new statute and explained purpose of statute). Further, this result appears to be in line with modern Texas cases on causation.
<table>
<thead>
<tr>
<th>State</th>
<th>Code Reference</th>
<th>Conduct</th>
<th>Maximum Punishment</th>
</tr>
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<tbody>
<tr>
<td>Alaska</td>
<td>ALASKA STAT. § 34.50.020 (1987)</td>
<td>Maliciously or</td>
<td>$2,000 + court cost</td>
</tr>
<tr>
<td>California</td>
<td>CAL. CIV. CODE § 1714.1 (Deering 1988)</td>
<td>Willful</td>
<td>$10,000 (injury to property or another) + cost + atty. fees</td>
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<tr>
<td>Delaware</td>
<td>DEL. CODE. ANN. tit. 10, § 3922 (Supp. 1986)</td>
<td>Intentionally or Recklessly</td>
<td>$5,000</td>
</tr>
<tr>
<td>Florida</td>
<td>FLA. STAT. ANN. § 741.24 (West 1986)</td>
<td>Maliciously or Wilfully</td>
<td>$2,500 + taxable court cost</td>
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<tr>
<td>Georgia</td>
<td>GA. CODE ANN. § 51-2-3 (Supp. 1987)</td>
<td>Malicious or Wilful</td>
<td>$5,000 + court cost</td>
</tr>
<tr>
<td>Illinois</td>
<td>ILL. ANN. STAT. ch. 70, para. 53 (Smith-Hurd 1987)</td>
<td>Malicious or Wilful</td>
<td>$1,000 + taxable court cost</td>
</tr>
<tr>
<td>State</td>
<td>Code and Section</td>
<td>Liability Type</td>
<td>Amount &amp; Notes</td>
</tr>
<tr>
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<tr>
<td>Indiana</td>
<td>IND. CODE ANN. § 34-4-31-1</td>
<td>Intentionally</td>
<td>$2,500</td>
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<td></td>
<td>(Burns 1986)</td>
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<tr>
<td>Iowa</td>
<td>IOWA CODE ANN. § 613.16</td>
<td>Unlawful Acts</td>
<td>$1,000 per act</td>
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<td>(West Supp. 1988)</td>
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<td>$2,000 maximum</td>
</tr>
<tr>
<td>Kansas</td>
<td>KAN. STAT. ANN. § 38-119</td>
<td>Malicious or Wilful</td>
<td>$1,000 + taxable court cost (result of parental neglect $1,000 limit not apply)</td>
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<td>(1986)</td>
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<td>Kentucky</td>
<td>KY. REV. STAT. ANN. §§ 405-025, 405-027</td>
<td>Wilful</td>
<td>$2,500 + court cost + atty. fees may cumulate to $10,000</td>
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<td>(Michie/Bobbs-Merrill 1984)</td>
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<td>Louisiana</td>
<td>LA. CIV. CODE ANN. art. 2318</td>
<td>Strict Liability</td>
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<td>(West Supp. 1988)</td>
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<tr>
<td>Maryland</td>
<td>MD. CTS. &amp; JUD. PROC. CODE ANN. § 3-829 (Supp. 1987)</td>
<td>Delinquent acts</td>
<td>$5,000</td>
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<td>(Callaghan 1988)</td>
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<tr>
<td>Minnesota</td>
<td>Minn. Stat. ANN. § 540.18</td>
<td>Maliciously or Wilfully</td>
<td>$500 + other liab. at law</td>
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<td></td>
<td>(West Supp. 1988)</td>
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<tr>
<td>Mississippi</td>
<td>Miss. Code ANN. § 93-13-2</td>
<td>Malicious or Wilful</td>
<td>$2,000 + court cost + other liab. at law</td>
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<td></td>
<td>(Supp. 1987)</td>
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<tr>
<td>Missouri</td>
<td>Mo. Ann. Stat. § 537.045</td>
<td>Purposely</td>
<td>$2,000</td>
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<td></td>
<td>(Vernon 1988)</td>
<td></td>
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</tr>
<tr>
<td>State</td>
<td>Statute Reference</td>
<td>Description</td>
<td>Amount</td>
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<td>---------------</td>
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<tr>
<td>Montana</td>
<td>MONT. CODE ANN. §§ 40-6-237, 40-6-238 (1987)</td>
<td>Maliciously or Willfully</td>
<td>$2,500 + taxable court cost + reasonable atty. fees (not to exceed $100)</td>
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<tr>
<td>Nevada</td>
<td>NEV. REV. STAT. § 41.470 (1985)</td>
<td>Willful</td>
<td>$10,000 + liab. imposed by law</td>
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<tr>
<td>New Hampshire</td>
<td>No Statute</td>
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<tr>
<td>New Jersey</td>
<td>N.J. STAT. ANN. § 2A: 53A-15 &amp; 16 (West Supp. 1987)</td>
<td>Malicious, Willful or Unlawful (Parents must be negligent)</td>
<td>$250 (for real or personal property) 1,000 + court cost (for damage to prop. of railroad, autobus)</td>
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<tr>
<td>New Mexico</td>
<td>N.M. STAT. ANN. § 32-1-46 (1978)</td>
<td>Maliciously or Willfully</td>
<td>$4,000 + taxable court cost + Atty. fees</td>
</tr>
<tr>
<td>North Dakota</td>
<td>N.D. CENT. CODE § 32-03-39 (1976)</td>
<td>Maliciously or Willfully</td>
<td>$1,000 + taxable court cost</td>
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<tr>
<td>Oklahoma</td>
<td>OKLA. STAT. ANN. tit. 23, § 10 (West 1987)</td>
<td>Criminal or Delinquent Act (Willful or Tortious Act)</td>
<td>$2,500</td>
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<td>Pennsylvania</td>
<td>PA. STAT. ANN. tit. 11, § 2002-4 (Purdon Supp. 1988)</td>
<td>Wilful or Tortious Act</td>
<td>$300 (one person injured) $1,000 (regardless no. injured)</td>
</tr>
<tr>
<td>State</td>
<td>Code and Section Details</td>
<td>Malicious and Intentionally</td>
<td>Year</td>
</tr>
<tr>
<td>----------------------</td>
<td>------------------------------------------------------------------------------------------</td>
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<td>South Carolina</td>
<td>S.C. CODE ANN. § 20-7-340 (Law. Co-op. 1976)</td>
<td>Maliciously and Intentionally</td>
<td>1981</td>
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<td>Tennessee</td>
<td>TENN. CODE ANN. § 37-10-101 (Michie Supp. 1987)</td>
<td>Maliciously or Willfully (Parents know or should know child's tendencies)</td>
<td>1981</td>
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<td>Texas</td>
<td>TEX. FAM. CODE ANN. §§ 33.01-02 (Vernon 1986)</td>
<td>Malicious and Wilful or Negligent if conduct attributable to parent</td>
<td>1981</td>
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<tr>
<td>Utah</td>
<td>UTAH CODE ANN § 78-11-20 (1987)</td>
<td>Intentionally Damages; Recklessly or Willfully Shoots; Intentionally and Unlawfully Tampers</td>
<td>1977</td>
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<tr>
<td>Virginia</td>
<td>VA. CODE ANN. §§ 8.01-43, 8.01-44 (Supp. 1987)</td>
<td>Malicious or Willful</td>
<td>1987</td>
</tr>
<tr>
<td>West Virginia</td>
<td>W. VA. CODE § 55-7A-2 (Supp. 1987)</td>
<td>Maliciously or Wilfully</td>
<td>1957</td>
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<td>Wisconsin</td>
<td>WIS. STAT. ANN. § 895.035 (West Supp. 1987)</td>
<td>Malicious, Wilful or Wanton</td>
<td>1985</td>
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<tr>
<td>Wyoming</td>
<td>WYO. STAT. § 14-203 (1986)</td>
<td>Maliciously or Wilfully</td>
<td>1978</td>
</tr>
</tbody>
</table>

$ date enacted dollar amount.
change in culpability.
\textsuperscript{*} enactment of atty. fees + court cost.

1. See Concise Oxford Dictionary 1231 (7th ed. 1982). \textit{Wilful} (preferred) for which compulsion or ignorance or accident cannot be pleaded as excuse, intentional, deliberate, due to perversity or self-will. \textit{Willful} — etymologies. form not recorded but merely inferred.

2. Date parental liability first imposed. Where date is listed "as of," the actual date or enactment may precede such date.