

## Risk Manager

### Virginia Supremes Cite Specific Duty by Parent's Assent

By: Justin Ward. *This was posted Friday, January 15th, 2010*

[Editor's note: This article is the work of [Andrew H. Wilson](#) of our [Risk Management](#) team]

On November 5, 2009, [Kellermann v. McDonough](#), Record No. 081718 (Va. filed November 5, 2009), the [Supreme Court of Virginia](#) expressly held for the first time that “when a parent relinquishes the supervision and care of a child to an adult who agrees to supervise and care for that child, the supervising adult must discharge that duty with reasonable care.” Id. at 8-9. The Court ruled that a [common law tort action](#) against a husband and wife survived the pleadings stage in a claim which arose out of the death of a 14-year old girl who was staying with them temporarily, and who was killed while riding in a car driven by an unrelated 17-year old boy.

In *Kellermann*, the plaintiff administrator of an estate filed a wrongful death action against the defendant husband and defendant wife with whom the decedent, who was 14 years old, was staying temporarily. The defendants had asked the decedent's parents if the decedent, who had moved with her family to North Carolina previously, could stay with them in Virginia for a day or two. The defendants' daughter, a former classmate, was having problems, and the defendants thought that her situation might improve if she spent some time with the decedent. The decedent's father drove the decedent to meet the defendant wife and her daughter at a place roughly equidistant from their respective homes in North Carolina and Virginia. Upon meeting the defendant wife and her daughter, the decedent's father expressly told the defendant wife that the decedent was not to be driven by inexperienced or young male drivers. The defendant wife agreed, and indicated she would take good care of the decedent.

Later that day, the defendant wife dropped off her daughter and the decedent at a mall. At the mall, the girls met a 17-year old boy who was the defendants' daughter's friend, another male friend, and a female friend, and they all attended a movie. The 17-year old boy had a reputation for “[street racing](#)”. He had been stopped by police previously for speeding in excess of 20 miles per hour over the speed limit, and he may have allowed the defendants' daughter, who was 14 years old, to drive his car. After the movie, the defendants' daughter called her mother and discussed riding home with the 17-year old boy. The defendant wife either instructed or permitted all three girls to go home with the 17-year old boy. The decedent and her female friend, however, did not want to ride home with the 17-year old boy. After learning about the defendant wife's instructions, the decedent and her female friend separated from the others. After unsuccessfully trying to reach the female

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friend's father, mother, brother and one other person in an effort to find a ride home, the decedent and the female friend reluctantly got into the 17-year old boy's car.

The 17-year old boy drove wildly. The decedent and the female friend begged the 17-year old boy to slow down and let them out. The decedent sent a text message to a friend in which she said she wanted to go home and get away from the "guys, and that she feared she would die". She also said the guys were planning on street racing. The 17-year old boy ultimately lost control of his car while travelling in excess of 77 miles per hour, skidded off the road, and slammed into a tree. The decedent was critically injured and died the next day. At the hospital, the defendant wife repeatedly told the female friend's parents that she was afraid she would be sued for instructing the girls to go home in the 17-year old boy's car, in violation of the decedent's father's instructions.

The trial court sustained a demurrer by the defendants which asserted, among other things, that the defendants owed no duty in tort to the decedent, and dismissed the case. The plaintiff appealed.

On appeal, the Supreme Court of Virginia reversed in part, holding that the plaintiff had pleaded sufficient facts to support a claim that the defendant wife had assumed a specific duty to provide care and protection to the decedent. However, the Court held that the Complaint failed to allege sufficient facts to support such a claim against the defendant husband, noting that he was not present when his wife assumed the duty to exercise reasonable care to prevent the decedent from riding in cars driven by inexperienced or young male drivers. Additionally, the Court ruled that the defendants did not owe a duty to the decedent to exercise reasonable care in controlling the conduct of third parties to prevent her from harm.

The Court noted that as a general rule, a person does not have a duty to protect another from the conduct from third persons unless a "special relationship" exists between a defendant and a plaintiff. Examples of such a special relationship include the relationship between a common carrier and its passenger, a business proprietor and its invitee, an innkeeper and its guests, and an employer and employee under certain circumstances. The Court noted that this list was not exhaustive, but declined to expand the list to include an adult who agrees to supervise and provide care to a minor. Additionally, the Court held that the 17-year old boy's negligence was not a superseding act sufficient to extinguish the defendants' potential liability as a matter of law, ruling that negligence and proximate cause could be questions of fact for the jury.

However, the Court went further. Even though the Court recognized that an adult who agrees to supervise and care for a child is not an insurer of the child's safety, the Court held that the complaint had alleged sufficient facts to state claims against both the defendant husband and the defendant wife based on a common law duty to exercise reasonable care in supervising a child. Recognizing the potentially broad implications of the majority decision, extensive concurring and dissenting opinions were authored by two justices, who concurred with the majority decision except for the holding that an adult supervising the child of another has a common law duty to exercise reasonable care with regard to that supervision.

*Kellermann* involves significant issues which may impact the insurance industry. We may well see an increase in claims involving "negligent supervision", particularly against insureds under homeowners' policies of insurance. Additionally, in cases where a child is making a claim against an insured who is not the supervising

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adult of the child, the *Kellermann* decision potentially might be used to support the affirmative defenses of the contributory negligence of a parent in caring for the child, or the intervening negligence of a supervising adult who is not a parent. Similarly, the *Kellermann* decision might be used to support a subrogation action against an adult or parent who negligently supervises a child.

As indicated above, the facts as pleaded by the plaintiff in *Kellermann* were somewhat compelling, as illustrated by the fact that all justices agreed that the plaintiff had stated a cause of action based on the defendant wife assuming a specific duty to care for and protect the decedent.

We will have to wait and see how trial judges and the Supreme Court of Virginia treat future cases with less compelling facts. It should be noted that there are older Virginia cases in which the Supreme Court of Virginia seemed reluctant to find a parent contributorily negligent in supervising a child. The facts in these older cases are less compelling than the facts presented to the court in *Kellerman*, and these older decisions might be used in future *Kellermann*-type cases to argue that the supervising adult did not breach a duty to supervise. Alternatively, reconciling these older cases with the *Kellermann* decision, the *Kellerman* decision might be used in the future to expand the circumstances under which a parent may be found contributorily negligent for the negligent supervision of a child.

In ruling on future *Kellermann*-type claims and issues, the factors a court might consider in making its determination could include, but would not be limited to, the following:

1. The circumstances under which the supervising adult undertook the care of the child (i.e., whether the supervising adult invited the child to stay with him or her, or the supervising adult was asked by the child's parent to care for the child, etc. )
2. Any specific instructions or other communications between the supervising adult and the child's parents regarding the care of the child.
3. The time period that the supervising adult was to care for the child.
4. The age, experience and maturity of the child.
5. Any instructions given by the supervising adult to the child.
6. The proximity of the supervising adult to the child at the time the child is harmed.
7. The circumstances under which the child was harmed.

For more information on this or any risk management issue or to discuss a matter with a *Kellermann*-type claim or issue, please contact any of the attorneys in the [Risk Management](#) Group at [Sands Anderson Marks & Miller, PC](#) .

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