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Article 9

Torts - Contributory Negligence of Infant Plaintiff

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in fact was inflicted. *Burge* v. *Forbes,* 23 Ala. 67, 120 So. 577 (1929). The intent element may be supplied by intending to cause (a) a harmful contact, (b) an offensive contact, or (c) intending to put in fear of either a harmful or offensive contact. RESTATEMENT, TORTS, (1934) §§ 13, 21.

In the principal case none of the required intents appeared to be present. Had they been, the required offensive or harmful contact undoubtedly could have been effected by means of fly spray. It has been held that a battery may be committed by bringing smoke into offensive contact with another. Thus, where a tenant failed to vacate the premises when the lease expired the landlord was held guilty of a battery because he tried to smoke out the wife of the tenant by removing the lid of the stove on the premises and pouring water on the fire. *Wood* v. *Young,* 20 Ky. Law Rep. 1931, 50 S.W. 541 (1899).

ELIZABETH MARY PLUCK.

Torts—Contributory Negligence of Infant Plaintiff.—The plaintiff, an eight year-old-boy, pursued into the street a handmade parachute which he had tossed into the air. His chase took him into the path of defendant's oncoming car. He had seen the car when it was still a block away, but misjudged the time it would require to retrieve the parachute, and was struck by the fender of the car. Defendant admittedly was traveling at a speed in excess of the legal limit, and estimated by witnesses at 35 to 40 miles an hour.

Defendant requested the trial court to direct a verdict in its favor because of the plaintiff's contributory negligence. From a denial of this request, the defendant appealed.

The trial court's instruction to the jury: that in determining whether plaintiff was contributorily negligent consideration must be given to his previous training, his mentality; that not the same degree of care and caution is required of an infant as of an adult, but his duty to exercise care must be measured by his age and capacity; that it was for the jury to determine from the evidence and the foregoing considerations whether or not there was contributory negligence.

Held, the charge to the jury was fully and fairly submitted; judgment affirmed. *Clemens* v. *City of Saulte Ste. Marie,* (Mich. 1939) 286 N.W. 232.

Infant plaintiffs were at one time held to that degree of care demanded of adult plaintiffs, as a condition to recovery from a negligent defendant. The first instance of the rule, in Wisconsin, was in 1875, where the court held it applicable to a child of seven. *Ewen* v. *C. & N. W. R. R. Co.,* 38 Wis. 613 (1875). In the same year, it was held that a child of seven, in view of his age and circumstances could not reasonably be expected to exercise that degree of care which an adult would be required to observe. *Miebus* v. *Dodge,* 38 Wis. 300 (1875). In 1881, the court, in submitting the question of contributory negligence, instructed the jury as to the degree of care required of an adult, but added that the fact the plaintiff (a child of seven) was a person of tender age should be considered in its determination. *Townley v. C. M. & St. P. Ry. Co.,* 53 Wis. 626, 11 N.W. 55 (1881). At present in Wisconsin, a child is required to exercise only that degree of care which the great mass of children of the same age ordinarily exercise under the same circumstances, taking into account the experience, capacity, and understanding of the child. *Briese* v. *Maechtle,* 146 Wis. 89, 130 N.W. 893 (1911); *De Groot* v. *Van Akkeren,* 225 Wis.

105, 273 N.W. 725 (1937). It was held a prejudicial error to instruct the jury to apply the adult rule to a thirteen year old plaintiff, who was struck by an automobile. *Quinn* v. *Ross Motor Car Co.*, 157 Wis. 543, 147 N.W. 1000 (1914).

Wisconsin does not apply the criminal law presumption that a child under seven is conclusively incapable of blameworthy conduct. *De Groot* v. *Van Akkeren*, 225 Wis. 105, 273 N.W. 725 (1937). However, a child of one, two, and three years respectively, are conclusively presumed to be incapable of contributory negligence. *Le May* v. *City of Oconto*, 229 Wis. 65, 281 N.W. 688 (1938); *O'Brien* v. *Wis. Central Ry. Co.*, 119 Wis. 7, 96 N.W. 424 (1903); *Pisarek* v. *Singer Talking Machine Co.*, 185 Wis. 92, 200 N.W. 675 (1924). The Wisconsin Supreme Court held that a child of five may be capable of contributory negligence, although the plaintiff in the case was found conclusively incapable of contributory negligence. *Ruka* v. *Zierer*, 195 Wis. 285, 218 N.W. 358 (1928). Children of six and seven years, respectively, may be found guilty of contributory negligence. *De Groot* v. *Van Akkeren*, 225 Wis. 105, 273 N.W. 725 (1937); *Mueller* v. *O'Leary*, 216 Wis. 585, 257 N.W. 161 (1935).

ALVIN M. BRUSS.

Torts—Negligence—Duty of Swimming Pool Operators.—Plaintiff's eleven year old son went to defendant's pool to swim. He was with a 4-H Club group under the supervision of two Red Cross swimming instructors. There was present a third lifeguard employed by the defendant. The boy drowned. Plaintiff charged negligence on the part of the defendant for 1) failing to prevent deceased from entering the pool ahead of the rest of the group, 2) failing to give personal notice of the depth of the water to the deceased, 3) failing to ascertain if deceased could swim before permitting him to enter the pool, 4) failing to employ enough lifeguards to discover the disappearance of the boy in time to prevent his drowning. There was a directed verdict for the defendant.

Held: judgment affirmed, since as to point 1) there was no duty resting on the defendant with respect to the care of the swimmers because they were accompanied by two Red Cross life guards; as to point 2) there was no duty to give personal notice of the depth of the water, because the depth was clearly marked on the sides of the pool and the danger was obvious; as to point 3) there was no negligence in failing to ascertain that the decedent could not swim, because it would not have been the defendant's duty to keep him out of the water; and as to point 4) there was no causal connection between the drowning and the failure to provide more guards since none of the other 150 swimmers noticed the decedent's disappearance. *Hecht* v. *Des Moines Playground and Recreation Association*, (Iowa 1939) 287 N.W. 259.

The operator of a swimming pool is not an insurer of his patron's safety but owes only reasonable care to provide for his safety. *Sistrunk* v. *Audubon Park Natatorium, Inc.*, (La. 1935) 164 So. 667. What constitutes reasonable care depends on the circumstances in each case. *Nordgren* v. *Strong*, 110 Conn. 593, 149 Atl. 201 (1930). A Nebraska case, where the deceased went to defendant's pool under the supervision of Boy Scout swimming instructors, held that defendant's duty was fulfilled when a sufficient number of guards was supplied. Who supplied the guards was held to be immaterial. *Nolan* v. *Y.M.C.A.*, 123 Neb. 549, 234 N.W. 639 (1932). This holding in effect states that the operator of a swim-